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A PARADIGM OF FIRST AMENDMENT DILEMMAS: RESOLVING PUBLIC SCHOOL LIBRARY CENSORSHIP DISPUTES

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I. INTRODUCTION

In recent years courts have begun to ponder the first amendment issue of public school library book censorship.¹ These fledgling judicial efforts have produced a mostly inadequate analysis of the complex legal picture presented by school library book censorship. Courts that desire to intervene in censorship disputes almost unthinkingly have relied on first amendment doctrines developed outside of the censorship area and assumed their easy application to this new problem.² Courts that take a hands-off attitude toward the area rely heavily on the inappropriateness of judicial intervention as their central theme.³ Nowhere to be found in these judicial re-

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1. *E.g.*, *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

2. *E.g.*, *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

3. *E.g.*, *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980);

sponses is there a comprehensive analysis of the difficult issues raised by these cases.

Recently, the United States Supreme Court granted certiorari in a case of school library censorship.⁴ That case may establish the first amendment boundaries of such disputes, or it may mark only the first of several Supreme Court probings of this complex problem. In advance of any Supreme Court resolution, this article will explore the school library censorship area with attention to the subtleties that beset any easy resolution of the problem. Its attempt is to highlight the often overlooked first amendment difficulties in the area even more than to provide clear solutions to the problems raised. This article will strive to point out where the cases fail and what issues require further probing before an adequate intellectual framework for dealing with the area can be created.

School library book censorship can occur in three related fact patterns: (1) A challenge to a school board decision to remove a

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

4. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 385 (1981). The *Pico* litigation began in the New York Supreme Court, Nassau County in an effort to overturn a decision of the Island Trees Board of Education removing nine books from elementary and secondary school libraries and from use in the curriculum. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, No. 22724 (N.Y. Sup. Ct., filed December 20, 1976). Defendants later removed the case to federal court and Judge Pratt of the Eastern District of New York granted defendants' motion for summary judgment. 474 F. Supp. 387 (E.D.N.Y. 1979). On appeal, the Second Circuit reversed the district court's decision and remanded the case for trial. 638 F.2d 404. The decision of the United States Court of Appeals for the Second Circuit was by a divided panel, Judges Sifton and Newman voting to remand for trial based on the allegations contained in plaintiffs' class action complaint, and Judge Mansfield dissenting. Judge Sifton of the Eastern District of New York, sitting by designation, reasoned that the procedural irregularities in the record, including the involvement of persons in the decisionmaking process not usually concerned with library operations and the ambiguous quality of the justifications offered for the removal, made out a *prima facie* case justifying federal court intervention. *Id.* at 414-15. Judge Newman, writing separately but concurring in the result, was of the view that a first amendment violation would be made out by a removal based on the political content of the books. By contrast, removal because the books contained vulgar language and sexually explicit passages would be justifiable. Since Judge Newman found the record, in the absence of a trial, inadequate as a basis for determining the nature of the school board's motivation, he voted to remand for trial. *Id.* at 432. Judge Mansfield, in dissent, argued that the majority's action was an unwarranted interference in matters of educational policy. *Id.* at 419. After the Second Circuit's ruling, defendants filed a petition for a rehearing en banc. The court, by a five-to-five vote, denied the request for a rehearing. 646 F.2d 714 (2d Cir. 1981). Defendants then filed a petition for a writ of certiorari and the United States Supreme Court granted the petition on October 13, 1981. 102 S. Ct. 385 (1981).

book from the school library;⁵ (2) a suit to force the removal of a book from the school library;⁶ and (3) a suit to force the purchase of a book for the school library.⁷ In distinguishing among these three situations, courts have disagreed on the proper result in the first fact pattern⁸ and uniformly have rejected claims in the second and third

5. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 385 (1981) (the following nine books were ordered removed from elementary and secondary school libraries and were no longer permitted to be used in the curriculum: (1) *Slaughter House Five* by Kurt Vonnegut, Jr.; (2) *The Naked Ape* by Desmond Morris; (3) *Down These Mean Streets* by Piri Thomas; (4) *Best Short Stories by Negro Writers* edited by Langston Hughes; (5) *Go Ask Alice* by Anonymous; (6) *A Hero Ain't Nothing But a Sandwich* by Alice Childress; (7) *Soul on Ice* by Eldridge Cleaver; (8) *A Reader for Writers* edited by Jerome Archer; and (9) *The Fixer* by Bernard Malamud; a tenth book, *Black Boy* by Richard Wright, was available to students only upon parental approval); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300 (7th Cir. 1980) (plaintiffs challenged defendant's decisions prohibiting the use of *Values Clarification*, *Growing up Female in America*, *Go Ask Alice*, *The Bell Jar*, *The Stepford Wives* and portions of *Student Critic* in the high school English curriculum, and permanently removing *Go Ask Alice* from the school library); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976) (challenge to the removal of the novels *Catch 22* by Joseph Heller and *Cat's Cradle* by Kurt Vonnegut, Jr. from the library of the high school in Strongsville, Ohio as well as a complaint against the refusal to approve *Catch 22* and *God Bless You, Mr. Rosewater* by Kurt Vonnegut, Jr. for use as textbooks); *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) (challenge to the removal of all copies of *Down These Mean Streets*, an autobiographical novel about growing up in New York City's Spanish Barrio, from junior high school libraries in the District); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980) (challenge to the removal of two books, *The Wanderers*, by Richard Price and *Dog Day Afternoon* by Patrick Mann, from the high school library and also the adoption of restrictive library acquisition policies); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979) (challenge to the removal of issues of *Ms.* from the library of Nashua Senior High School); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978) (suit to require the reshelving of an anthology of writings by adolescents entitled *Male and Female Under 18* which had been removed from the Chelsea High School Library because of a poem included in the anthology, "The City to a Young Girl," containing "street language").

6. *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 P. 801 (1924) (action to enjoin purchase of 12 copies of the King James version of the Bible for the high school library); *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1944) (suit to halt the use of *Oliver Twist* by Charles Dickens and *The Merchant of Venice* by William Shakespeare for classroom reading and to require the removal of the books from school libraries).

7. *In re Appeal of Daniel Kornblum*, 70 N.Y.S. Educ. Dep't Rep. 19 (1949). Daniel Kornblum, a taxpayer and the publisher of *The Nation*, sought to have *The Nation* included in the list of periodicals approved for high school libraries. Since the magazine previously had been on the approved list and was removed from that list for the 1948-49 school year, the case bordered between being a challenge to a decision to remove a book and a suit to force the purchase of a book.

8. For cases ruling against a school board's decision to remove a book from the school library, see note 2 *supra*. For cases upholding the school board's decision, see note 3 *supra*.

categories.⁹ These distinctions are made offhandedly without any real attention paid to whether a coherent approach to the area is being developed.

The first step in revealing the layers of complexity that lie hidden below the analytically smooth surface of the school library cases is to identify the reasoning relied on by the case law. From there the task will be to explore the accuracy of this reasoning. Finally, an additional perspective will be sought by comparing and contrasting the three factual situations in which the school library censorship issue arises. The aim of this part of the inquiry will be to develop some sense of the appropriateness of distinctions made by the courts among these three settings.

II. CHALLENGES TO BOOK REMOVALS

The censorship scenario that has received the greatest amount of judicial attention is that of a school board decision to remove a shelved book from the school library.¹⁰ Typically, in response to such action a group, variously composed of students,¹¹ parents,¹²

9. In both *Evans v. Selma Union High School Dist.* 193 Cal. 54, 222 P. 801 (1924) and *Rosenberg v. Board of Educ.* 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1944), the courts rejected the claims of parties seeking to remove books from the school library. The Commissioner, however, upheld the Board of Education's decision to remove *The Nation* from its list of approved periodicals in *In re Appeal of Daniel Kornblum*, 70 N.Y.S. Educ. Dep't Rep. 19 (1949).

10. See cases cited note 5 *supra*.

11. Students were among plaintiffs in all of the library book removal cases. In some instances, due to their minority, students sued through their parents as next friends. See, e.g., *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976). This article, for the most part, will view the school library book removal cases from the perspective of the rights of student plaintiffs. While other persons may have first amendment rights in this situation, the major impact is on the students themselves. Moreover, the purpose of the article, to demonstrate the unrealized complexities of the case law, can be achieved by viewing the problem from the perspective of the students. The author will leave it to others to detail the interests of other parties in the book censorship situation. For an examination of the parental interest in the related area of classroom book censorship, see Comment, *Challenging Ideological Exclusion of Curriculum Material: Rights of Students and Parents*, 14 HARV. C.R.-C.L. REV. 485 (1979).

12. Parents of students attending schools in which an incident of library book removal occurred sued on their own behalf in *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980); and *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978). In *Presidents Council* and *Bicknell*, the parents were allowed to remain as parties to the suit and no mention was made of the basis for the parents' claim. In *Right to Read*, the parents of a student plaintiff were dismissed from the action for lack of standing. No explanation for this dismissal was given by the court. 454 F. Supp. at 705 n.2. The difficulty of separating the first amendment interests of minor

teachers,¹³ librarians,¹⁴ and public interest organizations,¹⁵ files suit

children in the educational setting from the interests of their parents and guardians has been recognized. See *Wisconsin v. Yoder*, 406 U.S. 205, 241-46 (1972) (Douglas, J., dissenting in part); Garvey, *Children and the First Amendment*, 57 TEX. L. REV. 321 (1979).

13. Teachers were among plaintiffs in *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979); and *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978). In *Presidents Council*, the only special mention of the interests of the teacher-plaintiffs was a statement by the court to the effect that the interests of the teachers had not been impaired: "[T]he teacher is still free to discuss the Barrio and its problems in the classroom. The action of the Board does not even preclude the teacher from discussing *Down These Mean Streets* in class or from assigning it for outside reading." 467 F.2d at 292. In *Salvail*, the separate interests of teachers were reflected only in testimony that *Ms.* had been assigned as a research tool by several teachers at the senior high school and by the court's conclusion that the magazine had value as a means of researching current feminist attitudes on matters of social interest. 469 F. Supp. at 1272-73. In *Right to Read*, while plaintiffs included an English teacher, no discussion of the scope of teacher rights is found in the opinion. The rights of teachers were more central in *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976). While students were the only plaintiffs in that case, the challenged school board action included a refusal to approve the use of *Catch 22* by Joseph Heller and *God Bless You, Mr. Rosewater* by Kurt Vonnegut, Jr. as textbooks. The Sixth Circuit summarily dismissed the claim that teachers have a right to select textbooks that is greater than the rights of the school board in such matters. *Id.* at 579-80. After dismissing this claim, the court examined an allegation that the academic freedom of teachers had been violated by the school board's refusal to allow classroom discussion of the disapproved books. The court rejected this argument, finding no clear evidence in the record to support the claim that classroom discussion had been forbidden. *Id.* at 583-84.

The issue of teacher rights in the textbook selection process arose recently in *Cary v. Board of Educ.*, 598 F.2d 535 (10th Cir. 1979). In *Cary*, the Tenth Circuit rejected the claim raised by five high school teachers that they had a constitutionally protected right to academic freedom that included the right to free choice of books to assign for reading in their high school English courses. As in *Minarcini*, the case did not involve a ban on classroom discussion of books not included on the school board's approved reading list. See Note, *Cary v. Board of Education: Academic Freedom at the High School Level*, 57 DEN. L.J. 197 (1980).

The separate but related issue of the school board's right to dismiss a teacher for using teaching methods or materials disapproved by the school board has arisen with a fair degree of frequency. See, e.g., *Brubaker v. Board of Educ.*, 502 F.2d 973 (7th Cir.), *aff'd on rehearing en banc*, 502 F.2d 1000 (7th Cir. 1974), *cert. denied*, 421 U.S. 965 (1975); *Mailloux v. Kiley*, 448 F.2d 1242 (1st Cir. 1971); *Keefe v. Geanakos*, 418 F.2d 359 (1st Cir. 1969); *Sterzing v. Fort Bend Independent School Dist.*, 376 F. Supp. 657 (S.D. Tex. 1972), *vacated and remanded*, 496 F.2d 92 (5th Cir. 1974); *Webb v. Lake Mills Community School Dist.*, 344 F. Supp. 791 (N.D. Iowa 1972); *Parducci v. Rutland*, 316 F. Supp. 352 (M.D. Ala. 1970); *Parker v. Board of Educ.*, 237 F. Supp. 222 (D. Md.), *aff'd*, 348 F.2d 464 (4th Cir. 1965), *cert. denied*, 382 U.S. 1030 (1966); *Harris v. Mechanicville Cent. School Dist.*, 86 Misc. 2d 144, 382 N.Y.S.2d 251 (Sup. Ct. 1976). On the scope of teacher first amendment rights, see Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976); Miller, *Teachers' Freedom of Expression Within the Classroom: A Search for Standards*, 8 GA. L. REV. 837 (1974); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971); Van Alstyne, *The Constitu-*

complaining that the board's action is a violation of the first amendment to the United States Constitution.

The judicial response to such lawsuits falls into one of two categories: (1) A noninterventionist model in which the court takes the position that it generally will not intrude into matters of educational policy;¹⁶ or (2) a judicial review model in which the court finds such controversies subject to first amendment limitations and then examines the nature of the right interfered with and the weight of the justification offered for the invasion of that right.¹⁷

Courts offer a variety of explanations in defense of the noninterventionist model. One point consistently made by such courts is that no one's first amendment rights have been violated by such a decision. Students have no constitutionally protected right of access to certain books in the school library; neither do the publishers of those

tional Rights of Teachers and Professors, 1970 DUKE L.J. 841; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045 (1968).

14. In *Presidents Council*, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615 (D. Vt. 1979), *aff'd*, 638 F.2d 438 92d Cir. 1980), and *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978), school librarians were among the plaintiffs. In *Presidents Council* and *Right to Read*, the courts failed to consider the arguably separate interests of the librarians. In *Bicknell*, the district court rejected a claim of first amendment protection for librarians:

Nor do we believe that school librarians have an independent first amendment right to control the collection of the school library under the rubric of academic freedom. The selection of works for the library is a curricular rather than a methodological matter, and "public secondary school boards have considerable discretion as to the substantive content" of the curriculum.

475 F. Supp. at 622 (citation omitted). In *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 474 F. Supp. 387, 394 (E.D.N.Y. 1979), *rev'd on other grounds*, 638 F.2d 404 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 385 (1981), student plaintiffs attempted to assert the rights of librarians to academic freedom. The court found no reason to grant the students permission to raise the rights of the absent librarians and therefore dismissed this claim. For an argument that librarians have constitutionally protected rights of expression that limit the extent to which books can be removed from a library over the objection of the librarian, see O'Neil, *Libraries, Liberties and The First Amendment*, 42 U. CIN. L. REV. 209 (1973).

15. In *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980), plaintiffs included the Right to Read Defense Committee of Vergennes. The committee was organized for the purpose of challenging attempts to restrict school library collections. Similarly, in *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978), the Right to Read Defense Committee of Chelsea was among the complaintants. On the issue of the standing of public interest organizations to sue, see, e.g., *Sierra Club v. Morton*, 405 U.S. 727 (1972); Zacharias, *Standing of Public Interest Litigating Groups to Sue on Behalf of Their Members*, 39 U. PITT. L. REV. 453 (1978).

16. See cases cited note 3 *supra*.

17. See cases cited note 2 *supra*.

books have the right to have their publications kept on the library shelves.¹⁸ Moreover, students still can have access to the books through means other than the school library.¹⁹

In addition to the rejection of any first amendment right of students in this setting, the impropriety of judicial interference in the internal affairs of the school is a frequently sounded note in the cases.²⁰ Courts cite language from *Epperson v. Arkansas*²¹ to support this position.²² They rely on the broad discretionary powers granted to school officials in curricular matters as an explanation for their approach.²³

By contrast, courts that are willing to intervene in school library book removal cases justify their actions by a differing view of the proper school/court relationship. Because the school is viewed as an important adjunct to first amendment values, courts occasionally must intervene in matters of school policy in order to secure those

18. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 429 (2d Cir. 1980) (Mansfield, J., dissenting), *cert. granted*, 102 S. Ct. 385 (1981); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 621 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980).

19. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 621 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980).

20. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980) ("[N]othing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute."); *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289, 292 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) ("Academic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars.").

21. 393 U.S. 97 (1968).

22. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980); *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289, 291 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 619 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980). The frequently repeated quotation from *Epperson v. Arkansas*, 393 U.S. 97 (1968), stated: "By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values." *Id.* at 104 (footnote omitted). The use of this reference is ironic because the Court in *Epperson* found that an Arkansas law forbidding the teaching of Darwinian theory in the public schools did "sharply implicate constitutional values." The Court struck down the law as a violation of the first amendment establishment clause. For further discussion of *Epperson*, see text accompanying notes 136-39 *infra*.

23. *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 638 F.2d 438, 441 (2d Cir. 1980); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1305 (7th Cir. 1980).

values.²⁴ Cases such as *Shelton v. Tucker*²⁵ and *Tinker v. Des Moines Independent Community School District*,²⁶ in which the Supreme Court approved an interventionist stance toward educational policy, are pointed to by these courts as support for the conclusions they reach.

In addition to the basic question of philosophy, interventionist courts see the school library as a public forum.²⁷ While the state, so the argument goes, has no obligation to create such a forum in the first instance, nor to stock it with any particular books, having done so the state is not free to make content-based decisions to remove books unless those decisions are supported by sufficiently important state interests.²⁸ While removal may be justified on content neutral grounds such as a limitation on shelf space or the obsolescence of a book, decisions based on inadequately justified hostility to the ideas contained in the book are forbidden.²⁹

According to this view, students have the right to complain about content-based removals because such removals violate the first amendment rights of the students. While the students are not being denied the right to speak, they are being denied the right to receive information.³⁰ The "right to know" has a firm grounding in the first amendment, and the ability of the students to obtain a book from a source other than the school library does not minimize the gravity of the constitutional violation.³¹

While efforts are made by interventionist courts to reconcile

24. Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 710 (D. Mass. 1978).

25. 364 U.S. 479 (1960). In *Shelton*, the Court struck down an Arkansas statute that required all teachers at state-run schools to file an annual list of every organization with which they had been connected during the previous five-year period. The statute was held to violate the right of teachers to free association because it indiscriminately requested associational information not all of which was necessary to protect the state's interest in having fit and competent teachers. *Id.* at 490.

26. 393 U.S. 503 (1969). For a discussion of *Tinker*, see text accompanying notes 62-67 *infra*.

27. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582-83 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1275 (D.N.H. 1979).

28. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272 (D.N.H. 1979).

29. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 581 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1275 (D.N.H. 1979).

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

31. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1275 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714-15 (D. Mass. 1978).

their decisions with those of noninterventionist judges,³² it is clear that the two lines of decision reflect a fundamental disagreement about the proper role of the judiciary in matters of educational policy. Additionally, the two lines of cases differ on the applicability of two major first amendment doctrines to the book removal cases: the public forum principle and the first amendment right to know.

A. *The Public Forum Question*

As a beginning point in this analysis of the book removal cases, it will be useful to discover if the school library qualifies as a public forum in the way interventionist courts assume. In the first amendment lexicon, a public forum is a government owned place available for the exercise of first amendment rights.³³ Government ownership alone, however, is not enough to establish a right of access by the public for first amendment purposes. Some places, like streets and parks, traditionally have been considered available as forums for speech.³⁴ Other places, while not considered to be traditional public

32. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 581 (6th Cir. 1976); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978).

33. The term "public forum" gained prominence in Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1. Since Professor Kalven's classic exposition of the public forum concept, a vast literature has been required to chronicle the concept's continued development. See, e.g., Cass, *First Amendment Access to Government Facilities*, 65 VA. L. REV. 1287 (1979); Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931; Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233; Note, *The Public Forum: Minimum Access, Equal Access, and The First Amendment*, 28 STAN. L. REV. 117 (1975).

34. *Hague v. C.I.O.*, 307 U.S. 496 (1939) (opinion of Roberts, J.). A statement from Justice Roberts' opinion has come to be considered the quintessential articulation of this concept:

Wherever the title of streets and parks may rest, they have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions. Such use of the streets and public places has, from ancient times, been a part of the privileges, immunities, rights, and liberties of citizens. The privilege of a citizen of the United States to use the streets and parks for communication of views on national questions may be regulated in the interest of all; it is not absolute, but relative, and must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order; but it must not, in the guise of regulation, be abridged or denied.

Id. at 515. In addition to the streets and parks, several other traditional public forums have been identified. See, e.g., *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980) (courtroom); *Edwards v. South Carolina*, 372 U.S. 229 (1963) (statehouse grounds).

In addition to encapsulating the idea of the traditional public forum, the above quoted language from Mr. Justice Roberts' opinion also began what has become an ongoing debate in the public forum area. His opinion raised the still unresolved question of whether the first amendment guarantees minimum access to certain public places or,

forums, have been added to the list of places available for the exercise of first amendment rights.³⁵

In examining the cases, two kinds of public forums can be discerned.³⁶ One kind, a primary forum, is a place established by the government specifically for the expression of ideas. For example, in *Southeastern Promotions, Ltd. v. Conrad*³⁷ a municipal theater was identified as a public forum because its essential function was to serve as a place for a certain kind of expression. If the government creates a place primarily as a forum, exclusions from that place must be based on sufficiently important reasons and must follow constitutionally adequate procedures.³⁸

The other kind of forum, a secondary forum, is a government owned place created for some other primary purpose but which is incidentally compatible with speech use. An airport is an example of this kind of government facility.³⁹ In this second kind of forum, ex-

instead, whether equal access is all that is promised. Under the guaranteed access view, complete closure of the streets and parks to all expressive activity would be prevented. Under the equal access view, closure would be permissible if it was affected in an even-handed manner and not selectively. See Cass, *supra* note 33, at 1298-1303; Note, *supra* note 33. This unanswered public forum question will not be dealt with in the context of the school library. It is unlikely that even a clear victory for minimum access advocates would extend to ensure access to the library bookshelves.

35. See, e.g., *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503 (1969) (school); *Brown v. Louisiana*, 383 U.S. 131 (1966) (library); *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975) (airport); *Albany Welfare Rights Organization v. Wyman*, 493 F.2d 1319 (2d Cir.), *cert. denied*, 419 U.S. 838 (1974) (welfare office); *Wolin v. Port of N.Y. Auth.*, 268 F. Supp. 855 (S.D.N.Y. 1967), *modified*, 392 F.2d 83 (2d Cir.), *cert. denied*, 393 U.S. 940 (1968) (bus terminal).

36. See Cass, *supra* note 33, at 1297.

37. 420 U.S. 546 (1975).

38. Among the constitutionally adequate reasons for exclusion is that the speech at issue is not protected by the first amendment. Thus, if the production of the musical "Hair" at issue in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), had been found to be obscene as judged by constitutionally appropriate standards, exclusion of the production would have been justified. Further, in the case of a primary forum opened up for a certain kind of speech, if a speaker wishes to use the forum for a manner of expression outside the scope of the enterprise established by the government, exclusion also might be justified. Thus, if the government created a state operated public theater to be used solely for the production of plays and a speaker wanted to use the theater to give a speech, this noncompatible use could be foreclosed. Constitutionally adequate procedures for determining if access is to be allowed also must be established. In *Southeastern Promotions*, the Court's holding was based on the constitutional inadequacies of the procedures established for judging the appropriateness of allowing "Hair" to be presented. See note 80 *infra* for elaboration of these procedural infirmities.

39. See, e.g., *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975); *Kuszynski v. City of Oakland*, 479 F.2d 1130 (9th Cir. 1973); *Fernandes v. Limmer*, 465 F. Supp. 493 (N.D. Tex. 1979).

clusions can be based on disruption of the primary activity for which the forum was created or for other sufficiently important reasons.⁴⁰

Despite the existence of two kinds of forums, no clear-cut method for identifying a place as either kind of forum has been established.⁴¹ Further, whether the two categories are as distinctly etched as the above discussion suggests is far from certain.⁴² Finally, what purposes, if any, are served by distinguishing between the two categories has not yet been resolved.⁴³ Without attempting to settle these issues, an effort will be made to determine if the school library fits into either or both of these categories.

In first turning to the library book removal cases for guidance on these questions, the explanation for considering the school library to be a public forum is succinctly stated: "A library is a mighty re-

The character of the airport and the pattern of usual activity make the airport an appropriate place for communication of views. . . . True, the principal purpose of the airport is to move people from one place to another via airplane; but the court must look beyond "principal" purposes to determine whether or not an area is a "public" forum.

Id. at 504 n.4.

40. For instance, in *Chicago Area Military Project v. City of Chicago*, 508 F.2d 921 (7th Cir.), *cert. denied*, 421 U.S. 992 (1975), the court found the public areas of the terminal buildings at O'Hare Airport to be a public forum available to a group seeking to distribute literature. The court, however, excluded the areas leading to the arrival and departure gates from use for leafleting. The primary use to which those areas of the airport were put would be disrupted if they were made available for use by leafleteers. The court left open the question of whether leafleting at check-in counters similarly could be prohibited. The court, however, pointed out that such a ban would be upheld if it appeared "that such activities substantially interfered with rapid and efficient airport operations." *Id.* at 926.

In deciding whether a particular regulation of the time, place, and manner of forum use is reasonable, the court will consider "[t]he nature of a place, the pattern of its normal activities. . . ." *Grayned v. City of Rockford*, 408 U.S. 104, 116 (1972). Thus, in *Hefron v. International Soc'y for Krishna Consciousness*, 101 S. Ct. 2559 (1981), the Supreme Court upheld a rule that restricted those who wished to sell or distribute written materials or solicit funds at the Minnesota State Fair to doing so from a rented booth. The Court focused on "the need to maintain the orderly movement of the crowd given the large number of exhibitors and persons attending the Fair." *Id.* at 2565.

41. A number of criteria have been suggested as factors to be used in determining whether a public forum exists. One recommendation is to consider the customary usage of a place, whether it is available for general public access, any history of openness, and consistency between use as a forum and the other public uses of a place. Horning, *supra* note 33, at 945. Another suggestion is to look to the property's value for nonexpressive purposes, to consider the value of the property for expression, and to evaluate the extent to which speech and nonspeech uses are in conflict. Cass, *supra* note 33, at 1317-20.

42. Professor Tribe divides public forums into three groupings: (1) Traditional public forums; (2) "[p]ublic facilities or institutions created for the primary purpose of public communication;" and, (3) "semi-public forums." L. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 688-91 (1978).

43. See Cass, *supra* note 33, at 1297-98.

source in the free marketplace of ideas. It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech.”⁴⁴ The major authorities cited as support for this conclusion are the Supreme Court cases of *Brown v. Louisiana*⁴⁵ and *Tinker v. Des Moines Independent Community School District*.⁴⁶

In *Brown*, five black men entered the Audubon Regional Library in the town of Clinton, Louisiana in order to protest the segregation of the library. One of the men, petitioner Brown, requested a book. The branch assistant determined that the library did not have the book and informed Mr. Brown of this along with the information that the book could be obtained from the state library and made available to him by mail or at a bookmobile.⁴⁷ After speaking with the librarian, Brown sat down in the reading area and his four companions stood near him. The regional librarian was called from another room and she asked the men to leave. They nevertheless remained in the room making no noise. Ten to fifteen minutes later the sheriff arrived and, after unsuccessfully asking them to leave, arrested the men, charging them with a breach of the peace. The Supreme Court granted certiorari to consider the constitutionality of their convictions.

Justice Fortas, writing for the Court in an opinion joined only by Chief Justice Warren and Justice Douglas, reversed the convictions. His opinion found a lack of evidence of any “intent to provoke a breach of the peace,” or of “circumstances such that a breach of the peace may be occasioned.”⁴⁸ Petitioners were present in the library in order to express their opposition to the segregation of the library and they did so in an orderly and nonprovocative manner. Justice Fortas also found that even if the statutory definition of a breach of the peace was satisfied, the Court would have to find its application to petitioners’ behavior to be a violation of their first and fourteenth amendment rights.⁴⁹ These rights were found to “include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right

44. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 571, 582-83 (6th Cir. 1976) (citations omitted).

45. 383 U.S. 131 (1966).

46. 393 U.S. 503 (1969).

47. 383 U.S. at 136. The Audubon Regional Library had two bookmobiles. The red bookmobile serviced only whites. The blue bookmobile was for the use of black library patrons. Blacks were not permitted to use the three branch libraries.

48. *Id.* at 139.

49. *Id.* at 142.

to be, the unconstitutional segregation of public facilities.”⁵⁰ Because the use of the library by others was not interfered with by petitioners, the Court did not need to consider whether disruptive conduct also would have been constitutionally protected.⁵¹

While Justice Brennan concurred in the reversal of the convictions, he would have struck down the statute as facially overbroad, thereby eliminating the need to reach the question of whether petitioners’ conduct was constitutionally protected and therefore could not be punished even by a narrowly drawn statute.⁵² Justice White, also concurring in the result, reversed solely on equal protection grounds.⁵³

Justice Black, writing for the four members of the dissent, attacked the new constitutional doctrine established by the majority:

Though the First Amendment guarantees the right of assembly and the right of petition along with the rights of speech, press, and religion, it does not guarantee to any person the right to use someone else’s property, even that owned by government and dedicated to other purposes, as a stage to express dissident ideas.⁵⁴

Justice Black then insisted that the doctrine created by the plurality opinion had no stopping off place. It necessarily would allow protest groups to invade the peace and tranquility of the library and interfere with normal library use by the patrons of the library.

Brown raised more questions than it resolved. Why was the protest activity allowed in the library? Was it because the government owned the facility? Was it important that the protestors’ message was directed at the segregation of the very facility they used as the site of their protest? What would have been the result if disruption of the facility had occurred? What other forms of expression would be permitted on the library premises? Unfortunately, the questions raised by *Brown* were not quickly resolved. When the public forum doctrine next came before the Court, the Justices who had been in the majority in *Brown* found themselves outvoted. The

50. *Id.*

51. *Id.*

52. *Id.* at 149-50.

53. *Id.* at 151. Justice White argued that petitioners’ behavior in the library amounted to normal library use. He was convinced that no arrests would have occurred if the behavior had been engaged in by whites. Therefore, petitioners’ arrests violated their rights under the fourteenth amendment’s equal protection clause. This equal protection aspect of the case was not ignored in Justice Fortas’ opinion for the Court. He, too, commented on the state’s obligation to regulate its facilities in a nondiscriminatory manner. *Id.* at 143.

54. *Id.* at 166.

Brown dissenters joined by Justice White, thereby composing a majority of the Court, proceeded to put a roadblock in the path of the incipient public forum doctrine.

That development came in *Adderley v. Florida*.⁵⁵ In *Adderley*, 200 demonstrators partially blocked the driveway of the county jail in a protest against the arrest of other demonstrators and also against policies of segregation in effect at the jail and elsewhere. After they refused to leave, thirty-two demonstrators were arrested and convicted under the Florida general trespass statute. The Supreme Court upheld the convictions. Important to this result was that the demonstration had taken place on a part of the jail grounds not generally open to the public. The Court rejected petitioners' claims of a right of access to the part of the jail grounds reserved for transportation of prisoners:

The State, no less than a private owner of property, has power to preserve the property under its control for the use to which it is lawfully dedicated. For this reason there is no merit to the petitioners' argument that they had a constitutional right to stay on the property, over the jail custodian's objections, because this "area chosen for the peaceful civil rights demonstration was not only 'reasonable' but also particularly appropriate. . . ." Such an argument has as its major unarticulated premise the assumption that people who want to propagandize protests or views have a constitutional right to do so whenever and however and wherever they please. . . . The United States Constitution does not forbid a State to control the use of its own property for its own lawful nondiscriminatory purpose.⁵⁶

The Court in *Adderley*, however, was careful to point out that the sheriff had not sought to disperse the protestors because he objected to the substance of their protest.⁵⁷ Moreover, there was no evidence that any other group had been permitted access to the same part of the jail grounds for any reason.⁵⁸

The dissenting Justices in *Adderley* took a contrary view of the public forum issue. They considered the jail to be a forum akin to the statehouse, courthouse, or executive mansion and "an obvious center for protest."⁵⁹ While the dissent agreed that some public places serve functions incompatible with their use as places for pro-

55. 385 U.S. 39 (1966).

56. *Id.* at 47-48.

57. *Id.* at 47.

58. *Id.*

59. *Id.* at 49.

test and that some forms of protest may be inconsistent with the places in which they are sought to be held, the dissenting Justices were not willing to leave the decision as to whether a place is a forum to the discretion of public officials.⁶⁰

Adderley, like *Brown*, dealt with government property primarily dedicated to uses other than expression, but sometimes available for first amendment purposes. While reaching contrary results on whether the demonstrators were entitled to access to government property, the two decisions share a common concern. In both cases the attention of the Court was focused on whether the demonstrators disrupted the normal functioning of the government facility they used as the site of their protest.⁶¹

This same concern was central to the Court's analysis in *Tinker v. Des Moines Independent Community School District*,⁶² the second public forum case relied on by the courts examining the book removal question. In *Tinker*, the locus of the protest activity was the public high school. Petitioners, high school students, wore black armbands to school to symbolize their opposition to the Vietnam War. The students were suspended from school for their actions and, thereafter, filed a complaint challenging the constitutionality of the actions of school officials in suspending them.

In finding for petitioners, the Court first focused on the primary activity that takes place in the public school. The learning process was seen as a multifaceted experience encompassing both classroom and nonclassroom hours. The Court gave this enthusiastic description of the classroom learning experience: "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather]

60. *Id.* at 54.

61. Focusing on the similarity between *Brown* and *Adderley* is not intended to suggest that the two cases do not reflect a substantial difference of opinion. While it is possible to find sufficient numbers of factual distinctions between the two cases to view the results reached as consistent (that is, that the library reading area was generally open to the public while the jail driveway was not and that no disruption of library activities occurred in *Brown* whereas the jail driveway used for the transport of prisoners was blocked by the demonstrators in *Adderley*), the view that the cases reflect a substantial disagreement about the scope of first amendment protection for public access to government properties is very persuasive. See Cass, *supra* note 33, at 1294 (arguing that the *Brown* majority supported a broad based right of access to government owned places whereas the *Adderley* majority would require equal access only when the government opens up a forum).

62. 393 U.S. 503 (1969).

than through any kind of authoritative selection.'"⁶³ Education in the schoolhouse, however, was not viewed as limited to the classroom:

The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among those activities is personal intercommunication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process. A student's rights, therefore, do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects like the conflict in Vietnam, if he does so without "materially and substantially interfer[ing] with the requirements of appropriate discipline in the operation of the school" and without colliding with the rights of others.⁶⁴

With this ringing endorsement, the schoolhouse joined the list of public places available as public forums. To the extent possible without interfering with the normal functioning of the public school, students are permitted to exercise their first amendment rights.⁶⁵

The Court's decision in *Tinker* does not stand as firm support for viewing the book removal cases as involving a public forum. One important point to be stressed is that the forum in *Tinker* was available for the expression of student views whenever that could occur without interfering with good order and discipline. In discussing the impact of petitioners' activities in *Tinker* the Court was careful to note: "They neither interrupted school activities nor sought to intrude in the school affairs or the lives of others. They caused discussion outside of the classrooms, but no interference with work and no disorder."⁶⁶ This statement emphasizes the idea that the rights granted to students are rights to express their views through the making of personal statements. They may speak out so long as their speech can coexist peacefully with the day-to-day functioning of the school.

63. *Id.* at 512 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

64. *Id.* at 512-13 (footnote and citation omitted).

65. In addition to students, teachers are entitled to the first amendment rights established by *Tinker*: "First Amendment rights, 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 speech or expression at the schoolhouse gate." *Id.* at 506. On the issue of teacher rights of expression, see *Miller*, *supra* note 13; *Nahmod*, *supra* note 13.

66. 393 U.S. at 514.

The point to be made is that as forums, public places like the school or the library first serve their governmentally administered functions. As a secondary matter, they also may be available for compatible expressive use by members of the public.⁶⁷ Therefore, as a forum on the order of *Brown* and *Tinker*, the school library would seem to be available as a place for silent protest by students. Mary Beth Tinker would be permitted to wear her armband into the school library. Groups of students would be able to stand silently as "monuments of protest"⁶⁸ to school policies. Mary Beth even would be able to bring her own copy of a book removed from the school library and read it sitting at a table in the library as a way of protesting the library's book selection policies. These actions and others like them seem to describe the kind of rights made available by *Brown* and *Tinker*. Neither of these cases allow the protestors to have a say in the administration of the government facility itself. If petitioner Brown had wanted to step behind the librarian's desk and check out books for library patrons, the case would have had an entirely different result. Similarly, if petitioner Tinker had interrupted a class and demanded the right to class time to make a speech against the Vietnam War, the Court would not have granted her a forum so readily.

Tinker, however, is not the final word on the public forum issue and it may be that subsequent cases shed additional light on the book removal situation. After *Tinker*, the Supreme Court decided several other cases that contributed to the further development of the public forum doctrine. The first of these was *Police Department of Chicago v. Mosley*.⁶⁹ In *Mosley*, the Court gave express recognition

67. One additional point must be made about the school as a public forum. Contrary to the situation in *Adderley*, the forum in *Tinker* was not necessarily open to the members of the public. Cf. *Widmar v. Vincent*, 102 S. Ct. 269, 273 n.5 (1981) ("[T]he campus of a public university, at least for its students, possesses many of the characteristics of a public forum.") (emphasis added). The Court in *Tinker* included students and teachers in the group entitled to use the school as a place for expression. The Court never addressed the question of whether the schoolhouse was also available for the use of nonstudent members of the public. This limited holding in *Tinker* suggests that the public forum doctrine is flexible enough to view some places as limited forums, places in which rights of expression are guaranteed only to the special population taking part in the primary, nonexpressive activity engaged in at the government facility. On the question of whether nonstudent, nonteacher members of the public are entitled to access to the school as a forum, see Comment, *The University and the Public: The Right of Access by Nonstudents to University Property*, 54 CAL. L. REV. 132 (1966).

68. This phrase was used in the opinion of Justice Fortas in *Brown v. Louisiana*, 383 U.S. 131, 139 (1966), to describe petitioner Brown and his four companions as they sat and stood in the reading area of the Audubon Regional Library.

69. 408 U.S. 92 (1972).

to the equal protection component of public forum theory:

There is an "equality of status in the field of ideas," and government must afford all points of view an equal opportunity to be heard. Once a forum is opened up to assembly or speaking by some groups, government may not prohibit others from assembling or speaking on the basis of what they intend to say. Selective exclusions from a public forum may not be based on content alone, and may not be justified by reference to content alone.⁷⁰

In adding this equality principle to public forum theory, the Court made clear what it had insinuated in *Brown* and *Adderley*: Once the government opens up a forum for the expression of some ideas, that forum must be available for all ideas.⁷¹

After *Mosley*, the Court decided two cases which raised a different aspect of public forum analysis. Unlike the secondary forums in *Brown* and *Tinker*,⁷² the Court next encountered two cases in which

70. *Id.* at 96 (footnote omitted).

71. *Grayned v. City of Rockford*, 408 U.S. 104 (1972), was decided on the same day as *Mosley*. While adding no new dimensions to the public forum doctrine, *Grayned* did serve to accentuate the need for compatibility between the primary use of the forum and the manner in which first amendment rights are exercised:

The nature of a place, "the pattern of its normal activities, dictate the kinds of regulations of time, place, and manner that are reasonable." Although a silent vigil may not unduly interfere with a public library, making a speech in the reading room almost certainly would. That same speech should be perfectly appropriate in a park. The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.

Id. at 116 (footnote and citation omitted). *Grayned* involved a challenge to two ordinances: An antipicketing ordinance and an antinoise ordinance, both regulating first amendment activity within close proximity to a school building in which school was in session. The antipicketing ordinance was identical to the ordinance struck down by the court in *Mosley*. The ordinance fell under the weight of the equality principle. The antinoise ordinance was upheld as carefully tailored to the municipality's "compelling interest in having an uninterrupted school session conducive to the students' learning. . . ." *Id.* at 119.

72. While it is possible to describe the forum in *Tinker* as a secondary forum (see L. TRIBE, *supra* note 42, at 690, describing schools as "semi-public forums" where a greater variety of regulations designed to preserve the good order and discipline of the school will be permissible than would be true of ordinances regulating access to streets and parks), this characterization is subject to question. One interesting qualification of this assumption derives from the Court's division of the educational process into several primary parts. In one respect the school can be classified as a conventional secondary forum. Like the library in *Brown* it serves a government purpose independent of service as a forum for student expression. These parts of the education package include the classroom transmission of knowledge in a variety of required subjects and other extracurricular activities like team sports and drama club. In another respect, however, education includes a component that falls within the primary forum definition. The Court defines an important part of the educational process as "personal intercommunication

the potential forum was a place created by the government primarily for the expression of ideas. In both *Lehman v. City of Shaker Heights*⁷³ and *Southeastern Promotions, Ltd. v. Conrad*,⁷⁴ petitioners argued for the existence of a "primary forum." In *Lehman*, the potential forum was the advertising card space in the cars of a public transit system. That space was made available for commercial advertising but not for political ads. A candidate for political office argued that the city had created a forum by its policy of renting out such space. A four-Justice plurality rejected this contention, finding the advertising space to be part of the city's commercial venture and not the creation of a forum.⁷⁵ The four dissenting Justices, in an opinion by Justice Brennan, argued that the case did not call upon the Court to decide if public transit cars must be considered a forum but instead involved the voluntary creation of a forum by the city. Having voluntarily created such a forum for expression, the city was not free to base exclusions from that forum solely on the content of the potential advertisement.⁷⁶

After dissenting in *Lehman*, Justice Brennan was a member of

among the students." 393 U.S. at 512. With respect to this function the school is a primary forum for the expression of ideas by students. The Court's job is to accommodate both of these school functions. It does this by limiting student rights of communication to those that are compatible with the other educational functions served by the school. On the general subject of the school as a public forum, see Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. C.R.-C.L. L. REV. 278 (1970); Comment, *The Public School as Public Forum*, 54 TEX. L. REV. 90 (1975). Note also the Supreme Court's recent statement in *Widmar v. Vincent*, 102 S. Ct. 269 (1981), on the closely related question of the public forum status of public universities: "A university differs in significant respects from public forums such as streets or parks or even municipal theaters. A university's mission is education, and decisions of this Court have never denied its authority to impose reasonable regulations compatible with that mission upon the use of its campus and facilities." *Id.* at 273 n.5.

73. 418 U.S. 298 (1974).

74. 420 U.S. 546 (1975).

75. 418 U.S. at 303. The deciding vote in *Lehman* was cast by Justice Douglas, concurring in the result. Justice Douglas based his opinion on the constitutional rights of commuters: "In my view the right of the commuters to be free from forced intrusions on their privacy precludes the city from transforming its vehicles of public transportation into forums for the dissemination of ideas upon this captive audience." *Id.* at 307. Justice Douglas' view of the matter made the opening of the advertising spaces to commercial messages irrelevant. The clear implication of his opinion was that a later challenge brought against the intrusion of commercial ads also would result in his finding that those ads violated the privacy rights of the passengers.

The plurality opinion in *Lehman* has been criticized frequently for its misuse of public forum principles. See, e.g., Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 34-35 (1975); Stone, *supra* note 33, at 256-61, 275-80.

76. 418 U.S. at 313-14.

the majority in *Southeastern Promotions, Ltd. v. Conrad*.⁷⁷ The public forum in *Southeastern Promotions* consisted of a municipal theater. A production of the musical "Hair" was rejected by the directors of the Chattanooga Memorial Auditorium on the ground that it was not "in the best interest of the community."⁷⁸ In analyzing the case, the Court rejected any claim that petitioner was seeking entry to a place principally serving nonspeech purposes. In this respect the forum could be contrasted to traditional forums, such as the streets and parks. Unlike those places, the theater, in Justice Blackmun's opinion for the Court, was identified as a public forum "designed for and dedicated to expressive activities."⁷⁹ Exclusions from such a primary forum had to follow adequate procedural safeguards⁸⁰ and be based on constitutionally sufficient justifications.⁸¹ Since *Southeastern Promotions*, the Court has announced no new conceptual developments in the ongoing formulation of public forum theory.⁸²

77. 420 U.S. 546 (1975).

78. *Id.* at 548.

79. *Id.* at 555.

80. The Court found the procedures utilized by the directors of the municipal theater to be constitutionally defective in several respects. Contrary to the teachings of *Freedman v. Maryland*, 380 U.S. 51 (1965), there was no provision for prompt judicial review of the board's decision. 420 U.S. at 561. Additionally, the burden of instituting judicial review and proving the play was protected expression was placed on the play's producers and not on the board. *Id.* at 562. Finally, the restraint on the play imposed during the pendency of judicial proceedings was unduly long and altered the status quo. *Id.* These requirements of appropriate procedural safeguards are an aspect of first amendment due process. See Monaghan, *First Amendment "Due Process"*, 83 HARV. L. REV. 518 (1970).

81. After *Southeastern Promotions* was denied access to the municipal theater, it sought a permanent injunction allowing it to use the facility. Following that request for relief, the United States District Court for the Eastern District of Texas held hearings on the issue of obscenity *vel non*. 341 F. Supp. 465 (E.D. Tex. 1972). The jury returned a verdict finding "Hair" to be obscene within the meaning of city ordinances and state statutes. *Id.* at 472. Petitioner then appealed to the Court of Appeals for the Sixth Circuit and that court affirmed by a divided vote. 486 F.2d 465 (6th Cir. 1973). Petitioner argued in the Supreme Court that the courts below had applied an erroneous standard for determining the issue of obscenity *vel non* and that "Hair" was not obscene. In light of its finding that constitutionally inadequate procedures had been applied, the Supreme Court found it unnecessary to decide these questions. 420 U.S. at 552.

82. While the Supreme Court has relied on public forum principles in several cases decided since *Southeastern Promotions*, none of these more recent decisions contribute any new insight into the future direction of the public forum doctrine. See, e.g., *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 101 S. Ct. 2676, 2684 (1981) ("[t]here is neither historical nor constitutional support for the characterization of a letter box as a public forum"); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 578 (1980) (a trial courtroom, like streets, sidewalks, and parks, is a public place that traditionally has been open to the members of the public who have a first amendment right to be present there); *Jones v. North Carolina Prisoners' Labor Union*, 433 U.S. 119, 134 (1977) (a prison is not a public forum); *Greer v. Spock*, 424 U.S. 828, 834-38 (1976) (a

In light of the public forum cases, several potential arguments for applying the public forum rationale to the book removal cases deserve exploration. First, however, the *Brown-Tinker* analogy finally should be put to rest. In bestowing public forum status on the library and the school, the Supreme Court stressed the compatibility between government facilities principally serving nonexpressive functions and the use of those places for nondisruptive forms of expression. The library is principally designed for reading, reflection, and research. If demonstrators can quietly speak in the public space of the library reading room without disturbing library patrons, they may do so.⁸³ The classroom is principally for the communication of ideas through the transfer of those ideas to the students, but a silent symbol can be worn into class so long as no disruption occurs. Still in the school, but outside the classroom, other more vocal forms of expression may be permissible. In the lunchroom, for example, students may be permitted to distribute literature or solicit members for political organizations or support for candidates.⁸⁴ The common denominator among all these activities is that they all can peacefully coexist with the primary function of the forum. None of them, however, suggests a right to participate in those primary activities. The forum consists of the open space within the government facility. By the use of this space, a message may be communicated in a place where an effective audience exists. In none of these cases does the protestor gain the right to move into the government's own space and supplant or join the government in the running of the forum. Speech and nonspeech uses exist side by side, but each in its separate sphere. What this means in the library is that, as a secondary forum, the public forum consists of the open public spaces of the library. The government spaces, such as the library shelves and the reference desk, are reserved for the government's own use.

To reach the library shelves, arguments other than those relying

military base is not a public forum to which civilians have a right of access because the use of the base as a place to train soldiers and the paramount interest of the military in maintaining itself as a politically neutral establishment are incompatible with the characterization of the base as a public forum for civilian expressive activities); *accord*, *Brown v. Glines*, 444 U.S. 348 (1980) (military base).

83. *But see* *Bullock v. Mumford*, 509 F.2d 384 (D.C. Cir. 1974) (sit down strike in main reading room of the Library of Congress termed "disruptive" of study and meditation).

84. *Cf.* *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972) (suspension of students for distributing copies of underground newspaper in school corridors before and after classes and during lunch hour overturned since school rule plaintiffs were charged with violating was an unconstitutional prior restraint on expression).

directly on *Brown* and *Tinker* must be advanced. Three possibilities merit discussion. First, there is the argument that the library collection is itself a primary forum. The reasoning here is that the books on the shelves are a forum for the expression of ideas like the municipal theater in *Southeastern Promotions*. If this argument is successful, the *Mosley* equality principle takes over as a basis for a challenge to book removal. If the books themselves are a forum, selective exclusions from the collection become suspect.

While this reasoning results in the very variation on the public forum theme that is needed in the book removal cases, one major difficulty stands in the way of its success. That difficulty is that, unlike the municipal theater, the library collection was not created as a place for students to express their ideas and contribute books of their choice.⁸⁵ The school library's collection was created as a forum for the government's own ideas and not the ideas of members of the school community. While the expression of those ideas is through the vehicle of books written by a variety of authors and not by government authorship, the main point is that outside persons were not invited to participate in the selection of books for the collection. To illustrate this point further, if the library were to create a shelf in the library for student donated books, such a shelf might well be considered a forum. The library, having voluntarily created such a shelf, could not exclude some books because of disagreement with their content. But the entire library collection is not the equivalent of a student gift shelf. The existence of the library is not necessarily the equivalent of a government offering of a place where all ideas are welcome. In the absence of such a voluntary government offering, the equal access principle of *Mosley* does not come into play.

While the only participant in the process of filling the library shelves is intended to be the government itself, this restriction is not necessarily fatal to public forum theory. A second analysis of the library book collection is possible in which this facet of the government's intent is unimportant. In this view of the matter, a forum may exist where the government intends to be the only voice heard in the forum. In such a situation, the government will have the intent to use its voice to speak for all who wish to contribute to the

85. A similar distinction between a municipal auditorium and a publicly funded broadcast station was relied on to deny the station public forum status in *Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012, 1021 (5th Cir. 1981) ("There is an essential difference between a public broadcaster engaged in the private broadcaster function of selecting and presenting its own programs, and a municipal auditorium made available for presentations by others.").

forum. If the library can be seen as a place where the government has promised to represent all points of view, a voluntary forum will be found to have been created.

To further highlight this forum possibility, a look at a case in which just such a forum was created will be helpful. In *Alaska Gay Coalition v. Sullivan*,⁸⁶ the municipality of Anchorage published a guide to services and organizations in the greater Anchorage area. The *Anchorage Blue Book* rejected an entry submitted by the Alaska Gay Coalition because of hostility to the beliefs of the group's members. The Alaska Supreme Court identified the publication as a public forum and found that exclusions from that forum could not be based on objections to the ideas represented by the Coalition. Since other political groups were included in the publication, no content neutral reason could be discerned for the exclusion. The *Anchorage Blue Book* was considered to be a public forum because it was expressly created in order "to provide Anchorage residents with a single source of information regarding public services, local government, recreational opportunities and crisis assistance."⁸⁷ In light of the municipality's intent to disseminate a complete information guide, the municipality thereafter could not exclude a group from being listed in the guidebook based on objection to the ideas represented by the organization.

In *Alaska Gay Coalition*, the government was the sole author of the guidebook. A private group could not participate in the guide by requesting a page in the book on which it could describe its organization. The government's express intent in founding the guide, however, was to include information on all organizations in the community. Having voluntarily established this intent, a forum was viewed as having been created. The school library shelves differ from the *Anchorage Blue Book* in one critical respect. The public school has not created its library with the express credo that it shall contain books representing all ideas, both popular and unpopular. To the contrary, the government's clear intent is to selectively fill the shelves of the school library with only those books it determines are appropriate to the school's educational mission.⁸⁸ Lacking this kind

86. 578 P.2d 951 (Alaska 1978).

87. *Id.* at 953. The court acknowledged that in most cases a forum has been identified as a physical location. It had no trouble extending the public forum doctrine to include a publication, however, especially since the booklet's very purpose was communication. The booklet, therefore, satisfied the definition of a primary forum since it had been created voluntarily by the government for the purpose of expression. *Id.* at 956-57.

88. As an example of the possible criteria used in book selection, the court in *Presi-*

of volitional intent to give voice to all ideas, the school library cannot be considered to be a public forum on the order of the *Anchorage Blue Book*.

Despite the inadequacy of these two public forum theories for the case at hand, there remains one further argument with a chance for success in the library book removal cases. That argument does not depend on the voluntary nature of the government's actions in creating a forum. The essence of this argument is that by the very act of establishing a school library, the library shelves become an involuntary forum in which the government is obligated to represent all ideas.

Having articulated a public forum argument that seems a plausible means of fastening public forum status on the library bookshelves, the next step is to evaluate whether this argument can be supported by case law as well as logic. As a means of approaching this inquiry, it will be useful to see how this idea of an involuntary forum fared when applied to other areas in the schoolhouse. Not surprisingly, the public forum issue arose in the educational setting in a number of ways. The aspects of the school environment that received attention in the cases included the hallways, the lunchroom, the classroom, the school auditorium, the school newspaper, and the school notice distribution system. In the classroom, the hallway, and the lunchroom, questions of use for the exercise of speech rights relied directly on *Tinker*.⁸⁹ Since students sought access to places serving other primary functions, *Tinker*'s material disruption standard was applied.⁹⁰ Cases involving the use of the school auditorium were resolved with the use of the *Mosley* principle. If the auditorium generally was made available to some groups it must be made avail-

dents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972), cited the following regulation of the New York State Commissioner of Education as governing selections for secondary school libraries:

The book collection in the secondary schools shall consist of books approved as satisfactory for: (1) Supplementing the curriculum, (2) reference and general information, (3) appreciation and (4) pleasure reading. The course of study and the interest of boys and girls of given ages and grades are factors which should play a large part in the selection of books for a school library. Books of established quality and authority in sufficient quantity to meet all school needs are recognized as necessary tools and materials of instruction. 8 N.Y. Code, Rules & Regs. (Educ.) § 91.1(b) (1966).

Id. at 291 n.4.

89. *E.g.*, *Butts v. Dallas Independent School Dist.*, 436 F.2d 728 (5th Cir. 1971); *Aguirre v. Tahoka Independent School Dist.*, 311 F. Supp. 664 (N.D. Tex. 1970).

90. *Fujishima v. Board of Educ.*, 460 F.2d 1355 (7th Cir. 1972).

able to others on the same terms.⁹¹ The voluntary creation of a forum idea was central in these cases. The school newspaper cases were somewhat more complicated. Here as well, however, by the creation of a school newspaper relying on student writers and editors, the school was viewed as having voluntarily created a forum for student expression.⁹² School sponsorship and funding do not place the school in the position of a private publisher.⁹³ While the school may have been permitted to exercise control where it was necessary for the protection of the student body,⁹⁴ generally a forum was viewed as having been created by the establishment of a student run paper.⁹⁵ Having established a forum, student editors thereby were protected against attempts by school officials to censor articles slated for publication in the school paper.⁹⁶

In addition to the issue of whether school publications are forums with respect to student editors and writers, the public forum status of school publications has been raised in one other context. In this additional context the concern is whether outside contributors have rights of access to school publications because those publications are public forums.⁹⁷ An interesting example of this problem is

91. *National Socialist White People's Party v. Ringers*, 473 F.2d 1010 (4th Cir. 1973); *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 171 P.2d 885 (1946). The equality principle also is used to analyze claims of unconstitutional exclusion from other school facilities. *See, e.g., Gay Students Organization v. Bonner*, 509 F.2d 652 (1st Cir. 1974) (successful challenge by a student organization to the refusal to allow the organization to hold social functions on campus); *cf. Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala.), *aff'd*, 412 F.2d 1171 (5th Cir. 1969) (pre-*Mosley* challenge to the refusal to permit the Reverend William Sloan Coffin to speak on campus).

92. *Antonelli v. Hammond*, 308 F. Supp. 1329 (D. Mass. 1970); *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). For a discussion of the public forum status of school newspapers, see Note, *Tinker's Legacy: Freedom of the Press in Public High Schools*, 28 DE PAUL L. REV. 387 (1979); Note, *Public Forum Theory in the Educational Setting: The First Amendment and The Student Press*, 1979 U. ILL. L.F. 879.

93. *Bazaar v. Fortune*, 476 F.2d 570, 573-74 (5th Cir.), *modified en banc*, 489 F.2d 225 (5th Cir. 1973), *cert. denied*, 416 U.S. 995 (1974).

94. *Williams v. Spencer*, 622 F.2d 1200, 1205 (5th Cir. 1980) ("The First Amendment rights of the students must yield to the superior interest of the school in seeing that materials that encourage actions which endanger the health or safety of students are not distributed on school property.").

95. *Eisner v. Stamford Bd. of Educ.*, 440 F.2d 803, 810 (2d Cir. 1971).

96. *Gambino v. Fairfax County School Bd.*, 429 F. Supp. 731 (E.D. Va.), *aff'd*, 564 F.2d 157 (4th Cir. 1977). *But cf. Trachtman v. Anker*, 563 F.2d 512 (2d Cir. 1977), *cert. denied*, 435 U.S. 925 (1978) (court upheld a denial of permission to school newspaper to distribute a questionnaire concerning sexual attitudes of students). For a thorough discussion of *Trachtman*, see Comment, *Behind the Schoolhouse Gate: Sex and the Student Pollster*, 54 N.Y.U. L. REV. 161 (1979).

97. These cases involved several aspects of the school as public forum not discussed in *Tinker*. In addition to the obvious issue of the school newspaper as a public

found in *Avins v. Rutgers, State University*.⁹⁸ In *Avins*, a law review article was rejected by the *Rutgers Law Review*, a publication of the state-supported Law School of Rutgers University. The author of the article claimed that it had been improperly rejected based on its conservative jurisprudential outlook. The United States Court of Appeals for the Third Circuit upheld the exercise of editorial discretion by the Law Review's Editorial Board. The *Rutgers Law Review* was found to be part of the law school's educational program and not a forum available to all who wish to express their ideas on its pages. The court rejected Avins' claim, concluding that "the acceptance or rejection of articles submitted for publication in a law school law review necessarily involves the exercise of editorial judgment and this is in no wise lessened by the fact that the law review is supported, at least in part, by the State."⁹⁹ At least with respect to outside contributors, the law review was not considered to be a voluntary public forum and the court apparently was unwilling to consider it as an involuntary forum.¹⁰⁰

Two additional cases in the educational setting also concerned public rights of access to potential public forums within the school environment. In both of these cases, access claims were made to school notice distribution mechanisms. In the first, *Buckel v. Prentice*,¹⁰¹ an even more clear-cut rejection of the involuntary forum

forum, there is also the question of the rights of nonstudents when the public forum involved is a part of the school's educational program. See note 67 *supra*. At least one case suggested that the rights of students in an educational public forum are greater than the rights of nonstudents. *Stacy v. Williams*, 306 F. Supp. 963, 975 (N.D. Miss. 1969), *aff'd*, 446 F.2d 1366 (5th Cir. 1972). See generally Comment, *supra* note 72, at 120-24.

98. 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

99. *Id.* at 153-54.

100. Outside of the schoolhouse context, at least one case can be found in which the court reached a contrary result. In *Radical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970), the court found a right to place a political advertisement in a state-supported publication despite a publication policy barring such ads. In *Pool*, plaintiffs sought to place an ad in the *Texas Bar Journal* publicizing a caucus they were sponsoring during the annual meeting of the State Bar of Texas. The *Texas Bar Journal* had a policy against accepting political advertisements. Despite this policy, the court held for plaintiffs. The court ruled that the *Texas Bar Journal* had no policy against accepting advertising since it accepted commercial ads. Moreover, it found the defendant's explanation that it wished to remain neutral in controversial matters to be insufficient in light of other political materials published by the Journal. *Id.* at 270. While *Pool* seemed to create an involuntary forum in the face of a government intention not to open up the Journal to political ads, the case is of minimum assistance in finding support for such an argument. The court in *Pool* failed to discuss the public forum issue. It appeared to assume, *sub silentio*, that a forum existed, and went on to conclude that the government lacked a compelling reason for excluding plaintiffs from that forum. *Id.*

101. 410 F. Supp. 1243 (S.D. Ohio 1976), *aff'd*, 572 F.2d 141 (6th Cir. 1978).

concept occurred. In *Buckel*, plaintiffs based their claim on the equal access doctrine arguing that the Kingswood Elementary School in Columbus, Ohio had created a public forum by its practice of sending circulars home to parents through inschool distribution to their school-aged children. Defendant school system in *Buckel* had no written policy governing the distribution of noncommercial materials. The record in *Buckel* indicated that informational "materials about home fire safety, musical instrument rental plans, school lunch menus, summer recreation facilities and programs, and musical concerts and recitals" had been sent home in the past.¹⁰² Additionally, the schools had disseminated pamphlets "promoting tax levies and a state income tax."¹⁰³ The record was further complicated because plaintiffs previously had been granted permission to distribute a document urging decentralization of the public schools.¹⁰⁴ Plaintiffs' lawsuit sought the right to distribute additional materials on this same subject.

The court in *Buckel* recognized that the system was stepping dangerously close to the edge of creating a public forum by having no structured policy about distribution. At some point, the practice of allowing individual school principals to decide what material could be sent home with students might give rise to the creation of a forum. The court, however, felt that while such a potential existed, the evidence was insufficient to support a finding that the Columbus public schools had developed a practice of permitting parents to use student distribution to express opinions or disseminate information to other parents.¹⁰⁵ Therefore, no forum had been created on the facts before the court.

Having rejected plaintiffs' attempts to show that the school had voluntarily created a forum by developing a practice of allowing the message distribution system to be used by parents, the court also considered the possibility that an involuntary forum existed. The idea was that the school's own use of the distribution system for the dissemination of information gave rise to a right of parental usage of

102. *Id.* at 1246.

103. *Id.*

104. *Id.* In addition to the plaintiff's previous distribution, one other incident of private use of the school distribution system appeared in the record. A group called "Interested and concerned Kingswood Parents" distributed a circular urging parents to attend a discussion on the topic of school decentralization, to be held at the Kingswood Elementary School. *Id.*

105. *Id.* at 1247.

that same system. The court, however, rejected this possibility as well:

[T]he distribution via students of information concerning coming theatrical events, home safety measures, and the like, is not indicative of the establishment of a forum for First Amendment purposes. Dissemination of such material is a logical and a proper extension of the educational function of schools in our society, and such dissemination does not of itself give rise to any right of access to student distribution by parents or other concerned citizens.¹⁰⁶

Applying the same logic to the school library setting would result in a rejection of any access to the library shelves. The process of book selection is part of the educational function of the school. Engaging in this process of itself would not be viewed as giving rise to the creation of an involuntary forum.

The final case involving a notice distribution system is *Bonner-Lyons v. School Committee*.¹⁰⁷ In *Bonner-Lyons*, members of The Ad Hoc Parents' Committee for Quality Education challenged the distribution of notices about a planned antibusing rally through the use of the internal distribution procedure of the Boston public school system. Use of this procedure allowed the notice to reach the approximately 97,000 students attending the Boston public schools. The distribution of the notice was authorized by a resolution adopted by the Boston School Committee. The notice informed parents of schoolchildren that the Boston School Committee supported the "Parents' March on the Statehouse." Plaintiffs sought to enjoin future use of the distribution mechanism for notices voicing opposition to busing or, in the alternative, for access to the same system for the purpose of publicizing probusing rallies. The United States Court of Appeals for the First Circuit, in analyzing the case, assumed that the distribution procedure had been opened up to use by a private group for the dissemination of antibusing views.¹⁰⁸ Based

106. *Id.*

107. 480 F.2d 442 (1st Cir. 1973).

108. *Id.* at 443. The decision is ambiguous as to the source of the antibusing notice. The facts indicate that on March 29, 1973 the Committee authorized the distribution of the following notice:

Dear Parents:

At a meeting on March 29, 1973, a resolution of the School Committee to support the Parents' March on the State House on Tuesday, April 3, 1973, at 10:00 A.M. was passed unanimously.

The purpose of the meeting is to inform the Governor and members of the Legislature that parents and the Boston School Committee stand united in op-

on this assumption, the court applied the *Mosley* equal access principle and held that the system had been opened up to antibusing views, it had to be equally available for probusing opinions or, alternatively, to advocates of neither position.¹⁰⁹ Here again, a voluntary opening of the distribution system accounted for the result reached by the court. No issue of the involuntary creation of a forum by the school's attempt to create a forum solely for its own use had to be resolved.

These authorities make clear that when the public forum issue is raised in the school environment, the case law has relied on the voluntary creation of a forum and the equal access principle to find a solution. Only two of these cases spoke directly to the question of whether an involuntary forum is part of first amendment theory in circumstances in which the government sets up a forum only for government speech. In both of these cases such an argument was rejected. The Third Circuit in *Avins* concluded that the state may create a place for the expression of ideas that is not a public forum.¹¹⁰ This same result was adopted by the Sixth Circuit in *Buckel*.¹¹¹ Like the law review in *Avins*, the school's use of an information distribution system was found to be part of the school's educational function and did not give rise to the creation of a forum.

Avins and *Buckel* both adopted what has been described as an all or nothing approach to the public forum doctrine.¹¹² A place is or is not a forum with respect to all requests for access to that place. This approach, however, is not the only one available for analysis of public forum questions. One alternative is to consider the Law Review to be a public forum, but find justifiable many of the editorial

position to forced busing and redistricting now being considered by the State Board of Education.

All parents are encouraged to write the Governor, the Senators and the Representatives in support of House Bill 3439 which opposes busing without the written consent of the parents.

Id. While the content of the notice suggests that its source is the School Committee itself and not a private party, the court rejected such an interpretation. The court found support for its position in that on April 30, 1973, the School Committee apparently authorized a second set of antibusing notices to be distributed. According to defendants these notices were prepared by the "Home and School Association," a private association. *Id.* at 443 n.2. What the result would have been if the court had treated the notice as having been sent by the School Committee itself was not discussed in the case.

109. *Id.* at 444.

110. 385 F.2d at 153-54.

111. 410 F. Supp. at 1247.

112. Karst, *Public Enterprise and the Public Forum: A Comment on Southeastern Promotions, Ltd. v. Conrad*, 37 OHIO ST. L.J. 247, 248-52 (1976).

board's actions that result in the exclusion of certain articles from publication in the forum.¹¹³ For example, the rejection of Professor Avins' law review article because of dissatisfaction with its perspective on a question of constitutional analysis would seem to fall well within the permissible bounds of the editorial board's decisionmaking authority. Suppose the board, however, rejected an article for a reason unrelated to its content. Instead, the board felt a personal animus toward the author of the article or objected to the author's political opinions, opinions not reflected in the work itself. This decision should be considered an unjustified exclusion of the article from the pages of the Law Review. Nothing in the concept of editorial discretion requires a decision based on such grounds. Under this analysis, therefore, the Law Review would be considered a public forum, but not all exclusions from it would be unconstitutional.

While this reasoning might be preferred to the analysis of the courts in *Avins* and *Buckel*, it does not yet have support in the case law.¹¹⁴ Therefore, an attempt to consider the library book collection to be an involuntary forum first would depend on an ability to convince a court to adopt a more flexible response to public forum questions.

One final approach to the problem of viewing the library bookshelves as an involuntary forum remains. Unlike the kind of involuntary forum that would have been created in *Buckel*, this forum would not involve granting access to outside persons. The government's own voice would continue to be the only voice heard in the forum. The government, however, would take on an obligation to express a variety of views. The argument here is for a kind of constitutionally mandated fairness doctrine.¹¹⁵ Whenever government puts its machinery behind the selling of certain ideas by the creation of a forum for the expression of those ideas, as it does in the educational process, the first amendment would impose an obligation that the government make a "balanced presentation" by expressing a diversity of viewpoints.¹¹⁶

Several lines of decision have some relevance to the question of

113. See notes 292-304 *infra* and accompanying text.

114. Cass, *supra* note 33, at 1303.

115. The fairness doctrine is a requirement imposed on private broadcasters by the Federal Communications Commission that the broadcasters fairly present opposing views in their coverage of controversial public issues. Applicability of the Fairness Doctrine in the Handling of Controversial Issues of Public Importance, 29 Fed. Reg. 10,416 (1964).

116. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 714-16 (1970).

whether the first amendment permits the government to monopolize the school library as a forum for the expression of its own ideas. One point of inquiry focuses on Supreme Court statements about the role of public education and whether the schools are limited in the extent to which they may teach a favored ideology. A useful starting place in this discussion is *Tinker*.

In *Tinker*, the role of public education and limitations on the state's ability to formulate an educational program were discussed. The Court in that case set out limitations on the school's relationship with its pupils. The Court stated: "In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students."¹¹⁷ Later the Court reiterated this point: "[S]tudents may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved."¹¹⁸ These statements by the Court are open to two differing interpretations. One interpretation considers the Court's words in light of the facts of *Tinker* itself. The limitations on the power of school authorities to dictate certain messages to their students are supplied by the students having first amendment rights of freedom of expression in the schools. The state may preach its message, but the students have the right to rejoin with contrary messages of their own. A second interpretation of *Tinker* sees the case as imposing a much more direct restraint on school authorities. That interpretation views *Tinker* as requiring the school to disseminate a variety of messages. The school's obligation would be to expose students to a marketplace of ideas and would allow the students to choose those ideas that appeal to them most. This required democratization of the schoolhouse would limit the discretion of school authorities in matters of curriculum content. Even if no student desired to express contrary views to the school's favored ideology, the school itself would bear this responsibility. In the school library this would mean the school would be limited in its ability to screen out certain books because of disagreement with the ideas expressed in those books. This view of the school as an involuntary forum, however, is far from established.

To explore the question of whether such an argument can find further support in the case law, several additional cases deserve at-

117. 393 U.S. at 511.

118. *Id.*

tention. In *West Virginia State Board of Education v. Barnette*,¹¹⁹ the West Virginia State Board of Education's adoption of a resolution requiring compulsory flag salute in the schools was challenged. Challengers, Jehovah's Witnesses, claimed the flag salute law violated their rights to freedom of speech and religion. The Court invalidated the West Virginia statute, relying on free speech principles. While the West Virginia statute did not interfere with the challengers' right to speak, it did interfere with their right to remain silent, a right also protected by the first amendment's free speech guarantee. In declaring the West Virginia law to be unconstitutional, the Court had no quarrel with the state's ability to foster national unity. Instead, it objected to the state's choice of coercive means. That the end was legitimate and only the means unconstitutional was reaffirmed by this language in the Court's opinion: "To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds."¹²⁰ Thus *Barnette* cannot be viewed as a case in which the state's ability to foster patriotism was called into question.

A similar reasoning and result also appeared more recently in *Wooley v. Maynard*.¹²¹ In that case, George and Maxine Maynard challenged the authority of the State of New Hampshire to require that the Maynards display the New Hampshire state motto, "Live Free or Die," on their automobile license plate. The Maynards, Jehovah's Witnesses, claimed the motto "to be repugnant to their moral, religious, and political beliefs."¹²² The Supreme Court relied heavily on *Barnette* in finding for the Maynards:

Here, as in *Barnette*, we are faced with a state measure which forces an individual, as part of his daily life—indeed constantly while his automobile is in public view—to be an instrument for fostering public adherence to an ideological point of view he finds unacceptable. In doing so, the State "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."¹²³

In addition to reaffirming the notion of a first amendment right to

119. 319 U.S. 624 (1943) (overruling *Minersville School Dist. v. Gobitis*, 310 U.S. 586 (1940)).

120. 319 U.S. at 641.

121. 430 U.S. 705 (1977).

122. *Id.* at 707.

123. *Id.* at 715 (quoting *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

remain silent, the Court also reaffirmed the legitimacy of government attempts to "disseminate an ideology":

The State is seeking to communicate to others an official view as to proper appreciation of history, state pride, and individualism. Of course, the State may legitimately pursue such interests in any number of ways. However, where the State's interest is to disseminate an ideology, no matter how acceptable to some, such interest cannot outweigh an individual's First Amendment right to avoid becoming the courier for such message.¹²⁴

Once again, the Court had no objection to state attempts to instill favored values, only with its attempt to coerce allegiance to those values.

One final case provided direct support for the acceptability of state attempts to disseminate a favored ideology in the schools. In *Ambach v. Norwick*,¹²⁵ the Court upheld a ban on the employment of aliens as public school teachers. In doing so, the Court commented: "Public education . . . 'fulfills a most fundamental obligation of government to its constituency.' The importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions."¹²⁶ After describing public education as "'a principal instrument in awakening the child to cultural values,'"¹²⁷ the Court also recognized the role of public education in the indoctrination of fundamental values:

Other authorities have perceived public schools as an "assimilative force" by which diverse and conflicting elements in our society are brought together on a broad but common ground. These perceptions of the public schools as inculcating fundamental values necessary to the maintenance of a democratic political system have been confirmed by the observations of social scientists.¹²⁸

The Court went on to hold that the state's effort to further its educational goals justified imposing a citizenship requirement on public school teachers.¹²⁹

In upholding the legitimacy of state efforts "to promote particu-

124. 430 U.S. at 717 (footnote omitted).

125. 441 U.S. 68 (1979).

126. *Id.* at 76 (citation omitted).

127. *Id.* at 77 (quoting *Brown v. Board of Educ.*, 347 U.S. 483, 493 (1954)).

128. 441 U.S. at 77 (citations omitted).

129. *Id.* at 80-81.

lar values and attitudes toward government"¹³⁰ the Court, by implication, reinforced a narrower reading of *Tinker*. The Court's holding in *Ambach* suggests that the restraint on state authority imposed by *Tinker* was directed at the state's ability to silence student ideas and not at the state's right to choose to teach only certain ideas and values.

The impact of these cases in the school library setting cuts away from the idea of the school library as an involuntary forum in which a broad spectrum of ideas and values must be represented. As there appears to be no element of coercion in the library setting, the limitation established in cases like *Barnette* is inapplicable. The school library serves as a place for doing research on classroom assignments, borrowing books for voluntary spare time reading, spending study hour time reading books of a student's own choice, and similar activities. Students are not compelled to read any particular books¹³¹ and certainly are not compelled to affirm belief in ideas represented in books read or to serve as walking advertisements for ideas expressed in those books.

In searching for support among Supreme Court decisions for the argument that the school's ability to create a value laden library collection is subject to constitutional limitations, only two cases look promising. Upon closer examination, however, the support offered by these decisions is slight.

In *Meyer v. Nebraska*,¹³² the Supreme Court struck down a statute which forbade the teaching of any modern language, other than English, to any child who had not completed the eighth grade. The Court concluded that the statute interfered with the constitutionally protected liberty to acquire knowledge and with the right of parents

130. *Id.* at 79 n.10.

131. Unlike the school library situation, the element of coercion plays a role in the classroom setting. Since the students are required to participate in the classroom learning process and since the content of that process is controlled by the school, the classroom environment is distinctly more coercive than that in the library. This makes more persuasive the argument for first amendment limits on classroom curriculum content. *See, e.g.*, Comment, *supra* note 11, at 497-503 (arguing that the vulnerability of children in the classroom setting to indoctrination gives rise to a constitutional right to challenge curriculum exclusions that result in a curriculum that imposes ideological homogeneity). *But cf.* Hirschoff, *Parents and the Public School Curriculum: Is There a Right to Have One's Child Excused from Objectionable Instruction?*, 50 S. CAL. L. REV. 871, 905-09 (1977) (arguing that practical obstacles stand in the way of relying on a balanced presentation obligation for classroom teachers and that these obstacles point toward the alternative of allowing parents who disagree with the values taught in certain public school classes to have their children excused from such instruction).

132. 262 U.S. 390 (1923).

to control the upbringing of their children.¹³³

While *Meyer* appears to be an example of a constitutional limitation on curriculum content, its importance should not be exaggerated. In the first place, just as in the later cases of *Barnette* and *Ambach*, the Court recognized the legitimacy of "[t]he desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters."¹³⁴ The Court's quarrel was with the state's choice of means, not with its ends.

One further limitation on the importance of *Meyer* results from the Court restricting its decision to the facts before it. While the Nebraska statute was applicable to both public and private school instruction in foreign languages, plaintiff in *Meyer* was a teacher at a parochial school run by the Zion Evangelical Lutheran Congregation. The Court therefore dealt with the statute only as applied to the private school setting raised by plaintiff. The Court specifically eliminated from its consideration the question of the validity of the same curriculum control as applied to state run schools.¹³⁵ This limitation on the Court's decision is critical. Its impact was to reduce the value of *Meyer* in invalidating public school curriculum restrictions. Thus, the case has no direct application to curtailing what the state may teach in a forum of its own creation.

One Supreme Court case that involved the issue of a constitutional limitation on what may or may not be taught in the public schools is *Epperson v. Arkansas*.¹³⁶ In *Epperson*, an Arkansas law made illegal the teaching of the Darwinian theory of evolution in the public schools. In striking down this law, the Court reflected generally on past judicial involvement in educational controversies implicating constitutional values. While discussing *Meyer* and its reliance on the interference with the due process rights of students and teachers, the Court clearly disavowed any reliance on *Meyer* as a basis for *Epperson*. The controversy in *Epperson* was resolveable solely on establishment of religion grounds without any need to consider the broader problem of the general right to freedom of expression.¹³⁷ The Constitution requires the government to take a position of neu-

133. *Id.* at 401. On the same day as *Meyer*, the Court struck down three very similar statutes in effect in Iowa, Ohio, and Nebraska. *Bartels v. Iowa*, 262 U.S. 404 (1923) (cases consolidated).

134. 262 U.S. at 402.

135. *Id.*

136. 393 U.S. 97 (1968).

137. *Id.* at 105-06.

trality in religious matters, thus government advocacy of "a religious doctrine or the prohibition of theory which is deemed antagonistic to a particular dogma"¹³⁸ is forbidden. The Arkansas law was found to have been motivated by a desire to outlaw all discussion of evolution that contradicted the Biblical account of the origin of the species.¹³⁹ The law, therefore, was a violation of the establishment clause of the first amendment.

Meyer and *Epperson* provided only a feeble endorsement for the notion of a constitutional requirement that the government give something akin to equal time to the teaching of opposing ideas in the public schools. Instead, the message of *Tinker*, *Barnette*, *Wooley*, and *Ambach* is that the government is free to place its weight behind a particular idea so long as it does not coerce others to pledge allegiance to that belief.

The public school's ability to monitor its library collection so as to have it represent appropriate values is one aspect of the larger question of the constitutional treatment of government advocacy. This question has received scant attention until now.¹⁴⁰ The most direct treatment of the question came in a series of cases that challenged government advocacy in the electoral context.¹⁴¹

138. *Id.* at 106-07.

139. *Id.* at 107.

140. While this issue thus far has provoked infrequent scholarly comment, e.g., Z. CHAFEE, *GOVERNMENT AND MASS COMMUNICATIONS* 732-34 (1947); T. EMERSON, *supra* note 116, at 697-716; Van Alstyne, *The First Amendment and the Suppression of War-mongering Propaganda in the United States: Comments and Footnotes*, 31 L. & CONTEMP. PROB. 530, 531-36 (1966), there are indications this situation is changing. For two excellent recent treatments of the topic of government expression, see Kamenshine, *The First Amendment's Implied Political Establishment Clause*, 67 CAL. L. REV. 1104 (1979) (arguing that the first amendment contains an implied prohibition against political establishment similar in its operation to the religious establishment clause and limiting the right of government to advocate political viewpoints); and Yudof, *When Governments Speak: Toward a Theory of Government Expression and the First Amendment*, 57 TEX. L. REV. 863 (1979) (suggesting that excessive government expression should be curbed by courts becoming aware of the dangers of such speech and strengthening individual speech rights to combat those dangers, and by strengthening legislative limits on government speech through the use of the ultra vires technique). A third approach to the problem of government speech is advocated in Shiffrin, *Government Speech*, 27 U.C.L.A. L. REV. 565 (1980) (arguing that the legitimacy of government speech ought to be evaluated by an eclectic approach, in each case balancing the interests which weigh against allowing such speech against the interests in favor of government speech).

141. For an analysis of the problems presented by such cases, see Ziegler, *Government Speech and the Constitution: The Limits of Official Partisanship*, 21 B.C. L. REV. 578 (1980); Note, *The Constitutionality of Municipal Advocacy in Statewide Referendum Campaigns*, 93 HARV. L. REV. 535 (1980).

In *Anderson v. City of Boston*¹⁴² the city sought to expend funds "for the purposes of providing educational materials and disseminating information urging the adoption by the people of a proposed amendment to the Massachusetts Constitution relating to the classification of property for purposes of taxation."¹⁴³ In pursuit of his efforts to encourage passage of the classification amendment, the mayor created the Office of Public Information on Classification. As a result of the city's efforts, eleven taxpayers sued to prevent the city from engaging in activities to bring about the passage of the classification referendum. The Massachusetts Supreme Judicial Court ruled in favor of plaintiff taxpayers on the ground that the city lacked statutory authority to appropriate funds for the purpose of influencing election results.¹⁴⁴

Despite the lack of statutory authorization, the city argued that the first amendment protected its right to speak even in the absence of enabling legislation. The city was entitled to such constitutional protection, it therefore could expend funds in order to advocate passage of the proposed amendment.¹⁴⁵ In commenting on the constitutional claim raised by the city, the court suggested that the city's right to speak, while it might be constitutionally protected, also was subject to some degree of constitutional restraint:

There are, no doubt, constitutional restrictions on governmental speech even where the subject under discussion is one at the heart of the First Amendment's protection. On the other hand, there are a variety of instances in which government funds are used lawfully to express views and conclusions on matters of importance where various taxpayers may disagree with those views and conclusions. The Constitution of the United States, thus, does not forbid all government communications and publications which are not neutral and purely informative.¹⁴⁶

142. 376 Mass. 178, 380 N.E.2d 628, *appeal dismissed*, 439 U.S. 1060 (1979) (dismissed for want of substantial federal question).

143. *Id.* at 180, 380 N.E.2d at 631 (footnote omitted).

144. *Id.* at 182, 380 N.E.2d at 182.

145. *Id.* at 188-89, 380 N.E.2d at 635.

146. *Id.* at 191-92, 380 N.E.2d at 637 (footnote omitted). The court specified some of the restrictions on government speech in a footnote to this statement:

Surely, the Constitution of the United States does not authorize the expenditure of public funds to promote the reelection of the President, Congressmen, and State and local officials (to the exclusion of their opponents), even though the open discussion of political candidates and elections is basic First Amendment material. Government domination of the expression of ideas is repugnant to our system of constitutional government.

Id. at 191 n.14, 380 N.E.2d at 637 n.14.

The remainder of the court's analysis assumed for purposes of argument that the government speech at issue in *Anderson* was of the constitutionally protected variety. The court, however, even assuming such a protected status, found that the state has a sufficiently compelling interest in "assuring the fairness of elections and the appearance of fairness in the electoral process"¹⁴⁷ to justify curbing such advocacy.

The government's right to engage in political advocacy also was raised in *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*¹⁴⁸ and *Stern v. Kramarsky*.¹⁴⁹ The facts of *Citizens to Protect Public Funds* were similar to those of *Anderson*. The case involved a referendum on a proposal to issue bonds to finance a school building program. Prior to the referendum vote, the Board of Education printed and distributed an eighteen-page booklet entitled "*Read the Facts Behind the Parsippany-Troy Hills School Building Program*." The booklet contained facts about current school facilities and detailed plans of the proposed school expansion program. On the cover of the booklet and on several inside pages the reader was urged to "Vote Yes" on the referendum. The booklet also set out the untoward consequences of a negative vote. Plaintiffs challenged the legality of the Board of Education's use of public funds for the distribution of the booklet. The Supreme Court of New Jersey found no express or implied statutory authority for the expenditure of public funds for publication of the booklet. While not deciding the case on constitutional grounds, some of the court's reasoning seemed to bear on that question as well. The court found it appropriate for the school board to expend funds to fairly present all the consequences, both good and bad, of the proposed building program. For example, the Board of Education could sponsor a public forum for the airing of all views on the proposal or could broadcast a radio debate between proponents and opponents of the referendum.¹⁵⁰ The Board's authority, however, did not include the "use of public funds to advocate one side only of the controversial question without affording the dissenters the opportunity by means of that financed medium to present their side."¹⁵¹ The court's real objection was to "the expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to

147. *Id.* at 193, 380 N.E.2d at 638.

148. 13 N.J. 172, 98 A.2d 673 (1953).

149. 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

150. 13 N.J. at 182, 98 A.2d at 677-78.

151. *Id.* at 180-81, 98 A.2d at 677.

present their side.”¹⁵²

A similar opinion was expressed by the court in *Stern v. Kramarsky*.¹⁵³ In *Stern*, a taxpayer sued to enjoin the Commissioner of the Division of Human Rights of the State of New York from engaging in activities to bring about the adoption of the proposed equal rights amendment to the Constitution of the State of New York. While the court upheld the propriety of activities designed to educate and inform the public concerning the proposed equal rights amendment, it spoke out strongly against government departures from a position of neutrality on issues or candidates: “It would be establishing a dangerous and untenable precedent to permit the government or any agency thereof, to use public funds to disseminate propaganda in favor of or against any issue or candidate.”¹⁵⁴

While *Anderson*, *Citizens to Protect Public Funds*, and *Stern* suggested some limitation on the right of government advocacy, several caveats to the application of these cases to the school library book removal problem must be raised. First, there is the nonconstitutional *ratio decidendi* of these decisions. Second, there is the lack of any cited authority for the restrictions on government speech expressed in the opinions. Third, there are obvious distinctions between government support for a candidate or election issue and government support for certain positions in an educational setting. One possible distinction is based on the concept of a government function. According to Professor Emerson, the government’s right of expression should “not extend to any sphere that is outside the governmental function.”¹⁵⁵ While “direct support of a particular candidate for office”¹⁵⁶ is not a government function, education clearly is an important government concern.¹⁵⁷ Inherent in the administration of a public school system is the need to make choices of some ideas over

152. *Id.* at 182, 98 A.2d at 678.

153. 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

154. *Id.* at 452, 375 N.Y.S.2d at 239.

155. T. EMERSON, *supra* note 116, at 699.

156. *Id.*

157. As the Supreme Court recognized in *Brown v. Board of Educ.*, 347 U.S. 483 (1954):

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful

others. Ideological neutrality is not part of the history of public education in the United States.¹⁵⁸ One other distinction is that the selection of certain books for the school library is not as direct an instance of government advocacy as occurs when government supports a candidate for office. The act of placing books in a library for students to read at their option does not put the active voice of government behind those ideas, campaigning for their adoption. While the government may intend a student to hear a particular message, its manner of presenting that message is a great deal more subtle.¹⁵⁹

While the political advocacy cases of *Anderson*, *Citizens to Protect Public Funds*, and *Stern*, and the government forum cases of *Avins* and *Buckel*, all raised the issue of the government's right to create a forum for the dissemination of its own speech, the two lines of cases came at the issue from different directions. The government forum cases contemplated limiting the government's right to reserve a forum exclusively for its own use, while the political advocacy cases allowed the government to monopolize a forum but restrain

that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

Id. at 493.

158. It is common for state statutes to require the teaching of patriotism and democratic values in the public schools. *E.g.*, ALA. CODE § 16-40-3(c) (1975) which states:

The direction of study shall be one of orientation in contrasting the government of the United States of America with the Soviet government It shall lay particular emphasis upon the dangers of communism, the ways to fight communism, the evils of communism, the fallacies of communism and the false doctrines of communism.

ARK. STAT. ANN. § 80-1613 (1980) ("The instilling into the hearts of the various pupils of an understanding of the United States and of a love of country and of a devotion to the principles of American Government, shall be the primary object of such instruction. . . ."); NEB. REV. STAT. § 79-213(5)(b) (1976) which states

In at least two grades of every high school, at least three periods per week shall be devoted to the teaching of civics, during which courses specific attention shall be given to . . . [t]he benefits and advantages of our form of government and the dangers and fallacies of Nazism, Communism, and similar ideologies. . . .

159. Some might argue that despite their subtlety, government efforts at indoctrination in the educational process are more effective than any direct advocacy engaged in during the electoral process. *See Hirschhoff, supra* note 131, at 905-07. While this generally may be true with respect to classroom instruction, it is a much more difficult argument to make convincingly with regard to the school library. Attempts to tailor the school library collection to indoctrinate certain ideas must contend with the absence of required reading assignments and of the influential presence of the classroom teacher. Further, the subtlety of these efforts makes much more difficult the creation of an effective and appropriate remedy for excessive government expression. *See Yudof, supra* note 140, at 910-12.

what the government may say in its exclusive forum. Both of these principles, however, have application in the school library setting.

If the school is not free to create a library exclusively for its own use, the consequences would seem to involve either allowing others to donate books to the school library for placement on the library shelves, giving library patrons the right to suggest additional titles for inclusion in the library collection and have those suggestions judged by constitutionally adequate standards, or at the very least, allowing students to protest the removal of books from the school's collection. In this way the school would have the right to attempt to foster favored ideas in its selections for the library, but students would have a right to check these efforts by being given a constitutionally guaranteed voice in what the library places on its shelves. In this instance, the burden for speaking up is on the students themselves and does not fall directly on school administrators.

The application of the theory of a restricted right of government expression would have an even greater impact in the school library setting than the inability to create an exclusive forum. If the government may create a forum for its own use, but is constrained in the extent to which it may engage in advocacy in that forum, this would suggest that the school may not design the library collection with an eye toward indoctrination of several favored ideas. Outright expulsions of books because they represent a disfavored position would come up against this barrier. If the state were to include prolife abortion literature in the library, but refuse to keep shelved any prochoice literature arguing in favor of the right to choose an abortion, this barrier would be crossed.

The acceptance of either of these positions would lead to some amount of constitutional restraint on school board decisions to remove books from the school library. It, however, is clear that these two arguments are found far afield from the public forum doctrine routinely cited by courts willing to intervene in book removal cases. While these courts relied on *Brown v. Louisiana*¹⁶⁰ and *Tinker v. Des Moines Independent Community School District*,¹⁶¹ the issue of whether the school library qualifies as a public forum clearly cannot be resolved on the basis of these authorities alone. A complete analysis of the public forum status of the school library book collection requires a court to grapple with the idea of an involuntary forum and restrictions on the right of government advocacy. Neither of

160. 383 U.S. 131 (1966).

161. 393 U.S. 503 (1969).

these inquiries appear in the book removal cases, thus revealing the inadequacy of the analysis engaged in by the book removal courts.

B. *The Right to Know*

It is evident from the discussion of the public forum doctrine that one difficulty found in applying traditional first amendment principles to the school library book removal cases is that the plaintiffs in these cases are not asking to speak. Unlike the students in *Tinker*, these student plaintiffs seek access to books removed from the school library and the right to the information contained in those missing volumes.

This significant difference between the right to engage in speech and the right to receive information did not escape the attention of courts faced with deciding book removal cases. All of the school library censorship cases considered the nature of the first amendment right interfered with by the school board's action. The results of this consideration, however, varied depending on whether the court in question adhered to the noninterventionist model or the judicial review model of resolving book removal disputes.

The beginning premise for both kinds of courts is that the first amendment protects both the speaker and the listener. While agreeing on this initial assumption, the two lines of cases thereafter go their separate ways. The noninterventionist courts assert that the rights of the listener are no greater than those of the speaker.¹⁶² As the speakers in these cases, the publishers of the removed books, have no right to have their books retained on the library shelves, it therefore follows that the readers of the books have no such right.¹⁶³ Moreover, the courts go on to assert a second line of defense to the claim that a constitutionally protected right has been invaded. These courts point out that because the students have alternative means of access to the removed books, they have not been deprived of any right to receive the information contained in the books.¹⁶⁴

162. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 429 (2d Cir. 1980) (Mansfield, J., dissenting), *cert. granted*, 102 S. Ct. 385 (1981); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 620 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980).

163. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 429 (2d Cir. 1980) (Mansfield, J., dissenting), *cert. granted*, 102 S. Ct. 385 (1981); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 621 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980).

164. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 428 (2d Cir. 1980) (Mansfield, J., dissenting), *cert. granted*, 102 S. Ct. 385 (1981); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980); *Presidents*

A different analysis is offered by courts willing to review book removal controversies. These courts also rely on the right to know as established by such Supreme Court cases as *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*:¹⁶⁵ "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."¹⁶⁶ The willing speaker is identified as the book itself and the recipient as the student-reader.¹⁶⁷ No examination of the protected interest, if any, of the speaker is undertaken by these courts. Further, the existence of alternative avenues of access to the books is regarded as irrelevant.¹⁶⁸

Only one of the cases invalidating such school board action relied on a more expansive view of the nature of the student rights involved. In *Right to Read Defense Committee v. School Committee of Chelsea*,¹⁶⁹ the rights of the students were not viewed as reciprocal rights to those of the speaker. An independent right of access to information was identified: "It is the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences which is crucial here."¹⁷⁰

The right to "receive information and ideas" relied on in the book removal cases is firmly established as part of the first amendment territory.¹⁷¹ Whether this right, however, extends so far as to protect the student-readers is far from clear. The Supreme Court first definitively recognized the "right to know" as an independent

Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 292 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972); *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 621 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980).

165. 425 U.S. 748 (1976).

166. *Id.* at 756 (footnote omitted). This language was quoted by the courts in *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 583 (6th Cir. 1976) and *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979).

167. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979).

168. *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 n.19 (D. Mass. 1978).

169. 454 F. Supp. 703 (D. Mass. 1978).

170. *Id.* at 714 (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969)).

171. For a sampling of articles documenting this right, *see, e.g.*, Emerson, *Legal Foundations of the Right to Know*, 1976 WASH. U.L.Q. 1; Henkin, *The Right to Know and the Duty to Withhold: The Case of the Pentagon Papers*, 120 U. PA. L. REV. 271 (1971); Note, *The Constitutional Right to Know*, 4 HAST. CONST. L.Q. 109 (1977); Note, *The Right to Know in First Amendment Analysis*, 57 TEX. L. REV. 505 (1979); Note, *The First Amendment Right to Gather State-Held Information*, 89 YALE L.J. 923 (1980).

first amendment right in *Lamont v. Postmaster General*.¹⁷² In *Lamont*, the constitutionality of section 305(a) of the Postal Service and Federal Employees Salary Act of 1962 was challenged. Section 305(a) required that the addressee of a piece of mail identified by the Post Office as "communist political propaganda" be mailed a notice that the mail was being held by postal authorities. If the addressee desired the delivery of the piece of mail, a reply card requesting such delivery had to be returned within twenty days. Failure to return the card would result in the destruction of the mail. In *Lamont*, several addressees of mail identified as "communist political propaganda" argued that the statute violated their first amendment rights. The Court agreed with the challengers and struck down the statute because the requirement that the addressee request a piece of mail be delivered in order to receive it was found to abridge the first amendment rights of the addressees.¹⁷³

The issue of whether the rights of the recipients were in any way dependent on the rights of the senders of the mail was raised in *Lamont* as well. Justice Brennan's concurring opinion took the position that the "addressees assert First Amendment claims in their own right."¹⁷⁴ While "the First Amendment contains no specific guarantee of access to publications,"¹⁷⁵ Justice Brennan had no difficulty identifying such a right as part of the first amendment's protection: "I think the right to receive publications is such 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."¹⁷⁶ After *Lamont*, the right to receive information continued to be recognized as an independent constitutional right with those asserting the right being granted standing on their own and not in order to assert the rights of absent speakers. The cases, however, as in *Lamont*, involved government interference with communication between a willing speaker and a willing listener.

172. 381 U.S. 301 (1965).

173. *Id.* at 307.

174. *Id.* at 308. Justice Brennan noted that the case would present a more troublesome problem if the addressees were relegated to raising claims dependent on the rights of the senders. The reason for this was that the addressees then would need to demonstrate a justification for allowing them standing to raise the rights of absent third parties. Further they would need to establish "First Amendment protection for political propaganda prepared and printed abroad by or on behalf of a foreign government." *Id.*

175. *Id.*

176. *Id.*

In *Kleindienst v. Mandel*,¹⁷⁷ Ernest Mandel, a Belgian citizen and self-described "revolutionary Marxist," was invited to participate in a series of conferences, lectures, and panel discussions throughout the United States. To enter the United States, Mandel applied for but was denied a nonimmigrant visa. The legitimacy of the government's refusal to issue a visa to Mandel was challenged by Mandel and a group of eight university professors. The professors were "persons who invited Mandel to speak at universities and other forums in the United States or who expected to participate in colloquia with him so that, as the complaint alleged, 'they may hear his views and engage him in a free and open academic exchange.'"¹⁷⁸ That the interests of those who sought the right to hear Mandel were independent of Mandel's own constitutional rights was obvious to the Court. Because Mandel, "as an unadmitted and nonresident alien, had no constitutional right of entry to this country,"¹⁷⁹ appellee scholars could not depend on Mandel's rights as the basis for their claim. Instead, they relied on the right to receive information and ideas. The Supreme Court, while it ultimately held for the government,¹⁸⁰ recognized the legitimacy of this claim.¹⁸¹ The government's action in this case, as in *Lamont*, interfered with willing communication between a speaker and his audience, as Mandel sought entry to the United States and desired to participate in the scheduled conferences.

Kleindienst also raised, but did not resolve, another right to know issue disputed in the library book removal cases. The government argued in that case that no first amendment infringement had occurred because appellees had alternative avenues for access to Mandel's ideas "through his books and speeches, and because 'technological developments,' such as tapes or telephone hook-ups, readily supplant his physical presence."¹⁸² In responding to this argument, the Court first pointed out that these alternatives might

177. 408 U.S. 753 (1972).

178. *Id.* at 759-60.

179. *Id.* at 762.

180. *Id.* at 770. In reaching its conclusion, the Court relied on the plenary congressional power to exclude aliens. Under § 212(a)(28) of the Immigration and Nationality Act of 1952, ch. 477, 66 Stat. 27, Congress had delegated this authority to the Executive. The Court, in reviewing the Executive exercise of this authority, found it to be based on a facially legitimate and bona fide reason. *Id.* at 769. Under those circumstances, the Court refused to balance the government justification for its decision to exclude Mandel against the first amendment rights of those who wished to meet and speak with Mandel. *Id.* at 770.

181. *Id.* at 765.

182. *Id.*

not compensate completely for the benefits of face-to-face communication.¹⁸³ As for a final resolution of the relevance of alternatives, the Court found it unnecessary to resolve the question:

While alternative means of access to Mandel's ideas might be a relevant factor were we called upon to balance First Amendment rights against governmental regulatory interests—a balance we find unnecessary here in light of the discussion that follows in Part V—we are loath to hold on this record that existence of other alternatives extinguishes altogether any constitutional interest on the part of the appellees in this particular form of access.¹⁸⁴

This statement on the relevance of alternatives left the issue very much up in the air. While the Court was unwilling to rule out the relevance of alternatives, it also was unwilling to include them and express any opinion on how much weight alternatives are to be given.

The theme of willing speakers and listeners showed up again in the more recent right to know cases of *Procunier v. Martinez*¹⁸⁵ and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹⁸⁶ *Procunier* involved a challenge, on first amendment grounds, to the censoring of prisoner mail. The Court, in deciding the case in favor of the inmates, found it unnecessary to address the scope of prisoner first amendment rights. Whatever the scope of those rights, it was clear to the Court that the first amendment rights of noninmate correspondents also were being infringed. As in *Lamont*, the intended recipient of a letter had a constitutionally protected interest.¹⁸⁷ Also as in *Lamont*, willingness characterized both sides of the communication in *Procunier*.

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,¹⁸⁸ a ban that prohibited pharmacists from advertising the prices of prescription drugs was attacked. The challenge to the statute was raised not by a pharmacist but by a person required to take prescription drugs on a daily basis and by two nonprofit organizations. Plaintiffs claimed "that the First Amendment entitles the user of prescription drugs to receive information

183. *Id.*

184. *Id.*

185. 416 U.S. 396 (1974).

186. 425 U.S. 748 (1976).

187. 416 U.S. at 408-09. The Court in *Procunier* not only protected noninmates when they were the intended recipients of letters. Noninmates also received protection from the censoring of their correspondence when they authored letters to prisoners. *Id.*

188. 425 U.S. 748 (1976).

that pharmacists wish to communicate to them through advertising and other promotional means, concerning the prices of such drugs.”¹⁸⁹ The Court agreed that plaintiffs, as willing recipients of the price information, were entitled to first amendment protection.¹⁹⁰

Justice Blackmun’s opinion for the Court in *Virginia Pharmacy Board* also responded to an argument raised by the dissenting opinion of Justice Rehnquist. That argument concerned the relevance of alternative methods of obtaining drug price information. Despite its somewhat diffident handling of this issue in *Kleindienst v. Mandel*,¹⁹¹ the Court in *Virginia Pharmacy Board* unequivocally declared alternative methods for obtaining the information to be irrelevant:

The dissent contends that there is no such right to receive the information that another seeks to disseminate, at least not when the person objecting could obtain the information in another way, and could himself disseminate it. Our prior decisions, cited above, are said to have been limited to situations in which the information sought to be received “would not be otherwise reasonably available. . . .” We are aware of no general principle that freedom of speech may be abridged when the speaker’s listeners could come by his message by some other means, such as seeking him out and asking him what it is. Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated. Certainly, the recipients of the political publications in *Lamont* could have gone abroad and thereafter disseminated them themselves. Those in *Kleindienst* who organized the lecture tour by a foreign Marxist could have done the same. And the addressees of the inmate correspondence in *Procunier* could have visited the prison themselves.¹⁹²

Justice Rehnquist remained far from satisfied with the majority’s response to his argument. He rejected its contention that alternatives were equally available in *Procunier*, *Kleindienst*, and *Lamont*: “In *Procunier* this would have entailed traveling to a state prison; in *Kleindienst* and *Lamont*, traveling abroad. Obviously such measures would limit access to information in a way that the requirement of a phone call or a trip to the corner drugstore would not.”¹⁹³

If the majority’s position in *Virginia Pharmacy Board* is accepted as the last word on the issue of alternatives, nonintervention-

189. *Id.* at 754.

190. *Id.* at 756-57.

191. 408 U.S. at 765; see text accompanying notes 182-84 *supra*.

192. 425 U.S. at 757-58 n.15.

193. *Id.* at 783.

ist courts which point out that students will be able to obtain removed books through purchase or at other libraries are in error in their analysis.¹⁹⁴ If the distinction urged by Justice Rehnquist is accepted as viable, however, the position taken by these courts is more credible. Unlike the situation in *Procurier*, *Kleindienst*, and *Lamont*, the alternative means of access in the book removal cases are not so obviously inferior. In these cases there is no loss of face-to-face contact with the speaker by being forced to accept an alternative method of communication. In all cases the means of communication will be the same: the reading of the book by the student.

Despite the surface appeal of these alternatives, however, they still may make access to the books involved more difficult for the student. Purchase of the book as an alternative will involve a financial outlay not encompassed in the borrowing of the book from the library.¹⁹⁵ Borrowing the book from a municipal library may not be all that easily accomplished. The city library may not have a copy of the book, or it may be shelved in the adult section of the library. This latter possibility would mean student access would become dependent upon the willingness of the student's parents to borrow the book and give it to the student to read. None of these alternatives provide as ready access to the book as would be available in the school library.¹⁹⁶ The school library is established for the

194. *E.g.*, *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 621 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980).

Finally, we note that there has been neither evidence nor argument in this case that the Board's actions have in fact abridged the student plaintiffs' constitutional rights of free expression. Students remain free to purchase the books in question from private bookstores, to read them in other libraries, to carry them to school and to discuss them freely during the school day.

Id.

195. *See FCC v. Pacifica Foundation*, 438 U.S. 726, 774 (1978) (Brennan, J., dissenting).

196. The need to carefully analyze available alternatives to make sure they are equally effective exists both when the listener is seeking access to information and when the speaker desires to convey a message. For an example of such scrutiny when a speaker's preferred communication medium has been banned, see *Linmark Associates, Inc. v. Township of Willingboro*, 431 U.S. 85 (1977). In that case, an ordinance prohibiting the use of real estate "For Sale" signs was found to violate the first amendment. In finding that the ordinance did not leave the sellers of property with ample alternative methods for communication, the Court remarked:

Although in theory sellers remain free to employ a number of different alternatives, in practice realty is not marketed through leaflets, sound trucks, demonstrations, or the like. The options to which sellers realistically are relegated—primarily newspaper advertising and listing with real estate agents—involve more cost and less autonomy than "For Sale" signs; are less likely to reach persons not deliberately seeking sales information; and may be less effective

benefit of the students and exists as a readily available source of books. Thus, even if equally available alternatives were to be considered a relevant factor in the court's analysis, reasonable minds could differ on the issue of whether such alternatives exist in the book removal cases. Under either the view of the majority or the dissent in *Virginia Pharmacy Board*, the possibility of alternative methods of obtaining removed books need not affect the outcome of the right to know issue.

The elimination of the barrier posed by the existence of alternative methods of access to removed books, however, does not resolve all problems raised by the application of the right to know doctrine. There is still the requirement that the relationship between speaker and listener be a voluntary one. The question arises whether the term "voluntary" accurately describes the speaker/listener relationship in the context of the book removal cases.

The first step in answering this question is to determine the identity of the speaker. The identity of the listener is not in doubt. The student-readers desire access to the library books and the benefit of the information contained in the books, thereby qualifying them as willing listeners. Three possible speakers, however, must be considered: The publisher, the author, and the school board.

Addressing the first two possibilities, it is difficult to see how the interests of the publisher and the author differ in any significant way. As the disseminator of the book, the publisher stands in the shoes of a speaker.¹⁹⁷ Similarly, the author of the book, having penned the words contained in the book, is speaking through its pages. To this extent one can argue that the government in the form of the school board is interfering with the relationship between a willing speaker (the publisher or author) and a willing listener (the student-reader). The speaker/listener relationship, however, is not a direct one. The publisher or author has not attempted to sell or mail the book to the student and had that activity interrupted. Here the speaker and listener were able to communicate because of government purchase of the book. This is a much more active government role in the trans-

media for communicating the message that is conveyed by a "For Sale" sign in front of the house to be sold.

Id. at 93 (citations omitted).

197. *Cf. Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 64 n.6 (1963) (while the Rhode Island Commission to Encourage Morality in Youth purported to regulate only the distribution of books, the publisher of books found "objectionable" by the Commission could assert an independent constitutional claim based on the first amendment's free press guarantee).

action than is found in any of the other right to know cases. In at least one of those cases, the transaction was purely private.¹⁹⁸ In *Virginia Pharmacy Board*, the pharmacist purchased advertising space in an appropriate place and the consumer was able to see or hear that advertising. The first amendment simply prevented the government from interfering in that private transmission of information. No affirmative obligation was imposed on the government, such as providing the pharmacist with a place in which to advertise. In *Lamont* and *Procunier*, the government's role was a slightly more active one. The speech was transmitted by the use of the postal service. As the Court, however, remarked in *Lamont*:

Whatever may have been the voluntary nature of the postal system in the period of its establishment, it is now the main artery through which the business, social, and personal affairs of the people are conducted and upon which depends in a greater degree than upon any other activity of government the promotion of the general welfare.¹⁹⁹

The government's role in the transaction was the passive one of not denying the use of the postal system to two willing private communicators. The system generally was available to all on the same terms and the government simply was prevented from interfering with its use. This negative prohibition on government action again was not the imposition of an affirmative duty to aid the communication between the speaker and the listener.²⁰⁰

198. The speaker/listener relationship was purely private in *Stanley v. Georgia*, 394 U.S. 557 (1969), although the setting made irrelevant any inquiry into the exact nature of the means by which information was transmitted. In *Stanley*, appellant was convicted of "knowingly hav[ing] possession of . . . obscene matter." *Id.* at 558. The Supreme Court ruled that punishment for the mere private possession of obscene materials was not permitted under the first amendment. *Id.* at 568. The rights asserted by appellant in the case were described by the Court as follows: "He is asserting the right to read or observe what he pleases—the right to satisfy his intellectual and emotional needs in the privacy of his own home. He is asserting the right to be free from state inquiry into the contents of his library." *Id.* at 565. Because of the unprotected nature of the speech in *Stanley*, the only protection afforded was to the possessor of such material in the privacy of his home. The seller of the material had no reciprocal right to disseminate the material. Therefore, under the unusual circumstances of *Stanley*, the government was prevented from interfering with private possession of obscene material, but could punish the commercial distribution of this material. *United States v. Reidel*, 402 U.S. 351 (1971).

199. *Lamont v. Postmaster General*, 381 U.S. 301, 305 n.3 (1965) (quoting *Pike v. Walker*, 121 F.2d 37, 39 (D.C. Cir. 1941)).

200. The distinction made here is further supported by the Supreme Court's opinion in *United States Postal Serv. v. Council of Greenburgh Civic Ass'ns*, 101 S. Ct. 2676 (1981). In that case, the Court found that appellees had no first amendment right to use

It is at this point that the right to know doctrine and the public forum doctrine meet in the book removal cases. If the government activity required in order to bring about contact between speaker and listener is constitutionally mandated, the right to know doctrine is easy to apply. Such a constitutional mandate will exist whenever the speaker/listener relationship is to be consummated in a place that has been identified as a public forum. This result will follow whether the government has voluntarily created a forum or had a forum forced upon it by the operation of the involuntary forum doctrine. In either case the existence of a public forum gives rise to constitutionally protected interests on the part of both speakers and listeners.²⁰¹ Alternatively, if no forum exists the government is not free to interfere with a private meeting of speaker and listener, but takes on no special obligation to bring about their meeting. For example, if a speaker wishes to rent out a municipal auditorium in order to reach an audience, a member of the prospective audience also can sue on the basis of the right to know, claiming the municipality's refusal to rent the hall is unconstitutional.²⁰² Because the city has created a forum available for speech, it must make it available to all on a nondiscriminatory basis. The city, by its establishment of the auditorium, has taken upon itself the obligation of providing a forum in which the speaker and listener can find each other. On the other hand, suppose a speaker wishes to rent a public school auditorium but that auditorium is not made available to outside groups and the court is unwilling to find it to be an involuntary forum. In this setting, while the listener may have a constitutionally recognized right to know, that right standing alone will not be enough to force the school to provide the speaker with a place to speak.²⁰³

Applying this same reasoning to the publisher or author in the

letter boxes for the deposit of unstamped civic notices. While the Postal Service could not restrict appellees' right to use the mails to circulate their notices based on the content of the notices, *id.* at 2684, the Postal Service had no affirmative obligation to make letter boxes available for the deposit of letters that bore no postage.

201. This explanation dovetails with the situation in *Lamont v. Postmaster General*, 381 U.S. 301 (1965). The characteristics of the postal system described in that case make it easy to characterize the system as a voluntary public forum. Since the government has voluntarily created a forum by which to transmit communication between the sender and the recipient of a piece of mail, it follows that the recipient has a right to challenge wrongful exclusions from the use of that system.

202. See *Smith v. University of Tenn.*, 300 F. Supp. 777 (E.D. Tenn. 1969); *Brooks v. Auburn Univ.*, 296 F. Supp. 188 (M.D. Ala.), *aff'd*, 412 F.2d 1171 (5th Cir. 1969).

203. *Lawrence Univ. Bicentennial Comm'n v. City of Appleton*, 409 F. Supp. 1319, 1324 (E.D. Wis. 1976) ("The state is under no duty to make school buildings avail-

role of the speaker and the student-reader cast as the listener, the right to know fails to provide a self-sufficient basis for first amendment protection. While the right to know in this guise provides the student with standing to complain about the book removal, a successful result from the plaintiff's point of view will depend on the plaintiff's ability to argue that a public forum has been created in the form of the school library collection. While the rights of the listener are independent of the rights of the speaker, the right to know doctrine, while a necessary part of the plaintiff's case, is not a sufficient argument to sustain that case.

Still relying on right to know principles, the task now is to determine if any theory exists whereby the right to know can be viewed as a self-sufficient basis for judicial review in library book removal disputes. This attempt will involve an alternative analysis in which the government in the form of the school board steps into the speaker's shoes. In this analysis the focus is on the government's role in creating the library and stocking it with books. For purposes of the right to know, it is possible to say that the government is speaking through the books it places on the library shelves. Unfortunately, from this perspective, the government as speaker in a book removal situation is far from willing. Since the school has removed the book from the library shelves, the government has indicated its unwillingness to continue to speak.

The question raised by this alternative analysis is whether the right to know extends to situations in which the relationship is between an unwilling speaker and a willing listener. Two cases are relevant to this point. In both *Red Lion Broadcasting Co. v. FCC*²⁰⁴ and *Richmond Newspapers, Inc. v. Virginia*,²⁰⁵ the problem of the unwilling speaker received attention. In *Red Lion*, the Supreme Court upheld the constitutionality of Federal Communication Commission (FCC) rules adopted to implement the fairness doctrine. The fairness doctrine requires that broadcasters devote time to the discussion of public issues and that fair coverage be given to each side of an issue. To aid in the enforcement of the fairness doctrine, in 1967 the FCC promulgated rules to govern personal attacks made in the course of discussing controversial public issues and to regulate the right to reply to political editorials. These new rules were challenged

able for public meetings.") (quoting *Danskin v. San Diego Unified School Dist.*, 28 Cal. 2d 536, 545, 171 P.2d 885, 891 (1946)).

204. 395 U.S. 367 (1969).

205. 448 U.S. 555 (1980).

on both constitutional and statutory grounds. The constitutional claim made by the broadcasters was that the first amendment protected their right to broadcast what they chose.²⁰⁶ The Supreme Court responded to this argument by relying on the unique character of the electronic broadcast media, especially the scarcity of spectrum frequencies:

Because of the scarcity of radio frequencies, the government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment.²⁰⁷

Contrary to the broadcasters' claim, the Court found a first amendment interest to adhere, not to the broadcasters, but to the audience of viewers and listeners:

It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail, rather than to countenance monopolization of that market, whether it be by the Government itself or a private licensee. . . . It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC.²⁰⁸

The Court in *Red Lion* found a right to view and listen and allowed that right to be implemented even at the expense of an unwilling broadcaster. *Red Lion*, however, is only of limited precedential value in the school library context. First, the obligation on the unwilling broadcaster is imposed by statute. There is no suggestion that such an obligation would flow directly from the first amendment in the absence of a statute.²⁰⁹ Second, there is the unique nature of

206. 395 U.S. at 386.

207. *Id.* at 390.

208. *Id.*

209. The Court in *Red Lion* avoided the need to decide if the first amendment would dictate a version of the fairness doctrine, even in the absence of any FCC requirement, by the simple expedient of assuming the broadcast companies are private broadcasters. In the absence of a finding of sufficient government activity on the part of the broadcasters to bring into play the first amendment, the Court was free to ignore the issue of whether the first amendment guarantees certain access rights to governmentally sponsored broadcast stations. On this question see, Comment, *Access to State-Owned Communications Media—The Public Forum Doctrines*, 26 U.C.L.A. L. REV. 1410 (1979).

In a later case, *Columbia Broadcasting Sys., Inc. v. Democratic Nat'l Comm.*, 412 U.S. 94 (1973), the Court for the first time addressed both the question of whether the

the broadcast industry to consider.²¹⁰ These factors make it difficult to draw out of *Red Lion* a constitutional obligation for the government to speak, even if unwilling.

A more recent case, *Richmond Newspapers, Inc. v. Virginia*,²¹¹ may provide firmer support for such a proposition. In *Richmond Newspapers* the Court addressed the question of "whether the right of the public and press to attend criminal trials is guaranteed under the United States Constitution."²¹² To find an answer to this ques-

activities of the electronic broadcast media are sufficiently governmental to require the application of first amendment principles and whether, assuming they are, the first amendment would guarantee members of the public access to broadcast time to air their views. Unfortunately, while the Court addressed both these questions, no clear consensus developed on the government action question. The case raised these issues in the context of a challenge to a broadcaster's refusal to sell air time for editorial advertisements. While the Court held for the broadcaster, a majority was formed by a combination of four Justices (Chief Justice Burger and Justices Stewart, Rehnquist, and Douglas) who believed the first amendment did not apply to the broadcaster, and three Justices (Justices White, Blackmun, and Powell) who reasoned that, even assuming the first amendment did apply, the fairness doctrine and its policy of allowing broadcasters leeway in deciding how to comply with its requirements was consistent with the first amendment. The remaining two Justices (Justices Brennan and Marshall) dissented on the ground that there was sufficient government involvement to require the application of first amendment principles and that those principles required "that citizens be permitted at least *some* opportunity to speak directly for themselves as genuine advocates on issues that concern them." *Id.* at 189-90 (emphasis in original). While no majority of Justices was found on either side of the government action question, there was a majority in agreement that, if applicable, the first amendment would not require the selling of time for editorial advertisements. Five Justices shared this view although the conclusion was dictum for three of the five because they had previously found the first amendment inapplicable to the case. Four Justices, however, suggested that the first amendment would impose an obligation to allow access to the broadcast station to members of the public since, under those circumstances, the station would have to be viewed as a public forum.

210. The Court has continued to adhere to the distinction between the broadcast industry and other communications media that it relied on in *Red Lion*. In *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), the Court struck down a statute that gave a candidate for political office a right to reply to newspaper criticism. Despite the similarity between the Florida right to reply law and the FCC regulations upheld in *Red Lion*, the Florida statute was held to be a violation of the first amendment's guarantee of freedom of the press. The Court, in reaching its conclusion, refused to adopt an analogy between the scarcity of broadcast frequencies and the increasing concentration of press ownership in the hands of large media conglomerates. *Id.* at 256-57. The unique character of the broadcast industry was also a factor justifying regulation in *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1978) (upholding FCC regulations barring common ownership of a radio or television station and a daily newspaper located in the same community).

211. 448 U.S. 555 (1980).

212. *Id.* at 558. The Court specifically limited its decision to criminal trials. The question of a right of access to civil trials was left unresolved. The Court, however, did note that the tradition of openness it identified as an aspect of the criminal trial also applied to the civil trial. *Id.* at 580 n.17.

tion, Chief Justice Burger, writing for the Court, in an opinion joined by Justices White and Stevens, first traced the uncontradicted history of openness in the court system at both English common law and in the American colonies. The Chief Justice then found a constitutional recognition of this important common-law tradition inherent in the first amendment guarantees: "In guaranteeing freedoms such as those of speech and press, the First Amendment can be read as protecting the right of everyone to attend trials so as to give meaning to those explicit guarantees."²¹³

As *Richmond Newspapers* arose out of a request by defendant to have the press and the public excluded from his criminal trial, the government was not interfering with willing communication by granting his request. The government, however, by finding merit in defendant's motion, implicitly became the custodian of speech it was unwilling to let go public. The media representatives, as surrogates for the public, sought to enforce a right of access to the information the government refused to release. The Court, in responding to this claim of a right to know what went on in the courtroom, once again recognized the constitutional protection afforded listener status:

Free speech carries with it some freedom to listen. "In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.'" What this means in the context of trials is that the First Amendment guarantees of speech and press, standing alone, prohibit government from summarily closing courtroom doors which had long been open to the public at the time that amendment was adopted.²¹⁴

In order to protect the listeners' rights, the Court made it clear that the government is not free, without compelling reasons, to oust the public from the courtroom.²¹⁵

The question arises whether this imposition on an unwilling speaker necessarily is based on an extension of right to know principles. The answer appears to be that it is not. By the Court's own statements in *Richmond Newspapers*, the explanation for why the government is not entitled to summarily close the courtroom is found in the history of openness that surrounds the criminal trial: "[A] trial courtroom also is a public place where the people generally—and representatives of the media—have a right to be present,

213. *Id.* at 575.

214. *Id.* at 576 (citation omitted).

215. The Court left open the question of what circumstances would be sufficient to justify the closure of all or part of a criminal trial. *Id.* at 581-82 n.18.

and where their presence historically has been thought to enhance the integrity and quality of what takes place.”²¹⁶ By comparing the trial courtroom to other “places traditionally open to the public,”²¹⁷ such as streets, sidewalks, and parks, Chief Justice Burger placed the courtroom alongside other traditional public forums. Thus, under the analysis of the right to know doctrine developed previously,²¹⁸ *Richmond Newspapers* can be seen as a case in which the right to know alone is not a constitutionally sufficient basis for the result. That the courtroom is considered to be a traditional public forum is critical. Because such a forum exists, the government is not free to close it to listeners.²¹⁹

While it may be possible to draw out of *Richmond Newspapers* the beginnings of a right to information from an unwilling government, the Court really had no need to reach that question in the case. The issue of what other institutions of government have this same history of openness such that access to them cannot be restricted easily was not addressed by the Court.²²⁰ Further, the broader question of whether a right of access will be guaranteed even in the absence of such a history was not even hinted at by the Court. Only the concurring opinion of Justice Stevens reflected on the possible future repercussions of the case:

This is a watershed case. Until today the Court has accorded virtually absolute protection to the dissemination of information or ideas, but never before has it squarely held that the acquisition

216. *Id.* at 578.

217. *Id.* at 577.

218. See text accompanying notes 201-03 *supra*.

219. As a forum, separate from its role as a tribunal in our criminal justice system, the courtroom is peculiarly a forum for listeners. Use for most speech purposes would disrupt the primary activity taking place in the courtroom: the trial of criminal cases. There are exceptions, of course. For example, the wearing of a black armband by a spectator in a courtroom is no more disruptive than it was in the schoolroom in *Tinker*.

220. The only reference by the Court to this larger issue came in the form of a finding that prisons, like military bases, do not enjoy a history of openness and “are not ‘open’ or public places.” 448 U.S. at 576 n.11. The Court, therefore, was able to distinguish the prior cases of *Pell v. Procunier*, 417 U.S. 817 (1974), and *Saxbe v. Washington Post Co.*, 417 U.S. 843 (1974), in which the Court rejected press claims of a right of access to penal institutions for the purpose of face-to-face interviews with inmates designated by the press representatives. In both *Pell* and *Saxbe*, however, the Court was careful to point out that the press had not been denied the same rights of access that were available to the general public. The Court in *Richmond Newspapers* was not faced with the question of whether the media have greater access rights than the general public and thus the cases are distinguishable on that ground as well. 448 U.S. at 584 n.2 (Brennan, J., concurring).

of newsworthy matter is entitled to any constitutional protection whatsoever. . . .

. . . Today, however, for the first time, the Court unequivocally holds that an arbitrary interference with access to important information is an abridgment of the freedoms of speech and of the press protected by the First Amendment.²²¹

Justice Stevens extended his remarks further and also commented that he found the Court's willingness to find a right of access to criminal trials "somewhat ironic" in light of its prior refusals to recognize a similar right of access to penal institutions.²²² Even Justice Stevens chose not to speculate on the possible future scope of the right to information about the operation of government suggested by *Richmond Newspapers*.

The possibility of a more generalized first amendment right to information from an unwilling government, while having little basis in case law, has been urged by a variety of commentators.²²³ In a

221. 448 U.S. at 582-83.

222. *Id.* at 583. Justice Stevens' comment is directed at the Court's earlier decision in *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978). In that case, KQED news personnel were denied access to the Greystone portion of the Alameda County Jail other than as members of monthly public tours scheduled at the facility. KQED complained that: 1) The tours did not provide adequate media access because the scheduled tours were limited to 25 persons; 2) once this number was signed up media representatives were denied access; 3) the tours did not include parts of the jail involved in allegations of brutality and substandard conditions; 4) no cameras or tape recorders were permitted; and 5) inmates generally were kept from the view of tour members and could not be interviewed during the tour. *Id.* at 5. In rejecting a claim by KQED of a first amendment right of access to the jail, Chief Justice Burger stated: "Neither the First Amendment nor the Fourteenth Amendment mandates a right of access to governmental information or sources of information within the government's control." *Id.* at 15. Only Justices White and Rehnquist joined Chief Justice Burger's opinion. Justice Stewart concurred in the judgment. While agreeing with the Chief Justice that the press was entitled only to receive treatment equal to that of the general public in questions of access to government-held information, Justice Stewart argued for a more flexible definition of equal access. He recognized that there might be times when the terms of access applied to the general public would "be unreasonable as applied to journalists who are there to convey to the general public what the visitors see." *Id.* at 17. This four member majority was sufficient to outvote the dissent of Justices Stevens, Brennan, and Powell since Justices Marshall and Blackmun took no part in the consideration of the case. Therefore, despite a decision denying the journalists' claim of a first amendment right of access, no majority of the Court supported such a result.

223. *E.g.*, Klein, *Towards an Extension of the First Amendment: A Right of Acquisition*, 20 U. MIAMI L. REV. 114 (1965); Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1 (1957); Steel, *Freedom to Hear: A Political Justification of the First Amendment*, 46 WASH. L. REV. 311 (1971); Note, *The Rights of the Public and the Press to Gather Information*, 87 HARV. L. REV. 1505 (1974); Note, *Access to Official Information: A Neglected Constitutional Right*, 27 IND. L.J. 209 (1952); Note, *Access to Government Information and the Classification*

seminal article written in 1976, Professor Emerson argued for the existence of "a constitutional right in the public to obtain information from government sources necessary or proper for the citizen to perform his function as ultimate sovereign."²²⁴ According to Professor Emerson, "this right would extend, as a starting point, to all information in the possession of government."²²⁵ Whether an extension of the right to know along these lines would incorporate a right of access to books removed from the public school library is open to doubt. One question that must be asked is whether such information is relevant to the process of self-government. It could be argued that as prospective self-governors, all information is relevant to the future effective functioning of young citizens. Education furthers the goal of training young people to assume their roles as participants in our political system, thus the better their education, and the more ideas they are exposed to, the more effectively they will fulfill this future role. But this argument leads us into the realm of the house that Jack built. Certainly, knowledge of the contents of a removed book is not as directly related to self-government as knowledge of the workings of one of our government institutions, such as the courts. Second, the information being sought is not especially governmental in nature: It is not a document prepared by government officials relevant to some official action, nor is it access to a government institution to examine its workings, such as a prison. Initially, the book in question is placed in the private domain and made available through the commercial marketplace to all who wish to purchase it. The government has made it available through the alternative mechanism of a loan from a government run library, but query whether this transforms the book into the equivalent of government information. Thus, even this scholarly expansion of the right to know does not easily incorporate access to removed school library books.

One further extension of the right to know may be somewhat more helpful in this regard. Professor Emerson also has suggested one additional aspect of the right to know doctrine:

A third use of the right to know as protection against government interference with the system of freedom of expression arises

Process—Is There a Right to Know?, 17 N.Y.L.F. 814 (1971); Note, *supra* note 171, 89 YALE L.J. 923 (1980). But see O'Brien, *The First Amendment and the Public's "Right to Know,"* 7 HASTINGS CONST. L.Q. 579 (1980).

224. Emerson, *supra* note 171, at 16.

225. *Id.*

in certain situations when the government itself engages in expression. The government of course is entitled to participate in the system of freedom of expression and, while its contribution may at times tend to drown out others, no constitutional objection can normally be entered. Under some circumstances, however, the government may possess a monopoly, or a near monopoly, of the means of communication. Here restrictions on the government are necessary to prevent a serious distortion of the system. For this difficult task, a limiting principle may be found in the right to know.

For example, in the field of public education, where the government has a virtual monopoly, certain kinds of curriculum restrictions seem to run afoul of the right to know. Thus in *Epperson v. Arkansas*, the Supreme Court considered an Arkansas statute which prohibited teaching the doctrine of evolution in the public schools. A majority of the Court found that the law violated the establishment clause of the first amendment, but the Court might better have placed its decision upon a violation of the right to know. Similarly in the area of public broadcasting, the right to know would seem to compel the public broadcaster to present a reasonably balanced view on issues of public interest. The Supreme Court has not thus far employed right to know doctrines in this way, but the concepts are applicable and should be utilized.²²⁶

This argument, striking many of the same chords as the concept of an involuntary public forum discussed earlier,²²⁷ is not as clearly relevant in the school library as in the classroom setting described by Professor Emerson. Students in the classroom are a captive audience for the receipt of government ideas.²²⁸ In this way the government monopolizes their education. Students in the school library are not equally captives for particular ideas. Books are available on a voluntary basis. While students may be required to spend some time in the school library, they usually will not be required to read certain books during that time. The concept of required reading is associated with course materials for classroom use.²²⁹ Further, the school

226. *Id.* at 7-8 (footnote omitted).

227. See discussion of involuntary forum in text accompanying notes 89-161 *supra*.

228. Comment, *supra* note 11, at 497-99.

229. Challenges to material selected for required classroom reading occasionally have been brought by students and their parents. All of these suits have been unsuccessful. *E.g.*, *Williams v. Board of Educ.*, 388 F. Supp. 93 (S.D. W. Va. 1975); *Todd v. Rochester Community Schools*, 41 Mich. App. 320, 200 N.W.2d 90 (Ct. App. 1972); *Carroll v. Lucas*, 39 Ohio Misc. 5, 313 N.E.2d 864 (C.P. 1974); *In re Mitchell*, 13 N.Y.S. Educ. Dept. Rep. 228 (1974).

library may be monopolized by the government because it has total control over the book selection process, but the government message is much more muted in the many volumes on the library shelves than it is when it speaks through the person of the classroom teacher. The teacher's labeling of some ideas as true and others as false may be given almost conclusive weight by impressionable school age children.²³⁰ A book read in the school library does not so obviously come with a government seal of approval. Unlike the teacher in the classroom, no government voice has preached the ideas contained in its pages and identified them as true. The assumption that if a book is in the library it must be true is an improbable one. Students are unlikely to equate library shelf space with school approval. Therefore, even under this extension of the right to know doctrine, the doctrine would have difficulty reaching the library shelves.

Thus, just as with the public forum doctrine, the right to know doctrine does not easily extend to cover the problem of library book removal. The majority of the case law deals with government interruption of communication between a willing private speaker and listener. In the book removal cases, the student as listener and the publisher or author as speaker certainly are willing. No enforceable right to know, however, protects their relationship without the additional finding that the school library serves as a public forum. Alternatively, if the government assumes the speaker's position, the speaker ceases to be a willing one. While this speaker/listener relationship exists independent of reliance on public forum principles, it requires the extension of right to know theory to cover the listener's right to obtain information from an unwilling government speaker. Such a result, while arguably suggested in case law and scholarship, will not necessarily extend to the library book removal situation. These complexities are virtually ignored in the decided censorship cases. The library book removal courts, in this aspect of their analysis as in their public forum discussions, have failed in their task of adequately applying first amendment principles to the facts presented to them.

230. Cf. *Ambach v. Norwick*, 441 U.S. 68, 78-79 (1979).

[A] teacher serves as a role model for his students, exerting a subtle but important influence over their perceptions and values. Thus, through both the presentation of course materials and the example he sets, a teacher has an opportunity to influence the attitudes of students toward government, the political process, and a citizen's social responsibilities.

Id. (footnote omitted).

C. *The Selection of a Standard of Review*

If a court were to overcome the many first amendment hurdles placed in the path of judicial review of book removal disputes, the question of the scope of review would need to be addressed. With the threshold question of the existence of a constitutionally protected right out of the way, the merits of the dispute would next invite judicial scrutiny. This aspect of the decisionmaking process itself involves a host of difficult first amendment questions.

In initially turning to the decisions of book removal courts, one major difficulty in the selection of a standard of review becomes apparent. The first sign of this difficulty is found in the decisions of noninterventionist courts. One reason pointed to for their decision not to review is the difficulty of identifying any adequate standard for review. The point is made that the process of stocking a library collection is inevitably and continuously content-based.²³¹ Since shelf space and funding are finite resources, decisions constantly must be made about the comparative worth of books. One kind of decision will involve whether books on a particular topic should be included in the collection. Reasons such as lack of student interest in an area or the exclusion of an area from the school's curriculum might cause a particular subject not to be included in the school's collection. Another kind of decision arises once a topic is slated for inclusion in the collection. The various books on that topic must be examined to determine which should be included in the collection.²³²

231. *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1308 (7th Cir. 1980).

232. This examination usually will not involve a first hand appraisal of available books by the school librarian. Since such an examination often would be an impossible task, the librarian will rely on secondary sources such as book review journals and other publications, the reputation of the publisher of a book, and the reputation of the author of a book in order to select books for the library collection. A description of the decision-making process that went into a school librarian's decision to shelve a particular book is contained in one of the cases raising a successful challenge to a book removal:

Coleman [the librarian] read the book's introduction and scanned its contents, but did not read *City*, the poem which is the subject of this litigation.

Coleman felt that *Male & Female* would be useful for students taking adolescent literature and creative writing courses, particularly because it would give them an opportunity to see the variety of ways in which other students expressed themselves. She recognized the anthology's two editors as highly regarded professionals, and the publisher, Avon books, as having a good reputation in the area of young adult literature. These considerations, plus her own review, caused Coleman to place the anthology in the High School Library during March of 1976.

Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703, 706 (D. Mass. 1978) (footnote omitted). For a list of the book review journals commonly relied on by librari-

This decision will be a function of a variety of factors such as how many books in the area are suitable for the overall balance of the collection and which are the "best" of the available books on that topic. After the collection is initially compiled, a constant process of updating is necessary. For instance, new topics may be added and new books may be purchased and old ones discarded. These decisions are inescapably content-based.

Noninterventionist courts respond to this fact of life in the book selection process by resolving to leave such unavoidable questions of book suitability to the discretion of the elected school board members. Such courts consider a school board's proper function to be the implementation of an educational system that transmits the basic shared values of the community to its youth.²³³ The federal courts especially, in attempting to keep the proper state/federal balance, should rarely intrude in this process of value transmission.

Courts that feel free to intervene in book removal cases are not so willing to concede that all selection decisions are unavoidably content-based, at least, to be more accurate, book retention decisions. These courts see a distinction between the initial selection process, a process they see as raising fewer constitutional problems, and decisions to remove already shelved books.²³⁴ For these courts, removal decisions are divided into three categories: (1) Content neutral decisions; (2) constitutionally valid content-based decisions; and (3) constitutionally invalid content-based decisions. Despite identifying three categories, all of the decided cases in which a review of the merits occurred conclude that the situation presented to the court falls into the third category.²³⁵ It therefore is difficult to

ans, see Comment, *Censoring the School Library: Do Students Have the Right to Read?*, 10 CONN. L. REV. 747, 755 n.46 (1978).

233. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 426 (2d Cir. 1980) (Mansfield, J., dissenting), *cert. granted*, 102 S. Ct. 385 (1981); *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

234. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 436 (2d Cir. 1980) (Newman, J., concurring), *cert. granted*, 102 S. Ct. 385 (1981); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272 (D.N.H. 1979); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 712 (D. Mass. 1978). For a discussion of the related problem of challenges to the book selection process, see text accompanying notes 333-56 *infra*.

235. In *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976), the removed books were described as "completely sick" and "GARBAGE." *Id.* at 581. The court held that the school board was not free to remove a book because it found its content to be distasteful. In *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979), the court held the removal of *Ms.* to be constitutionally improper because it was based on objections to the political content of the magazine. *Id.* at 1274. Finally, in

discern much in the way of hard and fast rules on the specifics of this tripartite classification scheme. Some rationales for removal are identified as content neutral. These include the obsolescence of a book, a lack of shelf space, and the wearing out of a copy of a book.²³⁶ Among the potential constitutionally valid content-based justifications for book removal are that the book can be characterized as containing unprotected speech such as obscenity,²³⁷ and that a substantial government interest, such as education, is furthered by the removal.²³⁸ Constitutionally invalid content-based removals include a dislike for the political content of a publication²³⁹ and a distaste for the offensive language contained in a work.²⁴⁰

These courts, like their noninterventionist counterparts, recognize the need to leave school policymaking in the hands of school officials. When basic constitutional values are at stake, however, intervention is deemed appropriate. The very importance of education to our system of government is viewed as requiring that courts be especially protective of first amendment rights in the schools.²⁴¹ While striking a proper balance between leaving the control of the schools to school authorities and keeping an ever vigilant eye on first amendment rights may be a difficult task, it is a task that the constitution irrevocably assigns to the courts.

The differences between interventionist and noninterventionist courts on this point underscore a question of general concern in first amendment analysis. That question is whether and to what extent the government is permitted to make distinctions about speech protected by the first amendment based on its content.²⁴² This issue of

Right to Read Defense Comm. v. School Comm., 454 F. Supp. 703 (D. Mass. 1978), the district court found that the removal of a poem, "The City to a Young Girl," was impermissibly motivated by the school committee's objection to the poem's use of vulgar language. *Id.* at 713.

236. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 434 (2d Cir. 1980) (Newman, J., concurring), *cert. granted*, 102 S. Ct. 385 (1981); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 581 (6th Cir. 1976); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978).

237. *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1273 (D.N.H. 1979).

238. *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 713 (D. Mass. 1978).

239. *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 434 (2d Cir. 1980) (Newman, J., concurring), *cert. granted*, 102 S. Ct. 385 (1981); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979).

240. *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 713-14 (D. Mass. 1978).

241. *Id.* at 710.

242. On this question, see generally Farber, *Content Regulation and The First Amendment: A Revisionist View*, 68 GEO. L.J. 727 (1980); Stone, *Restrictions of Speech*

differential treatment of speech by government depending on its content was placed in sharp focus in *Police Department of Chicago v. Mosley*.²⁴³ *Mosley* was a challenge to a Chicago ordinance banning picketing within close proximity to any public school building while school was in session. The one exception to this restriction was for peaceful labor picketing of a school involved in a labor dispute.²⁴⁴ The Supreme Court held the ordinance to be unconstitutional because of the distinction it drew between labor and other kinds of picketing. The Court was outspoken in its hostility to content control: "But, above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."²⁴⁵ This and other similar sentiments expressed by the *Mosley* Court turned *Mosley* into a battle cry for those opposing content censorship.

While the result in *Mosley* was by a unanimous Court, later cases raising a similar problem split the Court sharply. Two cases especially highlight this conflict. In *Young v. American Mini Theatres, Inc.*²⁴⁶ and *FCC v. Pacifica Foundation*²⁴⁷ battle lines were drawn on the question of content discrimination. *American Mini Theatres* raised the issue in the context of a Detroit zoning ordinance which differentiated between motion picture theatres exhibiting adult films and other movie theatres. In the first paragraph of his opinion, Justice Stevens, writing for the Court, posed the question of the ordinance's constitutionality in terms of whether the statutory scheme was improperly based on the content of protected speech.²⁴⁸ In a part of his opinion joined only by Chief Justice Burger and

Because of its Content: The Peculiar Case of Subject-Matter Restrictions, 46 U. CHI. L. REV. 81 (1978); *The Supreme Court, 1975 Term*, 90 HARV. L. REV. 58, 196-205 (1976); Note, *Young v. American Mini Theatres, Inc.: Creating Levels of Protected Speech*, 4 HASTINGS CONST. L.Q. 321 (1977).

243. 408 U.S. 92 (1972).

244. The ordinance challenged in *Mosley* provided as follows:

A person commits disorderly conduct when he knowingly:

.
(i) Pickets or demonstrates on a public way within 150 feet of any primary or secondary school building while the school is in session and one-half hour before the school is in session and one-half hour after the school session has been concluded, provided that this subsection does not prohibit the peaceful picketing of any school involved in a labor dispute. . . . Municipal Code, c. 193-1 (i).

408 U.S. at 92-93.

245. *Id.* at 95.

246. 427 U.S. 50 (1976).

247. 438 U.S. 726 (1978).

248. 427 U.S. at 52.

Justices White and Rehnquist, Justice Stevens cautioned against overstating the impact of the *Mosley* equality principle.²⁴⁹ *Mosley* had to be analyzed in light of its facts and contrasted to other cases in which the Court approved of basing constitutional distinctions on the content of speech. With *Mosley* cut down to its proper size, Justice Stevens was free to conclude that society's interest in protecting the kind of expression contained in erotic materials was "of a wholly different, and lesser, magnitude than the interest in untrammelled political debate."²⁵⁰ This lesser interest justified subjecting sexually explicit motion pictures to a different regulatory system than other films.

Justice Stewart, in a dissent joined by Justices Brennan, Marshall, and Blackmun, expressed his outrage at the Court's "drastic departure from established principles of First Amendment law":²⁵¹

By refusing to invalidate Detroit's ordinance the Court rides roughshod over cardinal principles of First Amendment law, which require that time, place, and manner regulations that affect protected expression be content neutral except in the limited context of a captive or juvenile audience. In place of these principles the Court invokes a concept wholly alien to the First Amendment. Since "few of us would march our sons and daughters off to war to preserve the citizen's right to see 'Specified Sexual Activities' exhibited in the theaters of our choice," the Court implies that these films are not entitled to the full protection of the Constitution. This stands "Voltaire's immortal comment" on its head. For if the guarantees of the First Amendment were reserved for expression that more than a "few of us" would take up arms to defend, then the right of free expression would be defined and circumscribed by current popular opinion. The guarantees of the Bill of Rights were designed to protect against precisely such majoritarian limitations on individual liberty.²⁵²

249. *Id.* at 65-70. While only four Justices ascribed to the view that sexually explicit expression was entitled to less protection than political speech, a majority of the Court voted to uphold the Detroit ordinance. The fifth vote was provided by Justice Powell, concurring in the result. Justice Powell reasoned that because the ordinance did not suppress the production of adult films and also did not significantly restrict the public's access to such films, the ordinance should be treated as a regulation of the place where such films could be shown and not as a complete ban on sexually explicit films. *Id.* at 77-79. As a place regulation, the ordinance was justified because it was an exercise of the city's traditional and essential zoning power, it furthered the important government interest of preventing the deterioration of urban neighborhoods, and the city's interest was unrelated to the suppression of speech. *Id.* at 80-82.

250. *Id.* at 70.

251. *Id.* at 84.

252. *Id.* at 85-86. (citations and footnotes omitted). The reference to "Voltaire's

The dissenting Justices' unrelenting displeasure with the Court's willingness to differentiate between "important" and "unimportant" speech could hardly be plainer.

This same angry disagreement reappeared several terms later in *FCC v. Pacifica Foundation*.²⁵³ This time the differentiated speech was a radio broadcast of a George Carlin monologue entitled "Filthy Words." The case raised a challenge to the FCC's power to regulate indecent language. While a majority of the Court upheld FCC authority, as in *Young*, no majority of Justices was willing to condone content discrimination. The Court's opinion, again authored by Justice Stevens as it had been in *Young*, was joined only by Chief Justice Burger and Justice Rehnquist on the question of content-based regulation of speech.²⁵⁴ These three members of the Court characterized the speech in question as of "slight social value" and "offensive," therefore justifying its regulation.²⁵⁵ The other two members of the majority, Justices Powell and Blackmun, refused to join in these sentiments. While these two Justices found the FCC's action to be justified based on the presence of young children in the listening audience, the unique character of the broadcast media, and the need to protect unwilling adult listeners, they specifically disagreed with Justice Stevens' remarks recognizing a hierarchy of speech values under the first amendment.²⁵⁶ This same viewpoint is echoed in an elegantly scripted dissent by Justice Brennan in which he was careful to emphasize that a majority of the Court was unwilling to subscribe to a theory of "a sliding scale of First Amendment protection calibrated to this Court's perception of the worth of a communication's content."²⁵⁷

This ongoing debate between the Justices on the issue of content discrimination has been criticized in a variety of quarters on a variety of grounds.²⁵⁸ One point of criticism, however, needs to be

immortal comment" is to an exchange attributed to Voltaire in which, in response to a suggestion that violence is a justifiable method of overthrowing a tyrannical government, he remarked: "I disapprove of what you say, but I will defend to the death your right to say it." This statement was quoted in Justice Stevens' opinion. *Id.* at 63.

253. 438 U.S. 726 (1978).

254. Part IV-B of Justice Stevens' opinion concerned itself with the permissibility of regulating speech based on its content. It was this section of the opinion which drew the support of only three members of the Court. *Id.* at 744-48.

255. *Id.* at 746-47.

256. *Id.* at 761-62.

257. *Id.* at 763.

258. See, e.g., Stone, *supra* note 242, at 99-100 (Supreme Court's decisions in cases wherein a particular speech subject matter was singled out for different treatment are "contradictory and imprecise," may well be incorrectly decided, and have failed to accu-

stressed here. One factor greatly contributing to the confusion surrounding *Mosley*, *Young*, and *Pacifica* is the Court's intermingling of what really are two separate questions. The Court treated almost synonymously the issues of content-based censorship and a multilevel theory of speech protection. While the two questions are related and both have relevance in the book removal area,²⁵⁹ they are not one question and do not require a single response. It would be possible for a court to conclude that while all protected speech has

rately pinpoint the critical factors that led to the decisions); *The Supreme Court*, 1975 *Term*, *supra* note 242, at 200-02 (characterizing the attempt to distinguish political speech from sexually explicit speech as "unworkable" and inconsistent with first amendment values); Note, 28 CASE W. RES. L. REV. 456, 490-92 (1978) (describing *Young v. American Mini Theatres, Inc.* as "a jurisprudential mess" because of its disregard for basic first amendment precepts). *But see* Farber, *supra* note 242, at 729-31 (actual methodology used by the Supreme Court in cases involving content-based regulations provides a workable method of analyzing such regulations—the problem of content regulation is "largely illusory").

259. While this article concentrates on the issue of the permissibility of content-based regulation and only discusses in passing the possibility of a sliding scale of speech values, this latter inquiry is also very relevant to the book removal cases. In these cases, two of the frequently articulated reasons for the removal of a book are the book's use of offensive language and its description of sexually explicit scenes. *E.g.*, *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 618 (D. Vt. 1969), *aff'd*, 638 F.2d 438 (2d Cir. 1980); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 707 (D. Mass. 1978). Both of these speech types are among those suggested for a lesser degree of speech protection. *FCC v. Pacifica Foundation*, 438 U.S. 726, 746-47 (1978) (opinion of Stevens, J.); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 70-71 (1976) (opinion of Stevens, J.). If a court were to decide that one or both of these speech categories, while protected by the first amendment, should receive some lesser measure of that protection, it could make a significant difference in the outcome of a book removal case. If the school board were required to justify its actions by some lesser standard of review in cases wherein it removed books because they contained such speech, the board would stand a much better chance of being able to show the necessary level of justification to withstand a constitutional attack on its actions. Thus far none of the cases in which a court agreed to review the merits of a school board decision to remove a previously shelved book have adopted such a multileveled theory of speech protection. *E.g.*, *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 715 n.20 (D. Mass. 1978) (finding *FCC v. Pacifica Foundation* inapposite because of its reliance on the fact "that broadcasts have the unique potential for invading the privacy of the home"). These same courts, however, have not uniformly rejected a second potential argument for applying a double standard of speech protection. This second argument would be based on the idea that the scope of protected speech is not the same for children as it is for adults. *See, e.g.*, *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 212-13 (1975); *Ginsberg v. New York*, 390 U.S. 629, 637-43 (1968). *Compare* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 n.17 (D. Mass. 1978) (rejecting the argument that the youth of high school students justifies a school board's action in removing books containing vulgar language from the school library) *with* *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 638 F.2d 438, 441 n.3 (2d Cir. 1980) (adopting a different standard of obscenity when considering whether sexually explicit material can be removed from a school library used by young children).

the same first amendment weight, distinctions based on the content of speech are constitutional if the government justification offered for the differing treatment rests on a compelling reason. If, on the other hand, a court were to conclude that some speech is more valuable than other speech, the impact of this conclusion would be that a less than compelling level of government justification would be needed to uphold content-based regulations in cases in which the speech interfered with is given less than the full protection of the first amendment.

This distinction can be seen more clearly by a further look at *Mosley*. It certainly is true that the Court in that case was emphatic in its support of the principle that there is "an equality of status in the field of ideas."²⁶⁰ Despite this equal protection aspect of the first amendment, however, the Court acknowledged that some content-based distinctions could be constitutional:

Similarly, under an equal protection analysis, there may be sufficient regulatory interests justifying selective exclusions or distinctions among pickets. Conflicting demands on the same place may compel the State to make choices among potential users and uses. And the State may have a legitimate interest in prohibiting some picketing to protect public order. But these justifications for selective exclusions from a public forum must be carefully scrutinized. Because picketing plainly involves expressive conduct within the protection of the First Amendment, discriminations among pickets must be tailored to serve a substantial governmental interest.²⁶¹

The Court then went on to examine Chicago's justification for the antipicketing ordinance. That justification was identified as the legitimate one of preventing the disruption of the public schools. Despite the substantiality of the city's goal, however, the Court concluded that the city's choice of a means to effectuate this legitimate end was constitutionally defective.²⁶² Nothing could be found

260. *Police Department, of Chicago v. Mosley*, 408 U.S. 92, 96 (1972) (quoting A. MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1948)).

261. 408 U.S. at 98-99 (citations omitted).

262. *Id.* at 99-102. This distinction between a permissible means and a permissible end was emphasized by the Court's decision in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), decided on the same day as *Mosley*. In *Grayned*, the Court struck down an antipicketing ordinance virtually identical to the one in *Mosley*. A second Rockford ordinance, however, also was challenged in that case. That ordinance prohibited the willful "making of any noise or diversion which disturbs or tends to disturb the peace or good order of" a "school session or any class thereof" which is in session. *Id.* at 108.

to legitimately distinguish peaceful labor from nonlabor picketing. Peaceful labor picketing was no less disruptive than other peaceful picketing. Further, the city could not use unfounded predictions about the potential violence that could be caused by other picketing as a constitutionally sufficient justification for the distinction contained in the ordinance.²⁶³ Therefore, the Court reasoned, the city had not satisfied the constitutional requirement that it employ means that were tailored precisely to further substantial and legitimate government interests.

This analysis suggests that if Chicago had been able to demonstrate some significant distinction between labor and other picketing so that the regulation of only nonlabor picketing was important to the furtherance of its legitimate ends, its differential treatment might have been constitutionally permissible. Despite the suggestion in *Mosley* that the prohibition against content discrimination is not ab-

This antinoise ordinance was designed to prevent the disruption of school sessions, the same goal which supported the antipicketing ordinance. Unlike its treatment of the antipicketing ordinance, however, the Court upheld the constitutionality of the antinoise ordinance. *Id.* at 108-21. The ordinance was found to be narrowly tailored to further the city's compelling interest. *Id.* at 117-21.

A more recent case further highlights this point. In *Carey v. Brown*, 447 U.S. 455 (1980), an Illinois statute that barred all picketing of residences or dwellings, but exempted peaceful picketing of a place of employment involved in a labor dispute was struck down. The Court found the situation identical to that in *Mosley*. *Id.* at 460. While the state's interest in protecting privacy in the home was an important one, the state had chosen an impermissible means to protect that interest. As in *Mosley*, the state could not demonstrate any distinction between labor picketing and other kinds of picketing that would make labor picketing less disruptive of residential privacy. *Id.* at 465. Moreover, the Court rejected the state's attempt to justify the distinction as a means of giving special protection to labor picketing. The Court found no constitutional justification for singling out labor picketing since it was no more valuable under the first amendment than other types of picketing. *Id.* at 466. Lastly, the Court found inadequate the state's final attempt to justify the statute by arguing that residences that are also places of employment dilute their right to privacy by "inviting" such disputes. The Court rejected this justification because it found it to be substantially underinclusive: "Numerous types of peaceful picketing other than labor picketing would have but a negligible impact on privacy interests, and numerous other actions of a homeowner might constitute 'nonresidential' uses of his property and would thus serve to vitiate the right to residential privacy." *Id.* at 469 (footnote omitted). While none of the state's offered justifications were adequate to support the content-based distinction created in the Illinois statute, the Court made it clear that the statute was not being struck down simply because it was content-based, but instead because the state had no compelling reason for utilizing a content-based distinction. *Id.* at 465. *Accord*, *Widmar v. Vincent*, 102 S. Ct. 269, 274 (1981) ("In order to justify discriminatory exclusions from a public forum . . . the university must therefore satisfy the standard of review appropriate to content-based exclusions. It must show that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end.").

263. 408 U.S. at 100-01.

solute, the case had nothing to do with the issue of whether some kinds of protected speech are more important under the first amendment than others. No basis could be suggested for giving a greater first amendment value to labor picketing than to other kinds of picketing. None of the possible classifications of less protected speech suggested by Justice Stevens in *Young* and *Pacifica*, such as erotic speech and offensive speech, were applicable to *Mosley*. This amply demonstrates that it is possible to justify some content-based distinctions without at the same time creating a sliding scale for speech protection.

Dividing the Court's debate about content control into two separate inquiries is a help in understanding the dilemma, but it still leaves one far from a resolution of the problem. At this point one additional content control case will be looked to for guidance. *Southeastern Promotions, Ltd. v. Conrad*²⁶⁴ raised the issue of content-based distinctions in a context somewhat akin to the school library. In *Southeastern Promotions*, the board of directors of the Chattanooga Memorial Auditorium refused to approve the use of a municipally operated theater for a production of the musical "Hair." This denial of the use of a municipal facility occurred without any of the directors seeing the play or reading the script and was based on outside reports that the musical was obscene.²⁶⁵ Because the board's decision censored the production before it was performed, the Court labeled the board action a prior restraint on speech. As a prior restraint, it came before the Court "bearing a heavy presumption against its constitutional validity."²⁶⁶ Further, "rigorous procedural safeguards," such as a prompt system of judicial review, were a necessary accompaniment to the use of such a prior restraint.²⁶⁷ The Court held that the necessary procedural safeguards were lacking in several respects.²⁶⁸

264. 420 U.S. 546 (1975). Both *Southeastern Promotions* and *Mosley* are also important cases in the development of the public forum doctrine. See notes 69-82 *supra* and accompanying text.

265. 420 U.S. at 548.

266. *Id.* at 558 (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963)).

267. 420 U.S. at 561.

268. See note 80 *supra* for a description of the specific procedural requirements found to be lacking by the Court. Procedural infirmities also may be a way of disposing of some book removal cases. For example, in *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269 (D.N.H. 1979), copies of *Ms.* were removed from the school library after a resolution seeking to remove the magazine had been voted on affirmatively at a Board of Education meeting. Since the resolution had been presented to the Board of Education by one of its members, the Board acted on the proposal without following recently adopted interim "Guidelines for Selecting Instructional Materials." The district court

Having based its decision on this ground, the Court avoided any need to decide whether the board's reasons for barring "Hair" from its theater were constitutionally adequate.²⁶⁹ Certain statements made by the Court along the way to its ultimate decision, however, are relevant to that inquiry. For one thing, the Court expressed some concern over the role played by the board of directors: "An administrative board assigned to screening stage productions—and keeping off stage anything not deemed culturally uplifting or healthful—may well be less responsive than a court, an independent branch of government, to constitutionally protected interests in free expression."²⁷⁰ For another, it recognized "that approval of an application required some judgment as to the content and quality of the production."²⁷¹ These same two points have equal application to the process of school library book censorship. The school board's interest is in an educationally uplifting library collection and the decisions it makes must be based on the content and quality of various books. Unfortunately, after identifying that content evaluation is an inevitable part of the board's job, the majority refrained from addressing this crucial problem further.²⁷²

ruled that having adopted the guidelines, the Board of Education was obligated to follow them. *Id.* at 1273. The court invalidated the magazine's removal and ordered the Board to follow the guidelines in any future decisions to remove books from the library shelves. *Id.* at 1276.

Moreover, procedural irregularities may influence a court in favor of intervening in a book removal dispute.

In circumstances of such irregularity and ambiguity, a *prima facie* case is made out and intervention of a federal court is warranted because of the very infrequency with which it may be assumed such intervention will be necessary and because of the real threat that the school officials irregular and ambiguous handling of the issue will, even despite the best intentions, create misunderstanding as to the scope of their activities which will serve to suppress freedom of expression.

Pico v. Board of Educ., Island Trees Union Free School Dist., 638 F.2d 409, 414-15 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 385 (1981).

269. 420 U.S. at 559.

270. *Id.* at 560-61.

271. *Id.* at 555 n.7.

272. In addition to recognizing that content evaluation is an unavoidable aspect of the board of director's job, the Court in *Southeastern Promotions* also recognized that there may be occasions when content neutral reasons for excluding speech will come into play. The Court, for example, pointed out that "[t]here was no contention by the board that these facilities could not accommodate a production of this size." *Id.* at 555. The implications of this comment are that content neutral reasons for refusing the play would not have been objectionable under the first amendment. This suggestion is especially relevant in the context of the book removal cases because of the close analogy between exclusions resulting because the theater is too small and the explanation in the book removal cases that a book may be excluded because of a limitation on shelf space. *See*

This issue received due consideration, however, in both the separate opinion of Justice Douglas, in part dissenting and in part concurring, and in the dissent of Justice Rehnquist. Justice Douglas' concern was with the Court's "application of a few procedural band-aids"²⁷³ when the serious constitutional flaw in the case was the content screening engaged in by the board of directors:

As soon as municipal officials are permitted to pick and choose, as they are in all existing socialist regimes, between those productions which are "clean and healthful and culturally uplifting" in content and those which are not, the path is cleared for a regime of censorship under which full voice can be given only to those views which meet with the approval of the powers that be.²⁷⁴

Justice Rehnquist interpreted the Court's opinion differently from Justice Douglas, seeing it instead as a condemnation of content screening. It was the Court's apparent disapproval of board determinations based on decisions relative to the content and quality of offered productions that distressed Justice Rehnquist.²⁷⁵ While he conceded that the theater is a public forum subject to first amendment constraints, Justice Rehnquist was unwilling to classify it along with public streets and parks. Unlike expression in those places, expression in a municipal theater must be on a scheduled basis and that scheduling will involve a process of inclusion and exclusion.²⁷⁶ In Justice Rehnquist's view, the Court's unwillingness to recognize this reality and allow the theater to function as a theater produces some unsatisfactory consequences and leaves some important questions unresolved:

May a municipal theater devote an entire season to Shakespeare, or is it required to book any potential producer on a first come, first served basis? These questions are real ones in light of the Court's opinion, which by its terms seems to give no constitutionally permissible role in the way of selection to the municipal authorities.

. . . .

A municipal theater may not be run by municipal authorities

note 236 *supra* and accompanying text. The Court's remarks on this point in *Southeastern Promotions* lent validity to the noninterventionist courts' decision to uphold content neutral book removals under their three-part classification scheme. *Accord*, *Heffron v. International Soc'y for Krishna Consciousness*, 101 S. Ct. 2559, 2564-65 (1981).

273. 420 U.S. at 563.

274. *Id.*

275. *Id.* at 571-72.

276. *Id.* at 570.

as if it were a private theater, free to judge on a content basis alone which plays it wishes to have performed and which it does not. But, just as surely, that element of it which is "theater" ought to be accorded some constitutional recognition along with that element of it which is "municipal."²⁷⁷

These same unresolved questions might just as easily be asked about the public school library. Unfortunately, the Court's analysis in *Southeastern Promotions* suggested no surefire way to determine the extent to which the first amendment recognizes that element which is "school library" along with that element which is "public."

The conflict of roles crystallized in *Southeastern Promotions* is not unique to the municipal theater and the school library. It arises whenever government sponsorship is afforded an activity in which selectivity is ordinarily an important aspect. It is undoubtedly true, as Justice Rehnquist pointed out, that a private theater would select its productions based on a variety of content-based factors. The extent to which government must refrain from relying on these same factors when it is involved in running a theater or other similar activity is indeed a troublesome point. Regrettably, the judicial responses to this troubling inquiry leave us far from a complete resolution of the problem. For the most part courts, probably sensing this dilemma lying in wait for them once they determine some degree of scrutiny should be applied, avoid the dilemma entirely by the use of several evasive techniques.²⁷⁸ A screening of the case law for cases in which the issue of the permissible scope of editorial discretion was squarely addressed produces only a few solid nuggets of analysis.

One example of a case in which the court examined the proper scope of government editorial discretion is *Advocates for Arts v. Thomson*.²⁷⁹ In that case *Granite*, a literary journal, had applied for a grant-in-aid under a program of public funding for the arts sponsored by the New Hampshire Commission on the Arts. *Granite's* grant application was turned down because of objection to a poem published in a past issue of the magazine. The poem was described

277. *Id.* at 573-74.

278. Among the techniques used by courts to avoid tackling the difficult problem raised by government exercise of editorial discretion are a finding of insufficient state involvement in the challenged action to give rise to a first amendment claim, *e.g.*, *Mississippi Gay Alliance v. Goudelock*, 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977), and a decision that no public forum exists, thereby permitting the court to refuse all claims of access, *e.g.*, *Muir v. Alabama Educ. Television Comm'n*, 656 F.2d 1012 (5th Cir. 1981); *Avins v. Rutgers, State Univ.*, 385 F.2d 151 (3d Cir. 1967), *cert. denied*, 390 U.S. 920 (1968).

279. 532 F.2d 792 (1st Cir.), *cert. denied*, 429 U.S. 894 (1976).

as "an item of filth" by the New Hampshire Governor.²⁸⁰ *Granite* challenged the denial of its application as a violation of its first amendment rights. While the First Circuit noted a resemblance between the case before it and *Southeastern Promotions*, it found the differences between the two cases more compelling. The court found no tradition of neutrality in public support of the arts and could see no way that funding decisions could be made on a neutral basis.²⁸¹ While access to a municipal theater could be allocated neutrally on a first-come-first-served basis, no method of avoiding a judgment on the comparative worth of projects applying for grants could be discerned:

The decision to withhold support is unavoidably based in some part on the "subject matter" or "content" of expression, for the very assumption of public funding of the arts is that decisions will be made according to the literary or artistic worth of competing applicants. Given this focus on the comparative merit of literary and artistic works equally entitled to first amendment protection as "speech", courts have no particular institutional competence warranting case-by-case participation in the allocation of funds.²⁸²

The First Circuit's reaction to the fact that decisions based on artistic merit are necessarily both content-based and subjective was to leave those decisions entirely in the hands of the administrators of the program. Thus the solution proposed by the court in *Advocates for Arts* is that in cases in which the government activity requires the exercise of editorial discretion and no neutral standards can be substituted for subjective ones, that discretion should be exercised unhampered by any constitutional restraints. This result is on all fours with the result and reasoning of noninterventionist courts in the book removal cases.²⁸³

280. *Id.* at 793.

281. *Id.* at 796.

282. *Id.* at 795-96.

283. Despite this similarity in reasoning between *Advocates for Arts* and the analysis of noninterventionist courts, an attempt was made by one interventionist court to distinguish the case. In *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703 (D. Mass. 1978), the court found a difference between censoring speech, as in the book removal cases, and enlarging speech by making money available to fund expression, as in *Advocates for Arts*. *Id.* at 712 n.15. This distinction, while facile, seems a semantic difference at best. One also could argue that creating a library, which the school had no obligation to do in the first instance, enlarges expression and, therefore, decisions about what to shelve or not to shelve are not different than decisions about whether to fund.

While contrary points of view are available in the case law, for the most part these sources provide little in the way of satisfactory analysis.²⁸⁴ The most complete analysis suggesting some constitutional limitations on editorial discretion is found in the opinion of Circuit Judge Goldberg, dissenting in *Mississippi Gay Alliance v. Goudelock*.²⁸⁵ In that case, the Mississippi Gay Alliance submitted a paid advertisement to the student newspaper at Mississippi State University. The editor of the paper refused to publish the ad and the Gay Alliance sued. The United States Court of Appeals for the Fifth Circuit denied plaintiffs' claim relying on evidence that no university official had taken part in the decision not to publish the ad. The decision was made solely by the student editor of the paper in the proper exercise of his discretion, thus the Court found a lack of

284. Typical of the cases finding exercises of editorial discretion to be reviewable are *Radical Lawyers Caucus v. Pool*, 324 F. Supp. 268 (W.D. Tex. 1970), *Lee v. Board of Regents of State Colleges*, 306 F. Supp. 1097 (W.D. Wis. 1969), *aff'd*, 441 F.2d 1257 (7th Cir. 1971), and *Zucker v. Panitz*, 299 F. Supp. 102 (S.D.N.Y. 1969). In *Pool*, a political advertisement was found to be wrongfully excluded from a state funded bar journal despite a journal policy prohibiting the acceptance of political ads. See note 100 *supra*. The court in *Pool* applied a compelling state interest test in evaluating the justifications offered by the journal in support of its policy and found those justifications wanting. 324 F. Supp. at 270. The court rejected defendants' explanation that its policy was designed to protect the State Bar's public image for disinterestedness and integrity. *Id.* That rejection was based on the fact that speech that invites dispute is equally protected by the first amendment. The court did not even consider whether the need to exercise editorial discretion in any way tempered the application of this first amendment principle. The court also found that defendants could not rely on the argument that the State Bar desired to maintain a position of political neutrality in the face of the journal's practice of reprinting highly political editorials from various news sources. *Id.* In *Lee*, plaintiffs successfully challenged a university newspaper policy against accepting editorial advertisements. After finding the paper to be a public forum, the court based its decision that the ads could not be refused on the paper's acceptance of commercial and political ads. 304 F. Supp. at 1101. *Contra*, *Lehman v. City of Shaker Heights*, 418 U.S. 298 (1974). Additionally, the defendants failed to demonstrate that the printing of editorial ads would "materially and substantially interfere" with the operation of the university. *Id.* Finally, in *Zucker*, the issue of a publication's policy against the acceptance of political ads was again before a court. As in *Pool* and *Lee*, the court struck down the refusal to accept such ads. The facts in *Zucker*, however, did differ significantly from the situations in *Pool* and *Lee*. In *Zucker*, the student editor of a school paper wanted to publish an ad submitted by a student group opposing the Vietnam War. The school principal, however, refused to allow the ad to be printed. 209 F. Supp. at 103. The court found that the paper served as an important educational public forum for students in the school and that *Tinker* supported a right of access to the paper for the expression of student ideas. *Id.* at 104-05. Thus, in *Zucker*, no issue of the degree of editorial discretion that should be allowed the editors of a state-supported publication was raised. Unlike the events in *Pool* and *Lee*, in *Zucker* the paper's editor wanted to publish the ad and the refusal came at the hands of the school principal.

285. 536 F.2d 1073 (5th Cir. 1976), *cert. denied*, 430 U.S. 982 (1977).

state action.²⁸⁶ In the absence of state action, a necessary prerequisite to any claim of constitutional invasion, no review of the propriety of the editor's action was required.

In his dissenting opinion, Judge Goldberg first took issue with the majority's analysis of the state action question. After finding sufficient state involvement to justify a remand of the case to the district court,²⁸⁷ Judge Goldberg considered the delicate interplay between equal access principles and the right of the student editors to control the content of the newspaper they edit. Early on in his analysis, Judge Goldberg rejected both extremes of a feast or famine analysis. He refused to find either that a student newspaper is unhampered by constitutional constraints in its exercise of discretion or that student editors may never exclude material from the student paper for content-based reasons. In compromising on a happy medium between these two extremes, Judge Goldberg divided the campus newspaper into two parts: The "editorial product" of the newspaper and the paper's "unedited space." Student editors are permitted "unfettered discretion" over the "editorial product," which includes materials written by the student staff of the paper, guest columns, and letters to the editor.²⁸⁸ On the other hand, "unedited space," such as space available for "unedited advertisements or announcements from individuals outside the newspaper staff," must be made available on a content neutral basis.²⁸⁹ Despite the requirement of content neutral access to these spaces, Judge Goldberg recognized the need to allow some regulation of these parts of the student newspaper. For instance, he suggested that certain limits placed on the sources of the announcements might be permissible.²⁹⁰ This would include restricting access to members of the university community. Judge Goldberg also was aware of the problem of limitations on the space available in unedited portions of the paper.²⁹¹ Space limitations might cause the publication to restrict each announcement to a maximum number of words, require the payment of a reasonable fee for the placement of an announcement, or select from the submitted announcements at random until all the space allotted for this pur-

286. *Id.* at 1075. For additional comments on the state action question as it affects school newspapers, see Newell, *A Right of Access to Student Newspapers at Public Universities*, 4 J. COLL. & U.L. 209, 210-15 (1977); Note, *The State College Press and the Public Forum Doctrine*, 32 U. MIAMI L. REV. 227, 232-35 (1977).

287. 536 F.2d at 1085.

288. *Id.* at 1087.

289. *Id.*

290. *Id.* at 1088.

291. *Id.*

pose is filled. These solutions to the problem of limited space are approved because they are content neutral and not content selective.

The analysis suggested by Judge Goldberg appears to work well in the context of a school newspaper composed of both edited and unedited space. The nature of the forum involved makes feasible the exercise of Solomonic wisdom as a solution to the editorial discretion quandary. Not all forums, however, provide such convenient duality. Neither the municipal theater nor the school library seem easy targets for this half-and-half solution. Neither of these facilities has the equivalent of unedited space. If some access is to be made available on a content neutral basis it will have to be at the expense of editorial discretion in space akin to the edited portion of the newspaper.

A more broad based solution than is found in Judge Goldberg's opinion in *Mississippi Gay Alliance* is offered by Professor Karst.²⁹² Professor Karst proposes a standard of review that would tolerate government exercise of editorial discretion in the operation of a public forum only to the extent necessary to further a compelling government interest in maintaining the integrity of the forum.²⁹³

To see how this solution would work in actual operation, a good initial example is found in the campus newspaper. Like the division employed by Judge Goldberg, this standard sometimes will treat dissimilarly the different parts of the paper. With regard to the unedited space of the paper, no compelling need exists to exercise content control over such space. No essential characteristic of the newspaper will be threatened by requiring neutral distribution of such space. On the other hand, a different result is required when considering the treatment of articles written by members of the paper's staff. If student editors are not permitted to make judgments about the quality and content of these submissions, the essence of what a newspaper is all about would be sacrificed in the name of content neutrality. At this stage, as well, Professor Karst's compelling interest analysis

292. Karst, *supra* note 112.

293. *Id.* at 253-59. A similar approach is suggested by Professor Canby: The court must . . . determine whether the medium is one in which the state necessarily exercises an editorial function. . . . [N]othing in the nature of an auditorium or school plant requires the exercise of editorial judgment over the entire facility. . . . As long as alternative methods of expression are available, a right of access should be denied where the government enterprise cannot truly exist without the exercise of editorial discretion.

Canby, *The First Amendment and the State as Editor: Implications for Public Broadcasting*, 52 TEX. L. REV. 1123, 1133-34 (1974) (emphasis in the original) (footnote omitted). See also Comment, *supra* note 209, at 1451-60.

reaches an identical result to Judge Goldberg's "editorial product" theory. The two theories, however, diverge with respect to guest columns and letters to the editor. While Judge Goldberg treated these paper parts as marginal examples of editorial product, Professor Karst's compelling interest analysis standard dictates no clear-cut result in all cases based solely on the label attached to the section of the paper to which access is sought:

Can any constitutional doctrine be devised to permit the editor to exercise the discretion that is necessary to the operation of a "real" newspaper and at the same time prevent the exclusion of views from a government newspaper merely because the editor does not share those views? One solution might be found in a constitutional principle that tolerated editorial discretion so long as it were lodged in someone who could be counted on to use professional (rather than personal) standards in exercising it. In a given case, where it could be shown that an editor had abused this discretion by excluding opposing views . . . a court should feel no hesitation in intervening to guarantee access to the opponents, in the name of the first amendment's equality principle. But the refusal of the school newspaper editor to print a cartoon because of its bad taste . . . or to print an article that is badly written . . . should not raise a first amendment problem. That these two areas blur together at their edges should not disqualify a court from deciding where a particular editorial action falls.²⁹⁴

While Professor Karst concedes that courts may have to struggle with cases on the borderline of compelling, he also is correct in assuming that this failing should not serve as a deterrent to the use of his standard, as it is a failing held in common by all evaluative formulas employed in constitutional analysis.

The next step in testing the durability of the Karst formulation of course will be to apply it to the school library book removal process. In deciding when the government's interest in removal is compelling, it will be necessary to determine what varieties of removal are essential to the task of proper library management. It should be pointed out initially that making this determination is complicated by the human dimensions of the average book removal case. Ordinarily, those initially promoting removal of a book are not members of the professional staff of the library. The impetus for removal likely will come from a parent or an individual member of the school board.²⁹⁵ While an administrative review process usually will come

294. Karst, *supra* note 112, at 257-59 (footnotes omitted).

295. *E.g.*, *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d

into play before such a request results in the removal of a book,²⁹⁶ this process may be influenced by the political heat generated by a vocal group of parents. Therefore, the cooler heads of library personnel may be overruled on the issue of the book's suitability.²⁹⁷

This private intervention in the professional operation of the school library adds an interesting complication to any effort to apply a compelling government interest analysis to the book removal process. Professor Karst lists as one of his reasons for allowing some degree of content control to government officials the idea that professional judgment ought to be given some weight.²⁹⁸ If editorial discretion is to be vested only with professionals, this creates somewhat of a conundrum in the typical library book removal case. In truth, the book removal decision usually will be the product of collective deliberations by both professionals and nonprofessionals. While the instigation for the investigation of a book will be from a concerned parent, professionals at least will have been called in to participate in the final decisionmaking process.²⁹⁹ Whether this should influence a court in its resolution of a book removal case is open to debate. In part, the answer will be a function of whether the concern is more

404, 409 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 385 (1981) (removal directed by members of the (Board of Education); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1271 (D.N.H. 1979) (removal proposed by a member of the Board of Education); *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 705 (D. Mass. 1978) (removal instigated by a parent).

296. *E.g.*, *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 617-18 (D. Vt. 1979), *aff'd*, 638 F.2d 438 (2d Cir. 1980). Book removal

procedures provide that a parent or local citizen objecting to a book in the library may initiate a review of the work by completing a form entitled "Citizen's Request for Professional Reconsideration of a Work," and submitting it to the High School Principal. The Principal must provide copies of the request to the librarian and Superintendent of Schools and must inform the Board of the request. The librarian must then review the request and submit a written report of "action taken" to the Board. Finally, the procedures provide that "unresolved issues shall be settled by a majority vote of the Board or its designees."

Id. (citations omitted).

297. *E.g.*, *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 708 (D. Mass. 1978) (school librarian's opinion that the poem "was not obscene" and "that both students and faculty should have access to it" was rejected by School Committee and librarian was threatened with loss of her job for decision to initially place poem on the library shelves).

298. Karst, *supra* note 112, at 257.

299. *E.g.*, *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1271 (D.N.H. 1978) (complaints about library books were handled by "the appointment of an Instructional Materials Reconsideration Committee composed of professional library-media personnel, the principal or his representative, the appropriate assistant superintendent, the person or persons involved in the original selection of the material, and the person or persons using the materials in the individual school.").

with process or result. If this effort is solely to decide if a particular decision is justified, one ought to examine the proffered justification for removal to see if it satisfies constitutional standards. If the concern is with process, this flaw ought perhaps to be dealt with separately, and not intermixed with an appraisal of the importance of the justification offered for the removal.³⁰⁰

Despite this added difficulty in the analysis, there still is no reason to assume that the Karst standard will not prove workable in the context of the book removal cases. To test this assumption, it will be necessary to consider several different fact patterns. Suppose, for example, a book is removed because its contents are determined to be obsolete—a science textbook now out of date because of more recent scientific advances—it is essential to the running of the library that the librarian have the ability to make such decisions. Although a judgment is being made about the contents of the book in question, it is a judgment a court would not want to second-guess. Even if some degree of parental involvement in raising the question of obsolescence came to light, it is hard to see why this would make any difference in the outcome of the case.

As a second example, suppose a book were removed from the library because the school disagreed with the position it took on a controversial issue. Nothing necessary to the maintenance of a top-flight library requires allowing such a decision to stand unchecked.³⁰¹ Once a decision is made to include a book on a

300. See note 268 *supra*.

301. Some evidence of this is found in the "Guidelines For Selecting Instructional Materials" adopted by the Nashua Board of Education:

It was required by the guidelines that the materials be consistent with the general educational goals of the school district, meet high standards of quality in factual content and presentation, be appropriate for the subject area and for the age, maturation, ability level, and social development of the students, have aesthetic, literary, or social value, be designed to help the students gain an awareness and understanding of the contributions made by both sexes, and by religious, ethnic and cultural groups to American heritage; *and that a selection of materials on controversial issues be directed toward maintaining a balanced collection representing various views.*

Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269, 1271 (D.N.H. 1979) (emphasis added).

Further support for this position is contained in the Library Bill of Rights adopted by the American Library Association Council:

The American Library Association affirms that all libraries are forums for information and ideas, and that the following basic policies should guide their services:

1. Books and other library resources should be provided for the interest, information, and enlightenment of all people of the community the library serves.

particular topic in the library, expulsion solely because of disagreement with the point of view taken by the author should be viewed as an unjustified instance of content discrimination. This would be true no matter what the identity of the participants in the removal process.

Finally, suppose a book was removed from the library because the language used by the author was considered offensive or because the book included nonobscene, yet sexually explicit scenes; what then? This last example is by far the hardest. In part, a solution to it depends on one's definition of the essential function of the school library. If a school library is viewed as a limitless marketplace of ideas, no editorial discretion needs to exist based on dislike for the language or themes chosen by an author.³⁰² We are dealing here with a particular species of library, however, a school library. The question to be posed is whether there is something essential in the operation of a school library that requires allowing the school to attempt to foster certain ideas of morality by restricting its book collection. This question has been given varying answers by the courts deciding book removal cases.³⁰³ There also are constitutional con-

Materials should not be excluded because of the origin, background, or views of those contributing to their creation.

2. Libraries should provide materials and information presenting all points of view on current and historical issues. Materials should not be proscribed or removed because of partisan or doctrinal disapproval.

3. Libraries should challenge censorship in the fulfillment of their responsibility to provide information and enlightenment.

4. Libraries should cooperate with all persons and groups concerned with resisting abridgment of free expression and free access to ideas.

5. A person's right to use a library should not be denied or abridged because of origin, age, background, or views.

6. Libraries which make exhibit spaces and meeting rooms available to the public they serve should make such facilities available on an equitable basis, regardless of the beliefs or affiliations of individuals or groups requesting their use.

AMERICAN LIBRARY ASSOC. COUNCIL, *LIBRARY BILL OF RIGHTS* (1980); *reprinted in* 2 *CURRENTS* 3, at 10 (1980).

302. An exclusion based on objection to the language or themes chosen by the author should not be confused with exclusion because a book is badly written or constructed. While an exclusion based on the literary quality of a book is content-based, it should be categorized with exclusions based on obsolescence. One of the characteristics of a school library is that it serves as a repository for high quality writings. Therefore, to maintain this aspect of the library collection, it is essential that removals based on judgments about literary merit be permitted.

303. *Compare* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978) ("The prospect of successive school committees 'sanitizing' the school library of views divergent from their own is alarming. . . .") with *Zykan v. Warsaw Community School Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980) ("[T]he importance of

siderations associated with the question.³⁰⁴

One bright note is that this judgment is not further complicated by whether the removal was effected by parents, librarians, or the school board. If one were to accept the idea that the school may properly transmit community values to its students, there is no need to draw a line between professional judgments about morality and parental opinions on this same issue. Since the professionals only serve as surrogates for members of the community, it hardly should invalidate the decisions reached when the community expresses itself directly. On the other hand, if one were to deny the validity of the school as moral censor, moral justifications would not be compelling reasons for book removals, whether those removals were caused by parents or professionals. Because these questions are very much judgment calls, no final answers will be attempted here. Whichever way one chooses to define the contours of the role of the school library, once supplied with a definition a result can be reached easily in cases of removals for offensive language or sexual explicitness.

Despite some "blurring at the edges," Professor Karst's analysis provides a very workable standard of review for the typical book removal case. What is especially interesting about how this standard operates in practice is that it comes very close to what is done by courts following the judicial review model in the book removal cases. These courts have seen the need not to treat all content-based removals identically. The cases uniformly recognize the inappropriateness of removals based on the political content of a book.³⁰⁵ They reach divergent results, however, when books are removed because they contain foul language or explicit sexual descriptions, and their disagreement stems from a differing view of the goals of public education.³⁰⁶

If the cases have an obvious flaw, it is the way in which they

secondary schools in the development of intellectual faculties is only one part of a broad formative role encompassing the encouragement and nurturing of those fundamental social, political, and moral values that will permit a student to take his place in the community.").

304. See earlier discussion of whether the first amendment permits the government to disseminate a favored ideology in the schools in text accompanying notes 115-59 *supra*.

305. *E.g.*, *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979).

306. *Compare* *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978) *with* *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 436-37 (2d Cir. 1980) (Newman, J., concurring), *cert. granted*, 102 S. Ct. 385 (1981).

distinguish between content-based and content neutral removals.³⁰⁷ One example given in the case law of content neutral removal is a removal based on a lack of shelf space.³⁰⁸ If the library shelves were to overflow, removing the excess books by a random drawing of titles from the card catalogue would be content neutral. Removal based on a review of the collection to decide which books are least necessary to the overall balance of the collection, however, is not content neutral. While such a removal need not be viewed as an improper exercise of content discrimination, it is not neutral. For a second example, turn to the example of the outdated science book used earlier in discussing the Karst formulation. The book removal cases define removals resulting from the obsolescence of a book as content neutral.³⁰⁹ Because the process of deciding if something is obsolete requires an evaluation of its contents, such a removal cannot accurately be described as content neutral. While the removal of an obsolete book should not be found invalid, its proper classification is with other cases of justifiable content-based selection. This flaw aside, the cases do come to grips with the need to distinguish between valid and invalid content-based decisions. While the analysis relied on may overlook the controversial history of content control in first amendment analysis, the judgments reached, while in some cases debatable, are all eminently justifiable.

Thus, in attempting to summarize the results of this in-depth view of the book removal cases, there is both good news and bad news. The good news is that when dealing with the actual review of such decisions on the merits, the courts that reach the merits have applied standards and achieved results with which it is easy to feel comfortable. While these courts have not articulated the nature of the task required of them in as accurate a fashion as one might hope for, their ability to apply standards developed outside the book removal cases to this new context rates generally high marks. As for the bad news, it is found in the inability of both interventionist and noninterventionist courts to satisfactorily analyze those matters leading up to a decision whether to review on the merits. In this sphere,

307. This comment is not meant to suggest that the distinction between content-based and content neutral removals is not a legitimate one. The legitimacy of this distinction seems well established. *See* note 272 *supra*. The point made here is only that the line drawn by the interventionist courts between content-based and content neutral justifications is not an accurate dividing line.

308. *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978).

309. *Id.*

the major question to be asked is whether the plaintiff has suffered the invasion of a constitutionally protected interest. If no such invasion has occurred, no further review of government action is justified. The efforts to find such an invasion have involved two central first amendment doctrines. In dealing with the possibility that the school library is a public forum, the courts seemingly lack awareness of the complexities raised by this inquiry. Similarly, in deciding whether students have a constitutionally protected right to know, the courts' resolution of this issue fails to take into account many of the difficult aspects of applying right to know principles in the library book removal context. With respect to both of these doctrines, the courts' analysis leaves something to be desired.

III. SUITS TO FORCE REMOVAL OF A BOOK FROM THE SCHOOL LIBRARY

Having explored the ins and outs of the first of the situations in which school library book censorship occurs, the removal of a shelved book, it is now time to turn to the other two library censorship fact patterns for a brief comparison of the problems raised. The first of these alternative factual settings arises when a lawsuit is brought to force the removal of a book from the school library.

In such a setting, it is easy to imagine the chain of events leading the complainant to seek judicial intervention beginning with a parent being informed that the school library has a copy of a certain book. The parent then would initiate a complaint through whatever administrative channel is provided for such purposes to object to the book being available to students.³¹⁰ Dissatisfied by the school's decision to allow the book to remain in the library collection, the parent would petition for judicial review of the school's decision.

The case law involving this fact pattern is sparse.³¹¹ No case

310. An example of such an administrative review procedure is found in *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1274 (D.N.H. 1979). In that case, the Nashua Board of Education had adopted guidelines to be followed when a member of the public raised a complaint about a library book or other instructional material. After the filing of a complaint, an Instructional Materials Reconsideration Committee would be appointed. *See* note 299 *supra*. The committee was given the task of reexamining the material and issuing a report which would be given to the School Superintendent and then forwarded to the complainant. If the complainant was dissatisfied with the results of the reexamination, an appeal could be taken to the School Superintendent. If the complainant still was not satisfied, there was provision for a further appeal to the Board of Education.

311. The only cases that can be found involving this fact pattern are *Evans v.*

directly discusses the free speech aspect of such a lawsuit.³¹² This paucity of case law might be viewed as a reason for paying little attention to this category of censorship dispute but for one factual reality. In truth, there is no bright line separating cases in which the school's removal of a book is challenged and cases in which suit is brought to force removal. In many cases, as was pointed out previously,³¹³ a book is removed because of prompting by concerned parents. Some of these parental efforts meet with success in their initial encounter with the school administration. When this occurs, one potential result is that another group of parents and students with opposing views on whether the book should be left in the library will seek legal recourse to bring about the return of the book to the library shelf. In other cases, the early efforts of parents seeking removal will meet with failure. Thereafter, these parents may decide to take their fight to the courts. Viewed in this light, the two kinds of lawsuits begin to look more of a piece and simply reflect two sides of the same coin. Whether the judicial response to these two varieties of censorship dispute ought to be similar, of course, is not clear just from the disclosure that all that separates the cases is which group of

Selma Union High School Dist., 193 Cal. 54, 222 P. 801 (1924), and *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1944).

312. In *Evans v. Selma Union High School Dist.*, 193 Cal. 54, 222 P. 801 (1924), plaintiff sought to enjoin the purchase of 12 copies of the King James version of the Bible for the high school library. Plaintiff's claim was that the purchase of the Bible violated several provisions of the California Constitution and a number of state statutes that forbade the use of sectarian or denominational books in public schools and school libraries. The court denied plaintiff's request for relief on the ground that "[t]he mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself except as a work of literature fit to be included in a reference library." *Id.* at 60, 222 P. at 803. Since the lawsuit involved a religious book, the case raised a claim in the nature of an establishment clause violation and did not involve any free speech issue.

In *Rosenberg v. Board of Educ.*, 196 Misc. 542, 92 N.Y.S.2d 344 (Sup. Ct. 1949), petitioners challenged the shelving of *Oliver Twist* by Charles Dickens and *The Merchant of Venice* by William Shakespeare in the school library. Petitioners argued that the Board of Education of the City of New York had abused its discretion, under the New York Education Law, to select appropriate books for placement in the school library and for use as instructional material. They based this claim on the fact "that the two books are objectionable because they tend to engender hatred of the Jew as a person and as a race." *Id.* at 543, 92 N.Y.S.2d at 345. The court rejected petitioners' claim because it found the Board's action consistent with the educational objective of developing inquiring minds. In the absence of proof the Board had selected the books in order to encourage anti-religious feelings, the court upheld the Board's actions. While petitioners in *Rosenberg* could have argued their case based on first amendment principles, they did not do so. Instead, the case was argued and decided solely on the basis of the New York Education Law.

313. See note 295 *supra* and accompanying text.

parents the school sides with in the first round of the censorship contest. Still, this aspect of the situation justifies a more than cursory examination of suits that seek the removal of a book from the school library.

As a starting point in that examination, it will be useful to consider what this change in the fact pattern augurs in terms of the two judicial attitudes reflected in the book removal cases. From the perspective of a noninterventionist court there is no greater justification for intervention in a challenge to nonremoval than in the removal situation. The decisions of school administrators are no less trustworthy when they decide to turn back parental efforts to remove books than when they accede to such demands. Thus, courts wishing to defer to the greater expertise of the school board in such matters will feel comfortable with their noninterventionist stance in both kinds of cases.

As for interventionist courts willing to act where necessary in book removal cases, for several reasons they will not feel equally at ease second-guessing school authorities where the book has been kept on the library shelf. In the first place, as these courts view the library as a public forum, the issue arises whether there is a first amendment right to keep certain ideas out of a forum in addition to the acknowledged right to include ideas in a forum. Similarly, with the right to know, a version of this doctrine that would recognize a right not to know and to keep others from knowing would have to be adopted. Because in many ways both of these ideas are antithetical to the basic values furthered by the first amendment, they seem unlikely judgments to be made by interventionist courts. This is especially true in light of the fact that much of the philosophy behind the activist position is premised on the need to ferret out acts of censorship, even those committed by school authorities. To have these same courts turn around and force the school to censor its book collection seems an unlikely result. Thus, when dealing with suits to force the removal of a book, it appears that noninterventionist courts and interventionist courts will reach the same conclusion, though for very different reasons, and will refuse to remove a shelved book.

The only remaining question is whether this result is justified by analytic differences between the two kinds of censorship cases. To make this judgment will require a brief rethinking of some of the issues addressed in the analysis of cases challenging the removal of a book. Whether public forum and right to know principles demand a similar treatment of cases challenging book removals and cases seeking such removals or whether proper analysis requires dissimilar re-

sults in these two categories of censorship dispute needs to be determined.

In the cases challenging the removal of books, two public forum arguments were identified as being the most suited to characterizing the library collection as a public forum. Both of these arguments required reliance on the concept of an involuntary forum. Under the first of these arguments, the government's attempt to create a forum for a certain kind of expression and to reserve that forum exclusively for its own use will fail. Having opened a forum for government expression, the first amendment imposes an obligation on the government to make that forum available to nongovernment participants as well. Under this theory, if the school library is to be considered a public forum for purposes of challenges to book removals, that characterization will apply whether the plaintiffs seek to restore a book or remove one. Despite its continuing identity as a public forum, however, the critical question revolves around the nature of the rights granted to participants in the forum. The basic right involved in most public forum cases is the right to have one's voice heard in the forum along with the voices of others who seek to exercise their forum rights. In the book removal context, students seek to "speak" in the forum by having a book retained in the collection because it represents an idea they want included in the forum. Nothing about public forum principles suggests a parallel forum right to silence disfavored ideas. A speaker may not be forced to speak;³¹⁴ nor does a speaker have a right to silence others. Because the theory upon which the forum comes into being is premised on the idea that the government may not create a forum exclusively for the exposition of its own ideas, it would be ironic if that same censoring of ideas could be accomplished by a nongovernment participant in the forum. The idea behind this forum theory rebels at such a notion. Its thought is to open up forum use to a wider circle of ideas, not to constrict its use even further. Therefore, it is clear that under a theory that precludes the government from maintaining the school library exclusively for its own use, that same theory would not protect the right of someone to successfully request the removal of a library book.

A more interesting analysis results by looking at the involuntary forum theory that is rooted in limitations on the right of government advocacy. If it is determined that some constitutional limitations exist on the right of the government to advocate a preferred ideology,

314. *Wooley v. Maynard*, 430 U.S. 705, 714 (1977).

query what mechanism would exist to correct instances where the government oversteps the bounds of its discretion in this area. One obvious mechanism is that an affected parent or student, harmed by being the victim of this one-sided message, would be able to sue to correct the situation. The most likely form of relief to be sought in this event would be one that requires the government to deemphasize its favored ideology or to broaden the spectrum of messages being delivered by including other views in the delivery system as well. One alternative to this remedy, however, may exist. That alternative remedy would seek to silence the government's one-sided message by eliminating government speech in an area altogether. For instance, in *Anderson v. City of Boston*,³¹⁵ *Citizens to Protect Public Funds v. Board of Education of Parsippany-Troy Hills*,³¹⁶ and *Stern v. Kramarsky*,³¹⁷ plaintiffs prevented the government from using public funds for the endorsement of political issues.³¹⁸ The remedy in these cases involved silencing the government's voice in certain areas. While the government was permitted to relate neutral information revealing the pros and cons of particular issues, it could not speak as an advocate for a position. The choices available were to say nothing at all on a particular issue or to reform its speech so as to make it neutral. These two alternatives would seem to exist in the book censorship cases as well. One of those options would result in the removal of certain books from the library. For instance, suppose the school included books on the subject of capital punishment in its library, but all of the included books argued in favor of the death penalty. If a suit were brought to protest this practice, two remedies would be available. One would entail the school removing all the books it had on the subject of capital punishment, thus amounting to a judicially supervised example of book removal. Alternatively, the school could add books taking a position opposed to the death penalty. This remedy would render an equally satisfactory result in such a case.³¹⁹ Ultimately, the choice of remedies would be the li-

315. 1978 Mass. Adv. Sh. 2297, 80 N.E.2d 628, *appeal dismissed*, 439 U.S. 1060 (1979).

316. 13 N.J. 172, 98 A.2d 673 (1953).

317. 84 Misc. 2d 447, 375 N.Y.S.2d 235 (Sup. Ct. 1975).

318. For a discussion of these three cases, see text accompanying notes 142-50 *supra*.

319. Indeed, it might be more accurate to describe this second remedy, the addition of books, as more satisfactory. From an educational point of view, the library should choose to enhance its book collection rather than to restrict it still further and to screen out valuable subject areas. Despite the superiority of a decision to add books, from the perspective of improving the library as a tool for learning, it is difficult to find any consti-

brary's own to make. Because either option would cure the unconstitutional aspects of the school's behavior, and the removal option itself is not supported by any constitutionally based right to silence speech on controversial issues, the choice is the school's to make.

While the above situation sets out a scenario in which a suit to remove a book or books from the school library would be successful, this theory will be of limited utility in a practical setting. Realistically, most parental complaints about books in the library do not stem from a desire to expand the universe of ideas found in the library collection, but instead seek to contract that universe. Most suits will be intended to produce a library that fosters the complainant's one-sided view and not to allow the library to display alternative perspectives on its bookshelves. For instance, a suit might be brought because a parent objected to the collection including a book advocating premarital sex. The parent would wish to have this book removed from the library; a solution that involved the addition of a book taking the opposite outlook would not be an equally satisfactory result from the parent's point of view. Additionally, if the library collection already included books discouraging teenagers from engaging in sexual relations, no parental complaint could be raised to the presence of the offensive book. In such a case the school would not be guilty of having a book collection that preached too narrow a message, and therefore a book removal suit would have no legal basis.

Turning to the right to know issue, there is even less likelihood that this doctrine would support a lawsuit to remove a book from the school library. The idea behind a suit to remove a book is that there is a constitutionally guaranteed right not to know and to keep others from knowing. This notion is the antithesis of the right to know doctrine, thus it is difficult to imagine any twist of perspective that could

tutional basis for forcing this choice upon the library. Decisions about what subject areas to include in the library collection are among those compelling content-based decisions the school should be entitled to make. *See* earlier discussion of this suggested standard of review in text accompanying notes 292-304 *supra*. Of course, one might argue that once the government has established a forum that includes books on a certain topic, it is not free to disestablish that forum or any part thereof for an improper reason. Since the reason for now excluding books on a controversial topic is that otherwise the government would be forced to include books advocating a disfavored point of view, this reason arguably is constitutionally impermissible. *Cf.* *Mt. Healthy City School Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977) (School Board's failure to rehire untenured teacher is unconstitutional if the teacher's engaging in conduct protected by the first amendment was a motivating factor in the Board's decision, and the Board fails to show by a preponderance of the evidence that it would have made the same decision even in the absence of the exercise of first amendment rights).

result in restructuring the theory so as to make it exploitable by a person seeking to achieve the removal of a shelved library book. To be more specific, under one³²⁰ view of the right to know, the listener is the student and the speaker is the publisher or author. Here, instead of seeking to enforce a right to hear what the speaker has to say, the student (or the student's parent) would seek to stop the speaker from speaking. Similarly, if the speaker is the government and the listener is the student, the effort would be to stop the government as speaker from conveying its message. No right to know principles would support either of these positions.

In looking to other first amendment theories that involve silencing speech, there is little in the first amendment galaxy that could be called upon as an aid in this enterprise. One theory of forced silence is rooted in notions of privacy where the rights of others must be balanced against the plaintiff's right to privacy.³²⁰ Because the information being revealed by the presence of a book on the library shelf does not involve anything private to the plaintiff, this theory is of no assistance.

Another privacy related concept is that of the need to protect a captive audience that may deserve some protection from unwanted ideas.³²¹ It can be argued that the captive audience rationale is still more persuasive when the captives are juveniles.³²² While the school library patrons are juveniles, they do not qualify as captives. A student is free to ignore an offensive book in the library where there is no requirement that certain books be read, therefore no captive audience claim can be raised.

One additional theory of forced silence finds its origins in the

320. See, e.g., *Commonwealth v. Wiseman*, 356 Mass. 251, 249 N.E.2d 610 (1969) (injunction granted to prevent the showing of a film, "Titicut Follies," to anyone other than professionals with a special interest in the subject matter of the film because the film's portrayal of conditions at state correctional institution for the criminally insane, including numerous episodes of naked inmates exhibiting obvious signs of mental illness, violated the privacy rights of the inmates); *Doe v. Roe*, 93 Misc. 2d 201, 400 N.Y.S.2d 668 (Sup. Ct. 1977) (permanent injunction granted to prevent further circulation of a book by a psychiatrist containing verbatim transcripts of sessions between psychiatrist and patient which detailed intimate facts of patient's life).

321. See *FCC v. Pacifica Foundation*, 438 U.S. 726, 759 (1978) (Powell, J., concurring); *Rowan v. Post Office Dept.*, 397 U.S. 728, 738 (1970); Black, *He Cannot Choose But Hear: The Plight of the Captive Auditor*, 53 COLUM. L. REV. 960 (1953); Haiman, *Speech v. Privacy: Is There a Right Not to be Spoken To?*, 67 NW. U.L. REV. 153 (1972).

322. Cf. *Ginsberg v. New York*, 390 U.S. 629, 649-50 (1968) (Stewart, J., concurring) ("I think a State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees.") (footnote omitted).

parent/child relationship. The argument here would be that the primary responsibility for instilling values in a child is with the child's parents and that this parental role is entitled to constitutional protection as part of the concept of liberty within the due process clause.³²³ Therefore, the school would not be free to interfere with the constitutionally protected parent/child relationship by making available to children ideas that differ from the ideas of their parents. While this notion may have some credibility in the situation where the child is the captive of certain ideas in the classroom setting,³²⁴ whatever the scope of parental rights, those rights do not extend to the point of permitting a parent to "cleanse" the library shelves by removing all offensive books. One solution occasionally relied on by school boards in dealing with controversial books is an offshoot of this parental control model. In some cases, instead of being removed entirely, books are placed on a limited access shelf.³²⁵ In order to check a book on this shelf out of the library, the student must have a parent's approval for the loan of the book. Some schools claim this is a fair accommodation of the rights of the parties. Whether it is must be determined by delineating the extent to which minors have first amendment rights independent of the rights of their parents.³²⁶ This was not an issue in *Tinker* because the *Tinker* parents shared the same point of view as their children and actively encouraged their children to participate in protests against the Vietnam War. No clear answer to this difficult constitutional question has ever been provided. The answer may in part turn on the age of the students involved.³²⁷ The "mature minor" may have more constitutionally protected rights than the "immature minor."³²⁸ Whatever the answer to this problem, it is difficult to see that it makes a difference in

323. See, e.g., *FCC v. Pacifica Foundation*, 438 U.S. 726, 758 (1978) (Powell, J., concurring); *Wisconsin v. Yoder*, 406 U.S. 205, 232-34 (1972); *Ginsberg v. New York*, 390 U.S. 629, 639 (1968); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925); *Meyer v. Nebraska*, 262 U.S. 390, 399-400 (1923).

324. See Comment, *supra* note 11, at 492-503.

325. E.g., *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 423 (2d Cir. 1980), *cert. granted*, 102 S. Ct. 385 (1981) (while nine books were entirely removed from school libraries, one book, *Black Boy* by Richard Wright, was returned to the libraries with student access conditioned on parental approval); *Presidents Council Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289, 290 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972) (*Down These Mean Streets*, while removed from school libraries, was made available on a direct loan basis to the parents of children attending district schools).

326. See Garvey, *supra* note 12, at 328-37.

327. See Tushnet, *Free Expression and the Young Adult: A Constitutional Framework*, 1976 U. ILL. L.F. 746, 749-52.

328. *Bellotti v. Baird*, 443 U.S. 622 (1979).

the context of a suit to remove a book from the school library. In such a case, students are not being forced to read any particular book and it is hard to imagine that one parent would be granted rights that could be used to preclude other parents and their children from having access to books that they consider educationally beneficial. Giving one parent monopolistic control over the content of the school library and what it may not contain is no more satisfactory than giving the school itself this exclusive right.

The fourth possibility for a right of enforced silence stems from the idea that some speech is socially harmful. Arguments occasionally have been advanced that speech tending to promote socially harmful ideas is not protected speech and ought to be silenced.³²⁹ In the main, these arguments have been unsuccessful because one of the central purposes of the first amendment is to protect the expression of unpopular views.³³⁰ If the first amendment only protected views acceptable to a majority of the population, it would have little point since such views are in small danger of being suppressed. It is a cornerstone of first amendment theory that all ideas, good and bad, should have a chance to compete in the marketplace of ideas and that only the best ideas will emerge victorious as a result of this contest.³³¹ This notion runs counter to the idea of forced censorship. Moreover, even if in some cases the government may be able to determine that it needs to silence certain speech for the protection of the public interest, this is still a far cry from one individual being able to force the government to suppress speech against the government's better judgment.³³² Therefore, even this potential idea for

329. See, e.g., Note, *Group Vilification Reconsidered*, 89 YALE L.J. 308 (1979).

330. E.g., *Collin v. Smith*, 447 F. Supp. 676 (N.D. Ill.), *aff'd*, 578 F.2d 1197 (7th Cir.), *cert. denied*, 439 U.S. 916 (1978); *Village of Skokie v. National Socialist Party of America*, 51 Ill. App. 3d 279, 366 N.E.2d 347 (1977), *aff'd in part and rev'd in part*, 69 Ill. 2d 605, 373 N.E.2d 21 (1978).

331. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas,—that the best test of truth is the power of the thought to get itself accepted in the competition of the market; and that truth is the only ground upon which their wishes safely can be carried out.

Id.

332. If speech is shown to be unprotected, e.g., *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), or if the government has a sufficiently compelling justification for the suppression of speech, e.g., *United States v. O'Brien*, 391 U.S. 367 (1968), government restraints on speech are constitutionally permissible. That the government may be entitled to silence speech, however, does not mean that an individual would be able to force the silencing of speech the government chooses to leave alone. See Organization for a

imposed silence has no real application to cases attempting to force the school to remove books from its library.

It seems fairly clear that there is little support in first amendment theory for an argument that would result in a court ordering the removal of a book from the library shelves. With the limited exception that restraints on the right of government advocacy could produce such a result in the form of a remedy for the government overstepping the constitutionally prescribed bounds of its right to speak, no real claim can be grounded in any doctrine consistent with first amendment theory. Thus, the position that such suits are doomed to failure, shared by interventionist and noninterventionist courts alike, seems easily supported by first amendment principles. While intervention may be justified under several different theories in cases in which a school board's decision to remove a book is being challenged, this is not the case wherein a plaintiff is seeking to force the removal of a book.

IV. SUITS TO REQUIRE THE PURCHASE OF A BOOK FOR THE SCHOOL LIBRARY

The third and final censorship scenario arises in a situation wherein a parent or a student sues to force a school to purchase certain books for the school library. As a last point of examination into the school library censorship arena, this situation will be compared to its other two censorship counterparts: suits to challenge removal and suits to bring about removal.

The genesis of a suit to require the purchase of certain books for the school library will be rooted in parental or student dissatisfaction with the quality of the school library collection. After meeting with no success in efforts to suggest additional titles for the collection, a lawsuit will be commenced to force the school to correct deficiencies in its library collection.

While this situation is almost nonexistent among reported cases,³³³ it has not escaped the attention of courts handling book re-

Better Austin v. Keefe, 402 U.S. 415 (1971); cf. Chrysler Corp. v. Brown, 441 U.S. 281, 292-94 (1979) (while Freedom of Information Act permits federal agencies to withhold information under certain circumstances, nondisclosure cannot be forced upon agency by submitter of information who wishes to keep that information confidential).

333. *In re Appeal of Daniel Kornblum*, 70 N.Y.S. Educ. Dep't Rep. 19 (1949) is the only decision this author has been able to identify that came close to the situation of a suit seeking to require the purchase of a book. In that case, *The Nation* was removed from the list of periodicals approved for purchase by high school libraries in the City of New York. While previously on the approved list, the New York City Board of Educa-

moval controversies. All of the courts deciding cases raising a challenge to a book removal have parenthetically remarked on the likely fate of attempts to challenge a school library decision not to select a particular book for the school library as contrasted with a decision to remove an already shelved book.³³⁴ In most of the cases, the court, whether interventionist or noninterventionist, has concluded that judicial intervention rarely is merited in the initial book selection process.³³⁵ This result is easily reached and explained in the case of noninterventionist courts. Such a result is in keeping with their general philosophy of school autonomy in such matters. As for interventionist courts, while most such courts take time in their opinions to state that no intervention would be justified in the book selection process,³³⁶ none of the courts expressing such an attitude bother to supply an explanation for the distinction it draws. This willingness to leave selection decisions in the hands of the school board is pounced upon by noninterventionist courts as a basis for criticizing the judicial review approach. The noninterventionist

tion removed *The Nation* for the 1948-49 school year because of several anti-Catholic articles that had appeared in the magazine during 1948. Suit was brought by Daniel Kornblum, a taxpayer, and The Nation Associates, Inc., *The Nation's* publisher, challenging the Board of Education's action on a variety of statutory and constitutional grounds. The Commissioner of Education, in ruling on appellants' claim of a violation of the freedom of the press, held that free press principles did not require the Board to purchase any particular publications. After rejecting the remainder of appellants' arguments, the Commissioner ruled in favor of the Board of Education. *The Nation* was not returned to the approved list until 1963. Since that time, the Board of Education has changed its practices and the Magazine List is now merely a suggested list, no longer restricting what magazines schools may purchase. Letter from Helen Scattley, Director of the New York City School Library Service to David Berninghausen (Apr. 6, 1972), reprinted in D. BERNINGHAUSEN, *THE FLIGHT FROM REASON* 55 (1975).

The only other case seemingly involving such a fact pattern is *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577 (6th Cir. 1976). In *Minarcini*, the court initially described the case as raising issues of what books should be chosen as textbooks, purchased for the library, and removed from the library. *Id.* at 578. Moreover, the facts, as recounted by the court, indicated that one book at issue in the case, *God Bless You, Mr. Rosewater* by Kurt Vonnegut, Jr., had not yet been purchased by the library. Despite these facts, this aspect of the case was ignored throughout the decision. While the court stated that the school has no obligation to purchase any particular books for the school library, this remark appears to be dictum and was not made in relation to any facts in the record. *Id.* at 582.

334. See, e.g., *Pico v. Board of Educ., Island Trees Union Free School Dist.*, 638 F.2d 404, 435-36 (2d Cir. 1980) (Newman, J., concurring), cert. granted, 102 S. Ct. 385 (1981); *Minarcini v. Strongsville City School Dist.*, 541 F.2d 577, 582 (6th Cir. 1976).

335. See, e.g., *Bicknell v. Vergennes Union High School Bd. of Dirs.*, 475 F. Supp. 615, 620 n.3 (D. Vt. 1979), aff'd, 638 F.2d 438 (2d Cir. 1980); *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1272 (D.N.H. 1979).

336. See, e.g., *Right to Read Defense Comm. v. School Comm.*, 454 F. Supp. 703, 711 (D. Mass. 1978).

courts claim that this distinction is justified only by the theory that a book acquires tenure by being shelved in the library,³³⁷ a theory these courts find indefensible.

While there is agreement by almost all of the courts concerned that attempts to gain access to the book selection process should be rebuked, the question arises whether this easy dismissal is justified by the legal principles involved. Because no explanation is offered in defense of this distinction, an attempt will be made here to determine if a challenger seeking to force the purchase of a book ought to be perceived as in a different legal posture than one seeking to challenge the removal of a book.

The place to initiate a search for legally justifiable distinctions, as in the case of suits to restore removed books, is with public forum principles. The question to be asked is whether a finding that the school library is a public forum for purposes of the book removal situation requires this same characterization to be carried over to the book selection context as well. To resolve this inquiry it will be necessary to reexamine the several public forum theories that proved most workable when applied to book removal disputes.

The first theory successfully employed in the book removal setting was an involuntary public forum theory that required the government to give students access to a forum it had created exclusively for its own use. Despite a government intention to monopolize the primary forum it had established, public forum theory precluded it from doing so. Having opened a forum for its own use, the school was required to admit nongovernment users based on something akin to the *Mosley* equal access principle. In light of this theory, it must be asked why the access of nongovernment participants to the forum must be limited to contesting the removal of selected books. One obvious explanation comes to mind. Suppose the forum is considered to be the library collection itself, those books the library has purchased and placed on the library shelves. In that event access rights will rightfully exist only within the contours of the forum as defined. If a shelved book is removed, the exclusion of that book can be objected to by students who have the right to participate in the forum. If a book is not yet part of the collection, however, it is outside the forum and no student forum related rights come into play.

This interpretation of the situation does explain why book selec-

337. *Presidents Council, Dist. 25 v. Community School Bd. No. 25*, 457 F.2d 289, 293 (2d Cir.), *cert. denied*, 409 U.S. 998 (1972).

tion is not subject to the same constitutional limitations as book removal. This interpretation, however, is not the only possible view of the situation. An alternative position is that the government controlled forum is not comprised only of the books already purchased by the school but, instead, consists of the library bookshelves and all books that potentially could fill those shelves. If this is an accurate description of what it means to label the school library a public forum, students having rights in the forum can challenge both decisions about what goes on the library bookshelves as well as what comes off those shelves.

This alternative explanation raises the question of why there are two equally plausible ways of defining the school library as a forum in the context of this first public forum theory. The one answer that can be suggested for this anomaly is the flexibility of the public forum concept. Under this involuntary public forum theory, the government's promise of a forum is one implied in law and not in fact. The government's actual intent is to create a forum exclusively for the expression of government views and the first amendment simply says that such an intent cannot be effectuated. Instead, the government is required to allow nongovernment users access to the forum. Since the government never had the intent to open its forum to outside users, it is not possible to examine the government's intent in order to determine the scope of the primary forum it has created. As a forum implied in law, the forum can be either the protection of already shelved materials or the library bookshelves and all materials that potentially could be suited to filling those shelves.³³⁸

Another description of a situation in which this same problem occurs may be helpful in clarifying this difficulty. In *Roberts v. DiMauro*,³³⁹ the City of Springfield agreed to provide space and funding for a system of 180 medical information tapes (Tel-Med)

338. In most public forum contexts the distinction between initial exclusion and exclusion after access has been granted is irrelevant. In the case of a traditional voluntary public forum that is available to outside speakers, the speaker who has not yet been granted access to the forum is the very person who has the right to complain about his exclusion from the forum. Even in the case of voluntary forums where the government desires to be the only voice heard in the forum but has the intention of speaking on behalf of all who wish their views aired, e.g., *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alas. 1978), the difference between views once included and views never included is irrelevant. If the government's forum "offer" involves the expression of all points of view, then a violation of first amendment rights occurs both when the government removes a previously included viewpoint, and when it fails at any time to include a viewpoint.

339. No. 78-1634 (Super. Ct. Mass., Dec. 26, 1978) (order granting preliminary injunction).

compiled by Blue Cross-Blue Shield of Massachusetts. The tapes were played for members of the public who called the Tel-Med Tape Library phone number and requested particular tapes by number. After the tape system had been installed, the mayor became aware that the Tape Library contained tapes on the subjects of birth control and abortion. He then took it upon himself to remove a total of six tapes on these subjects. A suit was brought by several local residents claiming that the city's decision to fund the tape system created a public forum and that the removal of the six tapes violated their first amendment right to know.

The claim made by plaintiffs in *Roberts* is analogous to a suit challenging the removal of a book from the school library. The city's sponsorship of the collection of 180 tapes can be viewed as the creation of a primary forum exclusively for government controlled speech. As in the school library book removal cases, one can argue that the first amendment requires that the government's attempt at exclusivity fail and that members of the public acquire a vested interest in the availability of the information system. That being so, decisions by the government to remove previously included tapes are subject to challenge by those who are the intended beneficiaries of the information.³⁴⁰

That easy issue aside, the litigation developed a more interesting component. After the suit was brought to have the six tapes returned and a temporary restraining order was issued requiring the mayor to restore the missing tapes,³⁴¹ another group of citizens moved to intervene in the lawsuit claiming that they had a right to include a prolife tape in the Tel-Med Tape Library. They argued that having created

340. Characterization of the Tape Library as a primary forum has avoided the question of whether the forum (with respect to the original 180 tapes) was a voluntary or an involuntary forum. Two differing views on this question are possible. One view would characterize the Tape Library as a voluntary forum much like the *Anchorage Blue Book* in *Alaska Gay Coalition v. Sullivan*, 578 P.2d 951 (Alas. 1978). See text accompanying notes 86-88 *supra*. Under this view, the argument would be made that it was the city's intention to create a medical information system of 180 tapes for the benefit of local residents. Having such an intent and thereby creating a public forum, the city was not free to renege on its intention by selectively removing some of the 180 tapes. An alternative view of the facts would perceive the situation as involving an involuntary forum. Here the claim would be that the city was providing a service to the community that it felt free to alter or discontinue at any time and that the city never intended, by the provision of this service, to vest city residents with a constitutional interest in the continued existence of the Tape Library.

341. *Roberts v. DiMauro*, No. 78-1634 (Super. Ct. Mass., Dec. 18, 1978) (temporary restraining order issued as follows: "The Court orders that as long as the 180 tapes are on city property, the Mayor, agents or servants, cannot interfere or act as a censor over the playing of any of the tapes.").

a forum, the city was not free to use that forum to advocate a position on a controversial issue like abortion without giving opposing views a chance to be heard through the same medium. Unfortunately, this issue was never resolved by the court.³⁴² The case became moot when Blue Cross-Blue Shield removed the tapes from city property and began running them as a privately sponsored service.³⁴³

Had the court been forced to deal with this issue, however, the resolution of the issue, as in a book selection case, would focus on the exact nature of the forum that the city had created. Was the forum the closed collection of 180 medical information tapes or an open ended forum for all medical information tapes in areas related to the original 180? No easy answer to this dilemma presents itself.³⁴⁴ Either result is possible. The choice between the two approaches, however, has great significance in the context of a book selection challenge. One approach would make possible such challenges and the other would not.

Without resolving the issue of how the forum should be defined in such cases, it should be remembered that one other involuntary forum theory was suggested for use in the book removal cases. That version of the doctrine instead involves constitutional restrictions on what the government may say in its exclusive forum. If this forum theory is relied on, it seems fairly certain that book selection and removal cannot be analytically separated. Since the problem is that

342. *Id.* (Dec. 26, 1978) (application for intervention denied without prejudice on the ground that a further request for the inclusion of the proposed additional tape should be directed to the city before such an application for intervention could properly be considered).

343. Blue Cross-Blue Shield removed the Tape Library from city property on December 28, 1978. The city thereafter filed a motion to dismiss on the ground of mootness. The city's motion was never acted upon and thus the preliminary injunction issued on December 26, 1978 remains in effect.

344. In the interest of complete accuracy, one easy solution did seem in the offing had the Tel-Med controversy continued. While the court dismissed the intervenors' complaint, it did so without prejudice. The suggestion made to the intervenors by the court was that they should write to the city reiterating their request for including an additional tape. The city had turned down the initial request on the ground that it was prevented by the temporary restraining order issued against the city from tampering with the Tape Library. The superior court, however, stated that the city was in error in its interpretation of the court order. Under that order, the city was precluded only from removing any of the 180 tapes. The order did not prevent adding tapes to the collection. With this clarification of the court order presented to the city, it is entirely possible, had the tapes not been removed from city control, that the city would have granted the intervenors' request, thereby voluntarily opening up the forum to medical information tapes beyond the original collection. Aside from this development, however, the case would have had to be resolved based on involuntary forum grounds.

the government is using the forum it created and it monopolizes for the expression of one-sided viewpoints, behavior that is contrary to constitutional requirements, the proper remedy for this constitutional violation is for the government to correct the imbalance in its collection. This can be accomplished in several ways. If the imbalance arose only because shelved books were removed, reshelving is an appropriate remedy. If the collection was unbalanced from its inception, a cure will be achieved through either of two solutions. The first solution is the removal of those books that create the imbalance;³⁴⁵ all shelved books on abortion if all such books advocate a prochoice position. The second possible remedy is the addition of books to offer a wider selection of viewpoints: the addition of prolife books if all the shelved books advocate a prochoice position. This version of the involuntary forum theory necessarily would create a right on the part of a student to complain about the nonselection of books. Thus, in applying the public forum doctrine to book selection cases, one finds that under some applications of that doctrine, book selection and book removal cases can be dealt with differently and, under others, the results in both kinds of cases are identical.

The next point of comparison between book selection and book removal cases involves the right to know. In making this comparison, it must be recalled that originally in discussing right to know principles it was decided that two alternative analyses were available: One viewing the speaker as the publisher or author and the other viewing the speaker as the government.³⁴⁶ In a complaint about the book selection process, if the speaker were to be considered the author of a book that the government failed to include in the school library, there is a relationship between a willing speaker and a willing listener. As in the book removal cases, for this analysis to be tenable, it will be necessary to show that the speaker/listener relationship has been assisted by the government through the government's creation of a public forum. Thus, one must demonstrate that public forum theory includes a right to force the government to buy unpurchased books. If public forum principles attach only to purchased books, the right to know argument will fail. It will be only in the event that the forum consists of the bookshelves and books that could fill those shelves that a student will obtain relief by asserting the right to know. Ultimately, under this right to know

345. See text accompanying notes 315-19 *supra*.

346. See text accompanying notes 197-203 *supra*.

theory, removal and selection are not analytically separate because they both depend on the existence of a public forum.

As was pointed out, however, an alternative way of looking at the right to know question exists. It also is possible to utilize that doctrine by viewing the government as the speaker. Under this approach, the right to know is a self-sufficient basis for finding the invasion of a right protected by the first amendment and has no dependence on public forum theory. Unfortunately, under this view the speaker is no longer a willing speaker. As an unwilling speaker, however, there are significant differences between the book removal situation and the initial book selection process. In the removal context, since the book is owned by the school and has only been taken off the shelf; the student is seeking access to information (a book) in the control of the government. While one may quarrel over whether the information being sought is governmental in character or relates to the operation of government, at least it is government property. By contrast, in a suit to force the purchase of a book, the information being sought (the requested book) has never been in government hands and thus seeking such information from an unwilling government finds little or no justification in right to know theory.

The only other right to know argument with a potential for covering the selection situation is Professor Emerson's idea of the right to know acting as a restraint on government monopolization of an important channel of communication.³⁴⁷ As was pointed out in initially discussing that theory,³⁴⁸ as students are not a captive audience in the library and because library books do not so obviously bear a government seal of approval, Professor Emerson's theory is not as easily applied in the school library setting as it is in the context of the classroom.

Despite the significant difficulties standing in the way of judicial review of a claim of improper book selection, the greatest difficulty of all may be encountered in the process of a review of the merits of such a claim. Initially, it must be remembered that the job of filling the library's shelves involves continuous choices between numerous book titles, many of which are rejected for every one that is chosen. One's visceral reaction to this may be to conclude that the realities of the process ought to prevent holding each of these decisions up to scrutiny by a court. Once one begins to look carefully at the possible

347. See note 226 *supra* and accompanying text.

348. See text accompanying notes 227-30 *supra*.

reasons for selection, however, this nearly impossible task begins to look quite possible.

To begin with, the plaintiff in such a case will have the burden of showing the existence of a constitutionally improper reason for nonselection. Many reasons, as can be seen from the analysis of constitutionally adequate versus constitutionally inadequate justifications in the context of allegedly improper book removals,³⁴⁹ are entirely appropriate reasons for library action. Explanations such as a book's excessive cost, that its author or publisher is unknown to the selector, an author's reputation for poor quality work, the library collection being already adequately supplied with books in a certain subject area, a certain topic being unsuited to the needs of the school library, and many others of the same ilk, are easily identified as decisions it is essential that the school be able to make.³⁵⁰ The plaintiff must therefore demonstrate some other basis for the school's action. Among the improper reasons would be that the selector disagrees with the position the author of a book takes on a controversial matter, that the selector is antipathetic to the background or views of the author of a book, and possibly that the book contains offensive language or sexually explicit scenes. These reasons would be considered improper bases for book removal,³⁵¹ thus they are equally improper in the case of nonselection of a book.

The major obstacle for the plaintiff in a book selection case will be in obtaining evidence of improper selection. In cases in which the nonselection is essentially inadvertent—for example, where the librarian had no special knowledge about a nonselected book; instead, a positive choice was made to include a different book—no such evidence will be available. Such cases, however, are not bothersome. As the reasons for nonselection in these cases are not unconstitutional, there is no cause for feeling troubled by the unavailability of evidence of the specific reason for nonselection. In other cases, evidence may be more easily available. If a book were actively considered and then rejected for an improper reason, evidence of this may be available in the form of statements made by the selector.³⁵² In

349. See text accompanying notes 295-309 *supra*.

350. See notes 292-94 *supra* and accompanying text for a more detailed description of the standard of review suggested for use in cases raising a challenge to a book removal. This article assumes this same standard of review is appropriate for use in the book selection situation.

351. See text accompanying notes 301-04 *supra*.

352. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977).

still other cases, the nonselection decision may be made neither in an obviously improper manner nor in an obviously innocent one. In such cases, the plaintiff must show that at least one of the factors that motivated the decisionmaker was an unconstitutional factor.³⁵³ The burden then will shift to the defendant school board to show by a preponderance of the evidence that the same decision would have been made in the absence of an improper motive.³⁵⁴ Thus, if the plaintiff shows that the book was initially slated for purchase and that decision later was reconsidered and changed, this departure from ordinary book selection procedures would be *prima facie* evidence of an improper motive for nonselection.³⁵⁵ The burden of proof then would shift to the school to show that the reconsideration was unrelated to the book's content: For example, where all book purchases were reconsidered during that period because of cutbacks in the library budget; or that the reconsideration, while initiated by a member of the library staff because of concern over offensive language in the book, was made because the book in question had received bad reviews in several influential book review magazines due to its poor literary quality. These examples demonstrate that while the availability of evidence sometimes may present a problem to the plaintiff in a book selection case, that problem is no more acute than the difficulty usually faced in an attempt to demonstrate that government action is improperly motivated.³⁵⁶ Thus, despite surface differences between book removal and book selection controversies, in attempting to review the merits of such controversies the same standard of review that proved workable in the book removal cases is equally functional when applied to book selection cases.

In the end, despite the knee jerk reaction of interventionist courts, it appears that the distinction drawn between the initial selection situation and later removal of a book is not an inevitable one. While the selection situation encounters some additional difficulties, both in showing that a constitutional violation has occurred and in

353. *Mt. Healthy City School Dist., Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977).

354. *Id.*

355. *Village of Arlington Heights v. Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 267 (1977).

356. *See City of Mobile v. Bolden*, 446 U.S. 55, 65-74 (1980); Brest, *The Supreme Court, 1975 Term-Foreword: In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1 (1976); Brest, *Palmer v. Thompson: An Approach to the Problem of Legislative Motive*, 1971 SUP. CT. REV. 95; Ely, *Legislative and Administrative Motivation in Constitutional Law*, 79 YALE L.J. 1205 (1970); Symposium, *Legislative Motivation*, 15 SAN DIEGO L. REV. 925 (1978).

proving that the government has no compelling reason to justify that violation, these difficulties are not insurmountable.

V. CONCLUSION

As was suggested at the outset of this article, the resolution of school library censorship disputes requires an exacting application of a number of intricate and interwoven first amendment doctrines. In much of that analysis, it is necessary to cross uncharted first amendment territory, determining the proper boundaries of doctrine and exploring new aspects of recognized first amendment concepts. Courts faced with such controversies usually have chosen instead to rely on established doctrine, avoiding an attempt to examine new analytic possibilities. Unfortunately, this path is not really available without the sacrifice of accuracy and doctrinal integrity. In the Supreme Court's pending decision of a school library censorship case, the Court must be willing to deal with these complexities, no longer sweeping aside analytic weaknesses. Even if the result of this new probing is to reveal a number of first amendment dilemmas, this consequence should not be feared. In the end, the result of exposing these dilemmas and attempting to resolve them will be to strengthen the doctrinal foundation of free speech analysis and to add to the overall understanding of first amendment principles.