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Public School Library Book Removals: Community Values v. First Amendment Freedoms

Public criticism of library materials is increasing in the United States today. Since the 1980 presidential election, criticism of public library materials has increased 500%. A recent survey of 7500 public school administrators and librarians reveals that 20% of the nation’s public school districts and 30% of its school libraries have experienced challenges to literary works. Proponents of censorship in public school libraries argue that they are protecting traditional American values by safeguarding impressionable students from objectionable materials; consequently, they pressure school boards to remove such material. Opponents argue that censorship violates students’ first amendment rights; they look to the federal courts for the protection of those rights.

In the past ten years plaintiffs have brought seven cases into federal courts under 42 U.S.C. § 1983, alleging that school boards violated students’ first amendment rights by improperly removing books from public school libraries. The main issue in these cases has been whether a school board’s removal of books from the school library constitutes a prima facie first amendment violation. No two courts

4 Section 1983 (1976) provides:
Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress . . . .
6 A related question is whether a school board’s non-selection of a book for the school
have applied the same standard in resolving this issue, thus creating a confusing and inconsistent body of law.

This note will suggest to courts an approach which balances the first amendment rights of students against the authority of school boards to protect students from objectionable material.

I. The Case Law

A. Sources of Students’ First Amendment Right to Have Books Maintained in Public School Libraries

The first amendment prohibits official restrictions on free speech. *Tinker v. Des Moines School District* extended that protection to high school students. When a school board removes a book from a high school library, however, the board restricts the author’s, and not the student’s speech. Thus, it appears that students would have no standing to complain under the first amendment as long as the removal does not restrict student expression. Indeed, in *President’s Council, District 25 v. Community School Board No. 25*, the United States Court of Appeals for the Second Circuit refused to apply *Tinker* to a public school library book removal case. The court stated that “[t]here is here no problem of freedom of speech or the expression of opinions on the part of parents, teachers, students, or librarians.”

Similarly, in *Pico v. Board of Education, Island Trees Union Free School District*, the two Second Circuit judges who found that library book removals violated students’ first amendment rights, based those findings on the belief that the board’s actions tended to suppress speech or thought.

The Sixth Circuit, however, in *Minarcini v. Strongsville School District*, identified two sources for the students’ right to challenge library book removals other than the right of free speech. First, the court labeled the school library a “mighty resource in the free mar-

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7 393 U.S. 503 (1969).
9 457 F.2d at 293.
11 Id. at 414-15 and 434-35.
12 541 F.2d 577 (6th Cir. 1976).
Justice Holmes indicated the importance of this marketplace concept when he wrote that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." The Sixth Circuit court apparently felt that high school students, as consumers in the marketplace, were entitled to make their choices free from official censorship.

The second source, which the court in Minarcini found more persuasive, was the first amendment right to receive information. The court emphasized that removing a book from a public school library was a direct restraint, not on the students' speech, but on their right to receive information. The court relied particularly on Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, in which the Supreme Court overturned a Virginia statute that deemed pharmacist advertising of drug prices unprofessional. The Sixth Circuit adopted the Supreme Court's language which stated that "[i]f there is a right to advertise there is a reciprocal right to receive advertising," and concluded that the first amendment clearly embodied the right to receive information. Thus, the court held that the student plaintiffs had standing to raise the first amendment issue.

Although the Sixth Circuit in Minarcini treated the marketplace concept and the right to receive information separately, the district court in Right to Read Defense Committee v. School Committee of Chelsea indicated that they are integrated doctrine. The district court declared:

What is at stake here is the right to read and be exposed to contro-

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13 Id. at 582.
17 541 F.2d at 583 (quoting 425 U.S. at 757).
18 541 F.2d at 583.
versial thoughts and language—a valuable right subject to first amendment protection. As the [Supreme] Court commented in Red Lion Broadcasting Co. v. FCC [citation omitted], "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail . . . ." 20

If this right to read and be exposed to controversial thoughts and ideas is the same as the first amendment right to receive information, the district court in Right to Read would derive that first amendment right from the marketplace concept. 21

In Salvail v. Nashua Board of Education, 22 the New Hampshire district court primarily applied the right to receive information to find that students had a first amendment right to challenge library book removals. 23 In discussing this right, the district court reasoned that because a public school library contains both a communicative source, the books, and a recipient, the students, the first amendment protects the communications themselves. 24

The Seventh Circuit in Zykan v. Warsaw Community School Corp. 25 severely limited the application of both the right to receive information and the marketplace concept at the secondary school level. While secondary students retained a "freedom to hear," two factors limited the relevance of that freedom in secondary schools. First, the level of intellectual development precludes the average high school student from taking full advantage of the marketplace of ideas. Second, secondary schools have a responsibility to teach fundamental social, political and moral values that will permit their students to take their place in the community. 26

Judge Mansfield, in his Pico dissent, approached the right to receive information differently, emphasizing that the right, as stated in Virginia State Board of Pharmacy, is reciprocal. He reasoned that, because no author could claim a constitutional right to have a school library use his book, no student could claim the reciprocal right to receive the information contained in school library books. Accordingly, Judge Mansfield concluded that Virginia State Board of Pharmacy did not apply to a school board's removal of books from public school

20 Id. at 714.
21 The integration of the marketplace concept and the right to receive information is discussed more fully in the text accompanying notes 134-40 infra.
23 The court also briefly addressed the marketplace concept. Id. at 1275.
24 Id. at 1274.
25 631 F.2d 1300 (7th Cir. 1980).
26 Id. at 304.
libraries.  

B. The Prima Facie First Amendment Violation

1. Standards for the Violation

The Second Circuit was the first to deal with book removals in public school libraries. In President's Council, District 25 v. Community School Board No. 2528 the defendant school board had voted to remove Down These Mean Streets29 from all junior high school libraries in the district. The board, however, later decided to return the book to those libraries that had previously carried it, but to make it available only on direct loan to parents. Students and others30 instituted a Section 1983 action in federal district court, alleging that the school board's action violated the first amendment. The district court dismissed the complaint for failure to state a claim upon which relief could be granted. The plaintiffs appealed.

In assessing the complaint's adequacy, the Second Circuit relied heavily on the Supreme Court's decision in Epperson v. Arkansas.31 The Court in Epperson stated that public education should be locally controlled and that courts should not intervene in the daily operation of school systems unless basic constitutional values are directly and sharply implicated.32 The Second Circuit then opined that because there was no showing of a curtailment of freedom of speech or thought, the school board's action did not directly and sharply implicate first amendment values; thus, the court ruled that plaintiffs failed to establish a prima facie case.33

According to the court, several factors illustrated that the board's action did not curtail first amendment freedoms. First, the board's stated reason for the removal was that the book's obscenities and explicit sexual interludes would adversely affect the students, both psychologically and morally. Second, President's Council, unlike Epperson, presented no religious establishment or free exercise questions.34 Teachers in class were free to discuss problems which the

27 638 F.2d at 429.
28 457 F.2d 289.
29 Written by Piri Thomas.
30 The other plaintiffs were past presidents of various parent-teacher associations, parents, teachers, a librarian and a school principal.
31 393 U.S. 97 (1968).
32 457 F.2d at 291 (quoting 393 U.S. at 104).
33 457 F.2d at 293.
34 In Epperson, the Court found that an Arkansas statute criminalizing the teaching of evolution violated the free exercise and establishment clauses of the first amendment.
book addressed, the board’s action could not be construed as a ban on the teaching of any theory or doctrine. Fourth, parents could still borrow the book from the school library for their children. Thus, the court found the Board’s intrusion upon first amendment rights to be “not only not ‘sharp or direct,’” but “miniscule.”

The court’s language, however, invites subsequent courts to find a prima facie first amendment violation for book removals. In President’s Council, if the board’s reasons for removing the book had been less related to the students’ well-being, or there had been a ban on the teaching of some theory or doctrine, or if the board had totally removed the book from the library, then the court’s language implies that it may have found sufficient curtailment of freedom of speech or thought to constitute a first amendment violation. Subsequent courts accepted the Second Circuit’s invitation.

The Sixth Circuit faced a similar book removal situation in Minareini v. Strongsville Board of Education. The Strongsville Board of Education, without explanation, voted to disapprove the purchase of Catch-22 and God Bless You, Mr. Rosewater as high school text or library books and to remove Catch-22 and Cat’s Cradle from the school library. Five high school students sued under Section 1983, alleging that the board’s actions violated their first and fourteenth amendment rights. The federal district court dismissed the complaint for failure to state a claim, and the plaintiffs appealed.

The Sixth Circuit not only reversed the lower court, but also ordered the board to return Cat’s Cradle and Catch-22 to the library shelves. The court first focused on the absence of any explanation for the removal that was neutral in first amendment terms. From this absence, the court concluded that the board removed the books because it believed it had an absolute power to censor school library

35 457 F.2d at 292.
36 Id.
37 See generally text accompanying notes 56-59 infra.
38 541 F.2d 577 (6th Cir. 1976).
39 Written by Joseph Heller.
40 Written by Kurt Vonnegut, Jr.
41 Written by Kurt Vonnegut, Jr.
42 The court validated the board’s failure to approve the purchase of CATCH-22 and GOD BLESS YOU, MR. ROSEWATER. See text accompanying notes 55-59 infra for a discussion of the distinction between removal and non-selection.
43 541 F.2d at 582. The court failed to specify what kind of explanation would be neutral in first amendment terms.
materials that board members found distasteful. The court then held that, although neither the State of Ohio nor the school board was under any compulsion to create a public school library, once having created one "neither body could place conditions on [its] use . . . which were related solely to the social or political tastes of school board members." Thus, under *Minarcini*, a prima facie first amendment violation occurs when a school board removes a book solely because it conflicts with the social or political views of individual board members. The court will presume such a motive for the board's action when the board fails to provide an explanation that is neutral in first amendment terms.

In *Right to Read Defense Committee v. School Committee of Chelsea* and *Salvail v. Nashua Board of Education*, two First Circuit district courts applied the *Minarcini* standard. In *Right to Read*, a student's parent complained to the school committee chairman about the language of a poem in an anthology of writings by teenagers, titled *Male and Female Under 18*. The committee circulated a copy of the poem among its three male members, who characterized the poem's language as lewd, obscene, obnoxious and filthy. The committee then unanimously resolved to remove the anthology from the school library. Students and others brought a Section 1983 action seeking a return of the anthology to the school library.

Similarly, in *Salvail*, a board member objected to the public high school's subscription to *Ms.* magazine, charging that the magazine contained various offensive advertisements. At a public meeting,

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44 Id.

45 Id. In a later case interpreting *Minarcini* a district court stated, "[i]t is a familiar constitutional principle that a state, though having acted when not compelled, may consequently create a constitutionally protected interest." *Right to Read*, 454 F. Supp. at 712. If this interpretation is correct, then removal based on the social or political tastes of board members must violate a constitutionally protected interest. As the text accompanying notes 15-18, *supra* indicates, that interest is the first amendment right to receive information.

46 454 F. Supp. 703.

47 469 F. Supp. 1269.

48 The three female committee members were not given a copy because of the poem's "crude" and "offensive" language. 454 F. Supp. at 707.

49 Id. At trial the defendants did not contend that the poem was obscene. Id. at 711.

50 After commencement of this litigation and under the advice of counsel, the committee passed a resolution reaffirming the removal of the anthology because the poem dealt with sex education, had an unhealthy and counterproductive effect on school children, and used words considered filthy and shocking by a large segment of the community. Id. at 709.

51 The others included parents, teachers, the Right to Defense Committee and the Massachusetts Library Association. Parents and the Massachusetts Library Association were dismissed for lack of standing. Id. at 705 n. 2.

52 The offensive advertisements were for vibrators, contraceptives, materials dealing with
the board voted to cancel the library’s Ms. subscription and to remove all back issues from the shelves. Both the Right to Read and the Salvail opinions applied the Minarcini standard, stating that the school boards could not condition use of library materials upon compliance with the social or political tastes of individual board members. Because the board’s personal distaste was the primary motivation for the removals, both courts ordered the school boards to return the banned materials to the school libraries.

President’s Council, Minarcini, Right to Read and Salvail present a consistent and coherent body of law concerning the removal of books from public school libraries. Although the result in President’s Council differed from the results in the latter three cases, the courts’ analytical approaches were similar. Epperson stated that only actions which directly and sharply implicated constitutional values warranted judicial intervention. The Second Circuit in President’s Council indicated that only library book removals which curtailed free speech or thought directly and sharply implicated constitutional values warranted judicial intervention. The Sixth Circuit in Minarcini extended the Epperson standard by reasoning that removal of library materials, based solely on the social or political tastes of individual board members, also directly and sharply implicated a constitutional value, the first amendment right to receive information. The district courts in Right to Read and Salvail almost mechanically applied the Minarcini standard to find first amendment violations.

The Seventh Circuit’s decision in Zykan v. Warsaw Community School Corp., however, introduced inconsistency and confusion to the law concerning book removals. In Zykan, the school board removed Go Ask Alice from the school library. The plaintiff, a

lesbianism and witchcraft, pro-communist folk singers and newspapers, and vacations to Cuba. 469 F. Supp. at 1272.
53 After commencement of this litigation the board voted to return two back issues of Ms. to the shelves after excising the offensive advertisements. Id. at 1273.
54 454 F. Supp. at 713; 469 F. Supp. at 1272.
56 393 U.S. at 104.
57 457 F.2d at 293.
58 541 F.2d at 582-83.
60 631 F.2d 1300.
61 Anonymously authored.
high school student, brought a Section 1983 action, alleging that the school board banned the book because it offended the "social, political and moral tastes" of the board members and, thus, violated her first and fourteenth amendment rights. The district court, in dismissing the complaint for lack of subject matter jurisdiction, stated that "[t]o allege that school officials have made decisions regarding . . . library books . . . solely on the basis of personal 'social, political and moral' beliefs is insufficient to allege a violation of constitutionally protected 'academic freedom.' "

Upon appeal, the Seventh Circuit chose not to apply the Minarcini standard, which would have required a reversal of the district court. Instead, the court relied on Cary v. Board of Education and held that "it is in general permissible and appropriate for local boards to make decisions based upon their personal social, political and moral views." Thus, the court in Zykan affirmed the district court's dismissal of the complaint. The Seventh Circuit's standard is that a plaintiff can only establish a prima facie case by alleging "that the removal was part of an action to cleanse the library of materials conflicting with the School Board's orthodoxy," or that the removal was part of a "purge of all materials offensive to a single, exclusive perception of the way of the world." Bare allegations that the removal was based on the personal social, political and moral beliefs, sufficient under the Minarcini standard, do not meet the more restrictive Zykan test.

The Second Circuit's decisions in Pico v. Board of Education, and
Bicknell v. Vergennes Union High School Board of Directors add further inconsistency and confusion to the law governing book removals from public school libraries. In Pico, board of education members attended an educational conference where they obtained lists of offensive books and excerpts of the more objectionable material. About two months later, the board members found eleven of the objectionable books in the library. The board ordered the removal of all the books. The district superintendent protested any removal based on someone else’s list and requested that the board follow district procedures for such a situation and avoid creating a public furor. The board merely repeated the directive for removal of all the books and issued a press release stating that the books were "offensive to Christians, Jews, Blacks, and Americans in general" and contained "obscenities, blasphemies, brutality and perversion beyond description." Although a board-appointed committee read the books and recommended the return of six of them, the board voted to return only two of the books to the library. High school students sued, alleging first amendment violations and seeking injunctive and declaratory relief. The district court, relying principally on the Second Circuit’s decision in President’s Council, granted the defendant’s summary judgment motion.

In Bicknell, a companion case to Pico, two parents complained to the school board about vulgar and indecent language in Dog Day Afternoon and The Wanderers. Although it had adopted a procedure for the selection and removal of library books, the board voted immediately to remove The Wanderers from the library and place Dog Day Afternoon on a restricted shelf. Students and others sued to enjoin the book removals. They claimed that the board’s action violated their first amendment rights because the action was motivated solely

72 638 F.2d 438 (2d Cir. 1980).
73 638 F.2d at 407.
74 The books at issue are: THE FIXER by Bernard Malamud; SLAUGHTERHOUSE FIVE by Kurt Vonnegut, Jr.; THE NAKED APE by Desmond Morris; DOWN THESE MEAN STREETS by Piri Thomas; BEST SHORT STORIES BY NEGRO WRITERS edited by Langston Hughes; GO ASK ALICE by an anonymous author; A HERO AIN’T NOTHING BUT A SANDWICH by Alice Childress; BLACK BOY by Richard Wright; LAUGHING BOY by Oliver LaFarge; SOUL ON ICE by Eldridge Cleaver; and A READER FOR WRITERS edited by Jerome Archer. Id.
75 Id. at 410. The press release also attributed opposition to the book removal to union leaders who sought to use the issue to gain board seats in an upcoming election. Id.
76 Written by Patrick Mann.
77 Written by Richard Price.
78 638 F.2d at 440.
79 These were parents, library employees and the Right to Read Defense Fund.
by the board member’s "personal tastes and values." The district court dismissed the complaint for failure to state a claim upon which relief could be granted.

The Second Circuit, in *Pico*, voted to reverse the grant of summary judgment and to remand for trial. Each of the three judges filed a separate opinion and applied a different standard. The judges then applied the standards developed in *Pico* to the facts in *Bicknell* and voted to affirm the district court's dismissal of the complaint.

In determining whether a prima facie first amendment violation existed, the decisions before *Pico* focused on the substantive reasons for a book’s removal. Judge Sifton’s opinion in *Pico* departed from this approach by focusing on the school board's procedures for removing the book as well as the substantive reasons for the removal. In emphasizing the book removal procedures, Judge Sifton stated:

> What we have . . . is an unusual and irregular intervention in the school libraries' operations by persons not routinely concerned with their contents . . . under circumstances, including the explanations for their actions given by the participants, which so far from clarifying the scope and intentions behind the official action, create instead grave consequences concerning both subjects. In circumstances of such irregularity and ambiguity, a prima facie case is made out . . . because of the . . . real threat that the school officials' irregular and ambiguous handling of the issue will . . . serve to suppress freedom of expression.

In discussing the substantive reasons for the book removals, Judge Sifton indicated that mere reference to the board members' "personal standards of taste or political philosophy" as one factor in a book removal decision would not constitute a prima facie first amendment violation. He then opined that when boards remove books applying board member’s personal beliefs and using procedures which “suggest an unwillingness on [their] part to subject their political and personal judgments to the same sort of scrutiny as that accorded other decisions relating to the education of their charges,” a

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80 638 F.2d at 441.

81 One judge dissented from this result. No majority opinion was reached, however, as the two judges who voted to reverse relied on different reasoning.

82 One judge dissented from this result as well. No majority opinion was reached in this case because the two judges voting to affirm relied on different reasoning.

83 638 F.2d at 414-15.

84 *Id.* at 417.

85 *Id.*
prima facie first amendment violation occurs.\textsuperscript{86} Judge Newman, joining the majority in both \textit{Pico} and \textit{Bicknell}, recognized that school officials have broad discretion to chart the course of the educational process in public schools.\textsuperscript{87} He reasoned, however, that use of this discretion to suppress ideas threatened first amendment values only when the suppression was sufficiently specific and serious.\textsuperscript{88} Thus, although disapproval of ideas would not necessarily violate the Constitution, "clearly defined and carefully planned action to suppress an idea," such as removing a book from a school library because of the book's contents, may violate the first amendment.\textsuperscript{89} Judge Newman offered a specific two-step test for determining the existence of a prima facie first amendment violation. First, the court should focus on whether the board's action poses a sufficient \textit{threat} to the suppression of ideas, and not on whether ideas are, in fact, suppressed. Second, the threat of suppression becomes constitutionally impermissible when the board's actions are politically motivated.\textsuperscript{90} Judge Newman later added that when a case presents both permissible and impermissible motives for removing a book, the court should rule on the basis of the impermissible motives.\textsuperscript{91}

In applying his "political motivation" standard to the facts in \textit{Pico}, Judge Newman first emphasized that the board singled out the removed books for official disapproval.\textsuperscript{92} He then pointed to specific board objections to the books, noting their political overtones,\textsuperscript{93} and concluded that the \textit{Pico} facts required a trial to determine whether

\begin{itemize}
  \item \textsuperscript{86} Id. This note discusses the book removal procedures which Judge Sifton found to be impermissible. \textit{See} text accompanying notes 115-16 and 120-21 \textit{infra}.
  \item \textsuperscript{87} 638 F.2d at 432.
  \item \textsuperscript{88} Id. at 434.
  \item \textsuperscript{89} Id.
  \item \textsuperscript{90} Id. Judge Newman defines a politically motivated exclusion as one "motivated by the author's opinion about the proper way to organize and run society." \textit{Id}.
  \item \textsuperscript{91} Id. at 437-38. In reaching this conclusion, Judge Newman addressed the case of Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). That case held that an untutored teacher may be dismissed for a legitimate reason related to teaching performance, even if an impermissible reason such as expression of protected speech also affected the dismissal. He reasoned that the \textit{Mt. Healthy} decision, designed to avoid placing the teacher in a better position for exercising a constitutional right than he would have occupied had he done nothing, had no application to library book removals. \textit{Id}.
  \item \textsuperscript{92} Id. at 436.
  \item \textsuperscript{93} The board first objected to \textit{A Reader for Writers} because it contained an essay equating Malcolm X with our founding fathers. The board condemned \textit{Soul on Ice} because of its anti-American material and hate for white women. The board labelled \textit{A Hero Ain't Nothing But a Sandwich} as anti-American because it pointed out the irony of George Washington's status as a slave owner. \textit{Id}.  
\end{itemize}
the board's actions created a sufficient risk of suppressing ideas in violation of the first amendment.\textsuperscript{94} In \textit{Bicknell}, however, Judge Newman voted to affirm the dismissal of the complaint. The plaintiffs' failure to allege that the board's actions were content-based or politically motivated was, in his view, fatal. He emphasized that "it is no cause for legal complaint that the board members applied their own standards of taste about vulgarity."\textsuperscript{95}

Judge Mansfield, dissenting in \textit{Pico} and joining the majority in \textit{Bicknell}, urged a rigid application of the \textit{Epperson} standard, which permits court intervention only when board decisions "directly and sharply implicate basic constitutional values."\textsuperscript{96} He reasoned that a school board fails this standard only when its actions violate the students' right of expression and are not reasonably and necessarily related to the school board's performance of its educational functions.\textsuperscript{97} Judge Mansfield pointed out that the Second Circuit, in \textit{James v. Board of Education},\textsuperscript{98} ruled that the transmission of community values is a proper function of elementary and secondary education.\textsuperscript{99} Judge Mansfield, thus:

\begin{enumerate}
\item urged adoption of the Seventh Circuit's approval in \textit{Zykan} of book removals based on the "personal social political and moral views" of board members;\textsuperscript{100}
\item found it constitutionally permissible for a school board to implement its conservative educational philosophy;\textsuperscript{101} and
\item indicated that those who disagreed should resort to the election process.\textsuperscript{102}
\end{enumerate}

Furthermore, he reasoned that because the board's actions did not suppress the free exchange of ideas, prohibit class discussion of the books, or limit the students' access to the books from other sources, this case was indistinguishable from the Second Circuit's ruling in

\textsuperscript{94} \textit{Id.} at 438.
\textsuperscript{95} \textit{Id.} at 441.
\textsuperscript{96} \textit{Id.} at 425 (quoting \textit{Epperson}, 393 U.S. at 104).
\textsuperscript{97} \textit{Id.} at 425.
\textsuperscript{98} 461 F.2d 566 (2d Cir. 1972) (dealing with the discharge of a teacher for wearing a black armband to protest the Vietnam war).
\textsuperscript{99} 638 F.2d at 426.
\textsuperscript{100} \textit{Id.} (quoting \textit{Zykan}, 631 F.2d at 1305).
\textsuperscript{101} 638 F.2d at 431.
\textsuperscript{102} \textit{Id.} The Second Circuit in \textit{James}, on the other hand, said "[t]he dangers of unrestrained discretion are readily apparent. Under the guise of beneficient concern for the welfare of school children, school authorities . . . might permit the prejudices of the community to prevail. . . . [I]n such a situation . . . the will of the transient majority can prove devastating to freedom of expression." 461 F.2d at 575. \textit{Accord}, West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).
President's Council. He, therefore, concluded that the board's actions were constitutionally permissible.

2. Valid Defenses

Once the plaintiff establishes a prima facie first amendment violation, the burden shifts to the defendant to assert any available defenses. Only the Sixth Circuit in Minarcini, the Second Circuit in Pico, and the Massachusetts district court in Right to Read have substantially addressed the question of valid defenses. In Minarcini, the Sixth Circuit found a prima facie first amendment violation because the school board failed to explain its actions in terms neutral under the first amendment. In addition to failing to give guidance as to what "neutral in first amendment terms" entails, the court also did not indicate whether, in the absence of a neutral explanation, the school board could otherwise show a constitutionally permissible motive for the book removal.

The Massachusetts district court in Right to Read attempted to rectify Minarcini's failures by looking to Tinker v. Des Moines School District for a statement of valid defenses. The court stated that "[w]hen First Amendment values are implicated, the local officials removing the book must demonstrate some substantial and legitimate government interest. Tinker . . . stand[s] for the proposition that an interest comparable to school discipline must be at stake.”

In his extensive discussion of valid defenses in Pico, Judge Sifton formulated a two-part test that the defendant must pass in order to prevail. First, to show that a reasonable basis for the book removal exists, the defendant must prove, by reasonable inferences flowing from concrete facts, that the banned materials materially and substantially jeopardized the interests of discipline or sound education. Examples of reasonable bases include protection of the

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103 638 F.2d at 426.
104 Id. at 427.
105 See note 43 supra.
106 393 U.S. 503 (1969). In Tinker, high school students were suspended for wearing black armbands to protest the war in Vietnam. The Court ruled that only upon a showing by the defendant school board that the armbands interfered with school discipline could the suspensions be upheld. Id. at 513.
107 454 F. Supp. at 713. E.g., Salvail, 469 F. Supp. at 1275. The Right to Read court found that the defendants failed to assert a valid defense because the plaintiffs proved that the poem in question would have no harmful effects on students. Although the poem's language was offensive to some parents, this was not dispositive in light of Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969), which stated that "[p]arental sensibilities are not the full measure of what is proper education."
108 638 F.2d at 415 (citing James v. Board of Educ., 461 F.2d at 571).
psychological well-being of the young and promoting standards of civility and decency among students. Second, the defendant must show that the school board's action is as narrowly drawn as is necessary to justify the societal interests involved. This second prong includes both the substantive criteria by which the board decides to remove books and the procedures by which it accomplishes the removal. Judge Sifton urged that specificity by the school board was necessary to insure against any chilling of protected expression that could accompany a more broadly drafted regulation.

In concluding that the Pico defendants failed to establish a valid defense, Judge Sifton focused primarily on the second of his two prongs. Concerning the substantive issue, he stated that complaints of anti-Christian and anti-American content were too general and failed to provide the kind of guidance necessary to insure free and open debate. In considering the board's removal procedures, Judge Sifton wrote that "the defendants are hardly in a position to carry their burden of establishing that they have not 'unduly restricted speech to an extent greater than is essential' to the furtherance of the interest sought to be protected." In so holding, Judge Sifton focused specifically on the board's removing books without reading them, drawing the book removal issue into a board election and labor dispute and creating the impression that freedom of expression would be determined by the majority's will.

3. Overcoming a Valid Defense

A defendant school board should prevail if it alleges and proves a valid defense. However, some courts have afforded plaintiffs the opportunity to show that a purportedly valid defense was actually

109 638 F.2d at 415 (citing Trachtman v. Anker, 563 F.2d 512, 517 (2d Cir. 1977), cert. denied, 435 U.S. 925 (1978)).
110 638 F.2d at 415 (citing Thomas v. Board of Educ., 607 F.2d 1043, 1057 (2d Cir. 1979), cert. denied, 444 U.S. 1081 (1980) (Newman, J., concurring)).
111 638 F.2d at 415 (citing Eison v. Stamford Bd. of Educ., 440 F.2d 803, 806 (2d Cir. 1971)).
112 638 F.2d at 416 (citing Keyishian v. Board of Regents, 385 U.S. 589, 603-04 (1967)).
113 638 F.2d at 416.
114 Id. (quoting Eison v. Stamford Bd. of Educ., 440 F.2d at 806).
115 In Pico the board based its decision to remove on mimeographed quotations prepared by anonymous editors. 638 F.2d at 409.
116 The board surveyed 4,979 households in the district to determine whether they supported the board's actions. Id. at 411-12. It should also be noted that these procedures also constitute the unusual and irregular intervention by the board which Judge Sifton reasoned was an element of a prima facie first amendment violation. See text accompanying note 83 supra.
the pretext for an unconstitutionally motivated book removal. A primary example is Right to Read. There the district court found that the school board removed the offensive anthology because individual board members disapproved of a certain poem’s language and theme. After the plaintiff’s filed their Section 1983 action, the board, under the advice of counsel, passed a resolution stating that it was removing the book for reasons more specifically related to the education and well-being of the students. The court held the resolution to be a pretext designed merely to meet the issues of the litigation.

Similarly, the defendant school board in Salvail voted, after the plaintiffs sued, to return two back issues of Ms. magazine to the library. The district court in Salvail also found the board’s action to be a self-serving pretext.

Judge Sifton, in Pico, urged that courts should always give plaintiffs an opportunity to show that the purported justifications for a book removal are mere pretexts for the suppression of speech. The judge emphasized a number of factors which warranted an inference that the student’s welfare was not the true motivation for the book removals. First, the board’s reasons for removing the books were confusing and incoherent. Second, the board proceeded in an informal and dilatory manner. Third, after it removed the books, the board appointed a committee to review them and without explanation, ignored the committee’s recommendations. Fourth, professional personnel, including the district superintendent, strongly opposed the board’s tactics. Finally, the board removed the works of renowned authors, including Jonathan Swift, Richard Wright and Bernard Malamud. Thus, Judge Sifton concluded that even if the board asserted valid defenses, the plaintiffs were entitled to prove that those defenses were merely pretexts for the suppression of speech.

117 See note 50 supra.
118 454 F. Supp. at 712.
119 469 F. Supp. at 1275.
120 638 F.2d at 417-18.
121 These factors also comprise the unusual and irregular intervention which was an element of Judge Sifton’s prima facie first amendment violation. See text accompanying note 83 supra.
122 638 F.2d at 417-18.
123 Id. at 418.
II. A Suggested Approach

A. Source of the Students’ Right

Although the Supreme Court has not held that the right to receive information applies in public high schools, the Court has held that the high school is a marketplace of ideas.124 The marketplace concept is a source of the right to receive information.125 Thus, the right to receive information must exist in public high schools.

The Supreme Court initially applied the marketplace concept to schools at the university level.126 In *Tinker v. Des Moines School District*,127 the Court extended the marketplace concept to public high schools. Overturning the suspension of three students for wearing black armbands to protest the Vietnam War, the Court emphasized that students could not be confined to expressing officially approved sentiments and receiving officially approved communications.128 Rather, the Court ruled that “[t]he classroom is peculiarly the ‘marketplace of ideas.’”129

Despite the ruling in *Tinker*, commentators still dispute the applicability of the marketplace concept to public high schools.130 Professor Stephen R. Goldstein reasons that education can be divided into two models: the prescriptive, in which teachers furnish accepted truths to a theoretically passive, absorbent student, and the analytic, in which students and teachers actively participate in the search for truth through an examination of data and values.131 He asserts that the high school classroom serves a prescriptive function that is inconsistent with the marketplace concept.

Another commentator, however, argues that while the function of the high school classroom is prescriptive, the function of the li-

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125 See text accompanying notes 134-40 infra.
128 Id. at 511.
129 Id. at 512 (quoting *Keyishian*, 385 U.S. at 603).
library is analytic.\textsuperscript{132} Compulsory attendance and uniform curriculum requirements evidence the prescriptive nature of the high school classroom. On the other hand, students are not compelled to use the high school library. The library generally contains works outside the standard curriculum requirements and allows students to pursue their own interests. Thus, the statement in \textit{Minarcini} that "the library is a mighty resource in the marketplace of ideas"\textsuperscript{133} is especially cogent.

Equally cogent is the proposition that the right to receive information derives from the marketplace concept.\textsuperscript{134} Justice Brennan's statement that "[i]t would be a barren marketplace of ideas that had only sellers and no buyers"\textsuperscript{135} illustrates the logic of the derivation. The purpose of the marketplace concept is to preserve "that robust exchange of ideas which discovers truth out of a multitude of tongues."\textsuperscript{136} The Supreme Court has stated similar goals as the purpose of the right to receive information. For instance, in \textit{Martin v. City of Struthers}\textsuperscript{137} the Court reasoned:

The authors of the First Amendment knew that novel and unconventional ideas might disturb the complacent, but they chose to encourage a freedom which they believed essential if vigorous enlightenment was to triumph over slothful ignorance. This freedom embraces the right to distribute literature [citations omitted] and necessarily protects the right to receive it.\textsuperscript{138}

And in \textit{Red Lion Broadcasting Co. v. FCC},\textsuperscript{139} the Court emphasized that the rights of radio listeners mandated that stations function consistently with the purposes of the first amendment and declared that one of those purposes was preservation of an uninhibited marketplace of ideas.\textsuperscript{140} These decisions indicate that the right to receive information springs from the marketplace concept.

\textbf{B. The Prima Facie First Amendment Violation}

The next analytical step is to determine to what extent the mar-
ketplace concept and the right to receive information apply to a high school student's challenge of a library book removal. *Red Lion* defined the scope of those concepts, stating that they protected "the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences." Thus, if the right to receive information and the marketplace concept are fully applicable to the high school student, *Red Lion* directly contradicts *Zykan*’s holding that it is permissible for school boards to remove books based on the personal moral and political views of its members.

In so holding, the Seventh Circuit relied primarily on *Cary v. Board of Education*. An examination of *Cary* indicates that this reliance was misplaced insofar as it applied to library book removals. In *Cary*, a group of teachers challenged the school board’s prohibition of ten textbooks. The Tenth Circuit upheld the board’s decision, “even though it was a political one influenced by the personal views of the members.” The court recognized that *President’s Council* and *Minarcini* raised similar issues but explicitly refused to extend its holding to cases of public school library book removals. Furthermore, the court relied heavily on a concurring opinion of Justice Black in *Epperson v. Arkansas*, which reasoned that a teacher contractually agrees to teach what the school board designates and the first amendment does not justify his breach of that agreement. This reasoning has no application in a library book removal case. Thus, *Cary* is inapplicable to library book removals.

Yet the *Zykan* opinion so applied it and Judge Mansfield’s dissent in *Pico* followed *Zykan*. Judge Mansfield also used *James v. Board of Education* as authority for upholding book removals based on the personal preferences of the board members. In *James*, the Second Circuit wrote that “a principal function of all . . . secondary education is indoctrinative whether it be to teach the ABC’s or multiplication tables or to transmit the basic values of the community.” However, by stating that a principal function of the secondary schools is indoctrinative, the *James* opinion implies that other functions exist

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141 395 U.S. at 390.
142 598 F.2d 535 (10th Cir. 1979).
143 Id. at 544.
144 Id. at 542.
145 Id. at 540 (quoting 393 U.S. at 113-14).
146 631 F.2d at 1305.
147 638 F.2d at 426.
148 461 F.2d 566 (2d Cir. 1972).
149 638 F.2d at 426 (quoting 461 F.2d at 573).
which are not indoctrinative and which may be analytic. As has been illustrated, the school library serves an analytic function. Therefore, *James* is not necessarily authority for the validation of library book removals based on the personal preferences of board members.

From *Red Lion*, it can be inferred that a prima facie violation of the public's right to receive information occurs when suitable access to varying political, moral, esthetic and social views is restricted. This standard, however, is too broad to apply to the school setting. Rather, the school should be classified as a political marketplace of ideas, giving rise to a right to receive political information. The Supreme Court first applied the marketplace concept to schools in order to preserve a national leadership trained through a broad ideological exposure. This concern with the nation's leadership indicates that the Court intended the schools to be primarily a political marketplace. Judge Newman, concurring in *Pico*, also acknowledged the political marketplace concept, stating:

> [P]olitical thought is a particularly important and sensitive area. Our society depends for its choice of leaders and basic policy decisions on the independent thinking of its citizens, and on the vitality of the marketplace of ideas. [citation omitted] . . . Education plays a significant role in preparing students for those responsibilities of citizenship.

Furthermore, many of the right-to-receive-information cases indicate a political justification for that right. Case law thus supports the concept of the school library as a political marketplace of ideas.

Practical considerations also support a right to receive political information in public school libraries. Eighteen-year-olds, seniors in high school or recent graduates, have the right to vote. Should the government reinstate the draft, they would be among the first called to serve. A recent survey indicates that nearly half of the age sixteen and over population never reads a book. Consequently, school boards that remove books because they conflict with the personal political views of board members, effectively deny to many students

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150 *Keshishian*, 385 U.S. at 603.
151 638 F.2d at 435.
an exposure to alternative political viewpoints. These same students are then called to elect and to serve a government of which they may be woefully uninformed.

Thus, both precedent and policy support the doctrine that a prima facie first amendment violation occurs when a school board removes a high school library book based upon the personal political views of the board members. Removal of materials dealing with public figures, public issues or other important social matters\textsuperscript{154} indicates that the removal was politically motivated.

Once a plaintiff establishes a prima facie case, the school board should have defenses to assert. \textit{Procunier v. Martinez}\textsuperscript{155} sets out the standard for defenses to violations of the right to receive information. In \textit{Procunier}, the Supreme Court held that censorship of prisoners' outgoing mail violated the addressees' first amendment right to receive information.\textsuperscript{156} The Court then held that such a violation was justified only if the prison officials met two criteria. First, the censorship had to further "an important or substantial government interest unreleated to the suppression of expression." Second, the restriction had to be "no greater than [was] necessary or essential to the protection of the particular governmental interest involved."\textsuperscript{157}

The \textit{Procunier} criteria should apply equally to a school board's removal of library books in violation of the students' right to receive political information. Examples of legitimate and substantial governmental interests include a book's obsolescence, protection of the psychological well-being of the students,\textsuperscript{158} preservation of school discipline\textsuperscript{159} and vulgarity or indecency.\textsuperscript{160} Under the approach which this note suggests, board members could constitutionally apply their individual tastes and preferences in determining what is vulgar and indecent.

Finally, once the school board has asserted a valid defense the students should have an opportunity to show that the purportedly valid reason for the removal is actually a pretext for the assertion of personal political views.

\begin{itemize}
\item \textsuperscript{154} Steel, \textit{supra} note 152, at 341.
\item \textsuperscript{155} 416 U.S. 396 (1973).
\item \textsuperscript{156} \textit{Id.} at 409.
\item \textsuperscript{157} \textit{Id.} at 413. \textit{Accord, Pico}, 638 F.2d at 415. (Sifton, J.). Judge Sifton does not use \textit{Procunier} as authority, probably because he does not rely on the right to receive information.
\item \textsuperscript{158} Trachtman v. Anker, 563 F.2d 512, 517 (2d Cir. 1977), \textit{cert. denied}, 435 U.S. 925 (1978).
\item \textsuperscript{159} \textit{Tinker}, 393 U.S. at 513.
\end{itemize}
C. Suggested Means of Proof

Students have several available means by which to prove that a school board's removal of a library book was based on the personal political views of its members. First, the act of removal itself is strong evidence that the board members are exercising personal values or preferences. If the banned material concerns public figures, public issues or other important social matters and the board has not explained its reasons for the removal, a rebuttable presumption should arise that the school board based the removal on its members' personal political preferences. This presumption would abrogate the students' difficult task of proving the board's motive and encourage school boards to explain their actions. Any school board departure from established book removal procedures also evidences an impermissible removal, especially when those procedures provide for non-board input. Similarly, the lack of an established procedure requiring non-board input into book removal decisions is evidence the personal preferences motivated board decisions. These means of proof encourage local school boards to implement and follow book removal procedures that allow for input from parents, teachers, students and administrators.

Similar means of proof are available to defendant school boards in book removal cases. Steps short of removal, such as making the book available on direct loan to parents, indicate that the board's motive is not assertion of personal political preferences, but protection of students' well-being. Procedures allowing for non-board input into removal decisions are, likewise, proof that the board is not asserting personal preferences. Finally, board explanations concurrent with the removal, which authorize discussion of the book's political ideas and enumerate the legitimate reasons for the removal,

161 See Pico, 638 F.2d at 434 (Newman J. concurring).
162 Steel, supra note 152, at 341.
163 "The dangers of unrestrained discretion are readily apparent. . . . By requiring the Board . . . to justify its actions when there is a colorable claim of deprivation of first amendment rights, we establish a prophylactic procedure that automatically tempers the abuse of a properly vested right." James v. Board of Educ., 461 F.2d at 575.
164 In Salvail, the board voted not to follow interim book removal guidelines providing for input from library personnel, administrators and teachers. 469 F. Supp. at 1271. In Zykhan, the board disregarded the "Croft policy," 631 F.2d at 1302, which required teacher, administrator and lay input. Brief for Appellants at 3. In Pico a committee of school staff members and parents reviewed the books and made recommendations which the board ignored. 638 F.2d at 410-11. In Bicknell, the board declined to follow a procedure requiring parental input. 638 F.2d at 440-41.
demonstrate that the board's reasons are valid and not mere pretexts for the assertion of personal political preferences.

Students could prove pretext by showing that the board did not remove books which it knew contained material similar to that legitimately objected to in the removed books or by showing that the board formulated and advanced constitutionally valid explanations for the removal only after students challenged the removal in court.

III. Conclusion

No single test has been established for determining when removal of a book from a public school library violates the first amendment. Rather, a spectrum of standards exist which vary from circuit to circuit and even within the Second Circuit. A balance is needed between the students' first amendment rights and the community's right, through its school board, to regulate the books its children read. In striking that balance, the suggested approach encourages open, rational decision-making, discourages arbitrary abuse of discretion and adds a measure of certainty to an unstable area of first amendment law.

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165 See Salvail, 469 F. Supp. at 1274.
166 See Right to Read, 454 F. Supp. at 712.