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THE RIGHT TO KNOW AND SCHOOL BOARD CENSORSHIP OF HIGH SCHOOL BOOK ACQUISITIONS

In a recent Ohio textbook case,[1] the Sixth Circuit recognized the emerging constitutional concept of a "right to know."[2] Holding that a student's right to receive information limited a school board's power to remove books from his high school library, the court declared the existence of the right,[3] but did not discuss its content. Although the Sixth Circuit specifically relied upon the right to know in its decision, the court did not adequately ground the right in the Constitution.[4] Thus the right to know remained a concept with little analytic meaning, offering only slight constitutional protection.

Minarcini v. Strongsville City School District[5] arose in 1972 after a high school English teacher proposed the use of Joseph Heller's *Catch-22* and Kurt Vonnegut, Jr.'s *God Bless, You, Mr. Rosewater* as texts for the following school year. As in other textbook cases,[6] vehement disagreement regarding the merits of the books[7] dominated public discussion by the School Board and a citizen's committee.[8] The Board subsequently voted to reject the books as texts and also

[1] Minarcini v. Strongsville City School Dist., 541 F.2d 577 (6th Cir. 1976).

[2] *See* note 44 *infra.*

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

[4] The Sixth Circuit did not indicate from which first amendment guarantee the right to know derived, *see* text accompanying notes 57-59 *infra,* nor did it indicate the extent of protection from the right, *see* text accompanying notes 46-52 *infra.* Thus *Minarcini* joins the line of cases which do no more than point to the right to know, without defining or explaining it. *See* note 44 *infra.*

[5] 541 F.2d 577 (6th Cir. 1976), *modifying,* 384 F. Supp. 698 (N.D. Ohio 1974).

[6] *E.g.,* Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972); Williams v. Board of Educ., 388 F. Supp. 93 (S.D.W.Va.), *disposition recorded,* 530 F.2d 972 (4th Cir. 1975)(nationally publicized incident in Kanawha County, West Virginia); Grosser v. Woollett, 45 Ohio Misc. 15, 341 N.E.2d 356 (Ct. of C.P., Cuyahoga County 1974)(arising in same school system as *Minarcini).*

[7] Although the public discussion was over the literary value of the books, at trial their artistic merit was conceded. 384 F. Supp. at 703-04. *See* notes 17 and 43 *infra.*

[8] After approval by the Faculty Textbook Selection Committee the recommendations were sent to the Director of Secondary Education and to the Citizen's Textbook Committee. The Citizen's Committee then sent its own proposals to the Director, who presented the recommendations of both committees to the Educational Program and Policy Committee of the School Board. Thereafter, the School Board considered the recommendations of the Director and the three committees before deciding which books to use in the next school year. 384 F. Supp. at 700.

to remove them from the high school library.[9] Five students then sued for declaratory and injunctive relief,[10] asserting violation of their first and fourteenth amendment rights.[11]

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[9] 541 F.2d at 579. A related issue is the school board's authority to censor student publications, both official school newspapers and unofficial "underground" newspapers. *See* Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975) (school regulations on student newspapers vague and overbroad); Gambino v. Fairfax County School Dist., 45 U.S.L.W. 2414 (E.D. Va. Feb. 23, 1977) (school board censorship of student newspaper article concerning birth control violated first amendment); Leibner v. Sharbaugh, 45 U.S.L.W. 2414 (E.D. Va. Feb. 35, 1977 *[(sic)]* (ruling requiring student newspaper to conform to journalistic standards of newspapers of general circulation unconstitutional); Note, *First Amendment—Prior Restraint—Board of Education Rule Requiring Submission of Private Student Newspapers Is Unconstitutionally Vague and Overbroad*—Nitzberg v. Parks, 35 MD. L. REV. 512 (1976); Note, *Prior Restraints in Public High Schools,* 82 YALE L. J. 1325 (1973).

[10] The students, through their parents as next friends, brought suit under 42 U.S.C. § 1983 (1970)(deprivation of civil rights under color of state law or custom) and 28 U.S.C. § 1343(3) (1970)(federal district courts have original jurisdiction of suits alleging deprivation, under color of state law, of civil rights). Pursuant to FED. R. CIV. P. 23 the district court certified the class of all students enrolled in schools operated by the Strongsville City School District, 384 F. Supp. at 708, and the appellate court affirmed the determination of the class, 541 F.2d at 579.

Although neither of the *Minarcini* courts discussed the issue, there is a substantial question whether school board members or school districts are subject to suit under § 1983. School board members may be immune from § 1983 suits, Wood v. Strickland, 420 U.S. 308 (1975) (school board members have qualified immunity from damages under § 1983; if members knew or should have known they violated student's constitutional rights, or acted with malicious intent, board members are liable). The Supreme Court recently decided that school districts are more like "political subdivisions" than "states," and have no eleventh amendment immunity. Mt. Healthy City School Dist. Bd. of Educ. v. Doyle, 97 S.Ct. 568, 572-73 (1977). The circuits are split regarding whether a school district is a "person" within the terms of 42 U.S.C. § 1983; *Compare* Singleton v. Vance County Bd. of Educ., 501 F.2d 429 (4th Cir. 1974) (school district is not a person) *with* Keckeisen v. Independent School Dist. 612, 509 F.2d 1062 (8th Cir.), *cert. denied*, 423 U.S. 833 (1975) (school district is a person). The Supreme Court reserved decision of this issue in the *Mt. Healthy* case. 97 S.Ct. at 572. *See generally* Note, *Immunity of Teachers, School Administrators, School Board Members, and School Districts From Suit Under Section 1983 of the Civil Rights Act,* 1976 U. ILL. L.F. 1129.

[11] The plaintiffs alleged violation of their rights of "academic freedom, freedom of speech, due process, and equal protection of the laws." 384 F. Supp. at 700. Two years after the *Minarcini* events, the School Board was again attacked for its textbook decisions. Grosser v. Woollett, 45 Ohio Misc. 15, 341 N.E.2d 356 (Ct. of C.P., Cuyahoga County, 1974). In *Grosser,* the Board approved the use of Claude Brown's *Manchild In The Promised Land* and Ken Kesey's *One Flew Over The Cuckoo's Nest.* Several of the citizens involved in the *Minarcini* events thereafter went to local courts for an order enjoining the use of the books. The Court of Common Pleas ruled the books could be used, but only if the students had written consent from their parents. 341 N.E.2d at 368.

Without separating the two issues of school board control of textbook selection and school board removal of library books, the district court focused on the "editorial judgment"[12] necessary to allocate the limited resources of a school system. Since the Ohio legislature had delegated the exercise of this judgment to local school boards,[13] the only question deemed open by the district court was whether this particular school board had impermissibly exercised its authority so as to violate first amendment rights of students.[14] The court interpreted the plaintiffs' complaint in light of the Board's "editorial judgment" so that a violation of first amendment rights would not merely entail control by the Board, but arbitrary or capricious exercise of that control, as charged by the plaintiffs.[15] Traditional first amendment notions of censorship were apparently replaced by a consideration more closely related to procedural due process.[16] The district

[12] 384 F. Supp. at 704. Examining the kind of decisionmaking required, the court stated that editorial judgment was an "inescapable aspect of operating a school system." *Id.*

[13] *See* OHIO REV. CODE ANN. §§ 3329.01-.99 (Page 1972). In particular, *id.* §§ 3329.07-.08 (Page 1972) requires that the local school board determine which and how many textbooks will be required for the coming year, and which textbooks will be used in the schools under its control. OHIO REV. CODE ANN. § 3329.05 (Page 1972) provides that library books and other non-textbooks need not undergo the rigorous control procedures that are required for textbooks. The constitutionality of these statutes was conceded at trial. 384 F. Supp. at 705.

[14] 384 F. Supp. at 705.

[15] The court stated that the basis of the complaint was the Board's asserted failure to specify standards and procedures for purchasing textbooks. Thus the court reviewed the purchasing procedure as written and applied by the Board. *Id.* at 705-06.

The concept of arbitrary and capricious action has long been used to express the procedural, as opposed to the substantive, aspects of the requirement of due process of law. In Nebbia v. New York, 291 U.S. 502, 536 (1934), the Court stated that the function of the courts is to determine whether the challenged regulation is reasonable, or whether it is "arbitrary or discriminatory." *See also* Chas. Wolff Packing Co. v. Court of Indus. Relations, 262 U.S. 522, 534 (1923) (freedom of contract subject to a variety of restraints, but "they must not be arbitrary or unreasonable"); Chicago, B. & Q. Ry. v. Illinois *ex. rel.* Drainage Comm'rs, 200 U.S. 561, 592 (1906) (validity of regulation depends upon "the character of the regulation, whether arbitrary or reasonable"); Barbier v. Connolly, 113 U.S. 27, 31 (1885) ("there should be no arbitrary deprivation of life or liberty").

[16] Although speech has never been "absolute, above and beyond control by the legislature," Dennis v. United States, 341 U.S. 494, 508 (1951), the first amendment has traditionally been concerned with the power of a "state to forbid or proscribe advocacy." Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). While there have been exceptions, such as the procedural safeguards placed upon the effort to repress unprotected speech in Freedman v. Maryland, 380 U.S. 51 (1965) (obscenity), the general emphasis of first amendment analysis has been whether the state has the power to limit speech at all, not the form or manner of regulation. This is illustrated by the

court concluded that the Board had not acted arbitrarily,[17] and that the plaintiffs had not been denied academic freedom or first and fourteenth amendment rights.[18]

On appeal, the Sixth Circuit sharply distinguished textbook selection from library regulation, and analyzed the two separately. Adopting the trial court's rationale as to the Board's control of the curriculum, the court of appeals stated that someone must exercise discretion as to textbook selection, and there was no constitutional principle prohibiting school board officials from doing so.[19] In addition, the court found that the facts presented in *Minarcini* failed to disclose any due process violation by the Board.[20]

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distinction of protected versus unprotected speech, *e.g.*, Roth v. United States, 354 U.S. 476, 481 (1957) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942) (fighting words), and the use of the "clear and present danger" standard for the regulation of protected speech. *See* Brandenburg v. Ohio, 395 U.S. 444 (1969); Dennis v. United States, 341 U.S. 494 (1951); Schenck v. United States, 249 U.S. 47 (1919). By examining whether the Board's exercise of control was arbitrary, however, the district court moved from the question of regulation per se to the procedural question of the manner of regulation.

[17] 384 F. Supp. at 706. The district court concluded that the textbook purchasing procedure was "fair, equitable, and logical," and further found no arbitrary or capricious acts by the Board in administering the procedure. *Id.*

Since the textbook purchasing issue was essentially procedural, the *Minarcini* trial court stated that literary merit had been conceded and that the novels were not on trial. *Id.* at 703-04. This was not true of the *Grosser* proceedings, *see* note 11 *supra*, where the court held that the school board could not exercise its discretion to distribute books deemed "harmful to juveniles," as defined by OHIO REV. CODE ANN § 2907.01(E) (Page 1972). The *Grosser* court concluded that the books *One Flew Over the Cuckoo's Nest* and *Manchild In The Promised Land*

> have no literary, artistic, political or scientific value whatsoever. . . . The contents of the books were designed by the authors to appeal to the base instincts of persons and to shock others for the purpose of effectuating sales of the books.
>
> It is difficult to think of any material, except the hardest of hardcore pornography that the legislature intended to outlaw if not such as the subject books. The court does find that each of these books is offensive. . . .

341 N.E.2d 356, 367.

[18] 384 F. Supp. at 709. The district court also found that the Board issued no directive "precluding any instructor from discussing any or all of the novels in class or assigning any such novel as outside reading . . .", *id.* at 706-07, and dismissed a portion of the complaint alleging such acts. *Id.* at 708.

[19] 541 F.2d at 579.

[20] *Id.* at 580. The Sixth Circuit interpreted the language of the district court to refer to procedural due process. An ambiguity exists in the two opinions in the unexplained use of the phrase "first *and fourteenth amendment* rights." The emphasized words may designate the use of the due process clause of the fourteenth amendment

The Sixth Circuit could not, however, extend this locus-of-decisionmaking rationale to uphold the Board's removal of books from the school library. The difference was due to what the Sixth Circuit termed "the right of students to receive information which they and their teachers desire them to have."[21] This right to know demanded at least a constitutionally neutral explanation for the exercise of the Board's authority.[22] None was made, and the court of appeals reversed the trial court's dismissal of that portion of the complaint.

The first of the two main issues[23] discussed in *Minarcini* was the

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which expands the protection of the first amendment to state action. *See* Stromberg v. California, 283 U.S. 359, 368 (1931); Whitney v. California, 274 U.S. 357, 371 (majority), 373 (1927)(Brandeis and Holmes, JJ., concurring), *overruled on other grounds*, Brandenburg v. Ohio, 395 U.S. 444 (1969); Gitlow v. New York, 268 U.S. 652, 666 (1925). Alternatively, the reference to the fourteenth amendment may designate the requirement that there be fair procedure in the conduct of proceedings affecting legal rights. *See, e.g.*, Adamson v. California, 332 U.S. 46, 67 (1947)(Frankfurter, J., concurring) ("an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples"). It was in this latter sense, apparently, that the Sixth Circuit construed the phrase.

The district court may have intended to include elements of both applications of the phrase, for after examining the fairness of the procedure the district court discussed pure first amendment issues under the speech, establishment and exercise clauses. *See* 384 F. Supp. at 706-07. Applying both the fair procedure requirement and the first amendment-protective requirement, the court could replace the usual censorship test of the first amendment, *see* note 16 *supra*, with one more procedural in scope. *See* text accompanying notes 12-16 *supra*. To construe the district court's opinion as referring solely to procedural due process, however, with no influence from substantive first amendment concerns, would be to render the trial court's discussion of first amendment issues superfluous.

[21] 541 F.2d at 583.

[22] *Id.* at 582. Presumably, the right to know cannot be any more absolute than the first amendment from which it arises. *See* note 16 *supra*. Thus, in some circumstances the right may be justifiably abridged or restricted, as freedoms of speech ("clear and present danger," *see* note 16 *supra*), press ("actual malice," *see* New York Times Co. v. Sullivan, 376 U.S. 254 (1964)), or religion (incidental burdens justified by substantial government interests, *see* Gillette v. United States, 401 U.S. 437 (1971)) may be. Because the right to know does not seem to be an affirmative, enforceable claim, *see* text accompanying notes 46-55 *infra*, the Sixth Circuit did not require a showing of such special circumstances as other first amendment rights demand, but only an explanation in neutral terms.

[23] A third issue mentioned in the case was the plaintiffs' claim of a violation of academic freedom. Alleging that the School Board had issued directives prohibiting any class discussion, or any supplemental use of the books, the plaintiffs contended that their academic freedom, as protected by the first amendment, had been restricted. The district court made a factual determination that the Board had not passed such a resolution or directive. 384 F. Supp. at 706-07. *See* note 13 *supra*. The appellate court

authority of the school board to overrule a teacher's professional decision. While there has been recent litigation of this issue,[24] the best analysis[25] would seem to be the locus-of-decisionmaking rationale adopted by both courts in *Minarcini.* Editorial judgments are inevitable in administering a school system since limitations of time, space, and finances demand that certain textbooks be selected and others rejected.[26] Thus the issue is not simply one of censorship. The issue

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affirmed this finding, 541 F.2d at 584, and consequently the issue of academic freedom was not analyzed.

The Constitution has been invoked by public school students only rarely, and then usually to challenge statutes or school rules governing the conduct. *See Developments in the Law: Academic Freedom*, 81 HARV. L. REV. 1045, 1128 (1968) [hereinafter cited as *Developments-Academic Freedom*]. The concept of academic freedom involves the claim that a community of scholars in the pursuit of knowledge should be immune from ideological coercion. This is based on the assertion that the societal value to be derived from the scholarly community can be gained only in at atmosphere free of "administrative, political, or ecclesiastical constraints on thought and expression." *Id.* at 1048. In light of the value-inculcative purpose of secondary public education, as contrasted with the broader intellectual investigation of the university level education, *see id.* at 1154-55 and text accompanying notes 28-33 *infra*, it would not appear that the concept would form a sufficient basis for a high school student to challenge library book acquisition decisions.

The issue of academic freedom has generated much discussion. *See, e.g.*, T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 593-626 (1970); Kutner, *The Freedom of Academic Freedom: A Legal Dilemma*, 48 CHI.-KENT L. REV. 168 (1971); Van Alstyne, *The Constitutional Rights of Teachers and Professors*, 1970 DUKE L.J. 841.

[24] *See* Mailloux v. Kiley, 436 F.2d 565 (1st Cir.), *after dismissal*, 323 F.Supp. 1387 (D. Mass.), *aff'd.* 448 F.2d 1242 (1st Cir. 1971) (per curiam) (teacher who in good faith chose teaching method relevant to subject and students, and which could be regarded as serving serious educational purpose, could not be discharged for using such method); Keefe v. Geanakos, 418 F.2d 359, 361 (1st Cir. 1969) (teacher may, for demonstrated educational purposes, quote a "dirty" word); Parducci v. Rutland, 316 F. Supp. 352 (M.D. Ala. 1970) (where public school officials failed to show that assigned short story was inappropriate or created significant disruption to educational process, dismissal of teacher violated first amendment).

[25] An outstanding article in the area of school board control of texts is Goldstein, *The Asserted Constitutional Right of Public School Teachers to Determine What They Teach*, 124 U. PA. L. REV. 1293 (1976) [hereinafter cited as Goldstein]. Professor Goldstein supports the locus-of-decisionmaking rationale with a careful analysis of the values and purposes of prescriptive, secondary education. *See* text accompanying note 29 *infra*. *See generally* Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373 (1969); Nahmod, *Controversy in the Classroom: The High School Teacher and Freedom of Expression*, 39 GEO. WASH. L. REV. 1032 (1971); Nahmod, *First Amendment Protection for Leaning and Teaching: The Scope of Judicial Review*, 18 WAYNE L. REV. 1479 (1972); Project—*Education and the Law: State Interests and Individual Rights*, 74 MICH. L. REV. 373 (1976).

[26] 384 F. Supp. at 704. *See* note 12 *supra*.

is whether the teacher or the elected school board should exercise the necessary judgment.[27]

The function of secondary school education, as contrasted with university level education, is significant in making this determination. The goal of secondary education is to inculcate certain preferred values in the students,[28] and may be termed "prescriptive."[29] In contrast, university level students are encouraged to examine all values and ideas; their education is "analytic," that is, learning in a marketplace of diverse, competing ideas.[30] The determination of which ideas are socially preferred, and thus are to be taught in public secondary schools, is a predominantly political decision. As such, the determination is best left to the political mechanisms of the state government.[31] The state may choose to delegate the decision to local, elected school boards,[32] as arbiters of community values, but individual teachers should not be allowed to overrule the decisions "of society."

Beyond this political analysis, the right of a teacher to vary the determinations of the school board would appear to be constricted by the employer-employee relation between the board and the teacher. This is demonstrated by two facets of the claim of the teacher to

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[27] *See* Goldstein, *supra* note 25, at 1334.

[28] The District Court of Massachusetts in Mailloux v. Kiley, 323 F. Supp. 1387 (D. Mass. 1971), noted the difference between secondary and higher education, stating that

> members of the community usually expect the secondary school to concentrate on transmitting basic information, teaching "the best that is known and thought in the world," training by established techniques, and, to some extent at least, indoctrinating in the *mores* of the surrounding society. While secondary schools are not rigid disciplinary institutions, neither are they open forums in which mature adults, already habituated to social restraints, exchange ideas on a level of parity.

Id. at 1392. *See also Developments-Academic Freedom, supra* note 23, at 1050, 1098.

[29] The terms "analytic" and "prescriptive" were used by Professor Goldstein in examining student rights. *See* Goldstein, *Reflections on Developing Trends In The Law Of Student Rights*, 118 U. PA. L. REV. 612, 614 (1970).

[30] *See* Goldstein, *supra* note 25, at 1297.

[31] While teachers are highly trained and educated, they are still not suited to resolve such political questions.

> Such judgments [as to what should be taught] are not of the type which the prior training and experience of teachers have uniquely equipped them to answer definitively for society, either as individual teachers or as an organized faculty or profession. These are truly political questions that should be determined by instruments of societal will rather than by professional experts.

Goldstein, *supra* note 25, at 1337-38 (footnote omitted).

[32] *E.g.*, OHIO REV. CODE ANN. §§ 3329.07-.08 (Page 1972).

determine what materials will be used. If selection of textbooks is viewed as a duty of employment, then the teacher's claim would be that he is free of the normal power of the employer to control the actions of the employee within the scope of employment.[33] Alternatively, if selection of textbooks is viewed as an exercise of protected speech, then the claim would be that the teacher is not merely to be free of unconstitutional conditioning[34] of his right to speech, but is to be paid for exercising that right. In short, the teacher demands subsidized speech rather than speech free of interference.[35] Neither of these claims seems fully tenable.

The political nature of the textbook decision and the restrictive nature of the employment relationship furnish ample reason why the authority to select textbooks should rest finally with the school board and not with the teacher. The trial court recognized these considerations,[36] and the Sixth Circuit adopted the same rationale.[37] The Sixth Circuit did not apply this reasoning, however, to the second main issue, that of library book regulation. The difference in result was due to the putative right to know, to read books, and to receive information. The prescriptive/analytic distinction that may be drawn from the functions of secondary and higher education[38] may also be applied to the different functions of the classroom and the library. Within the secondary school, the library serves a more analytic purpose while the classroom is the center of the prescriptive, value-inculcative effort. Thus a denial of access to books and ideas would be manifestly more serious in the library than in the classroom. Consequently, the Sixth Circuit accepted the School Board's general decisionmaking authority as final in the classroom,[39] but stated that the exercise of this authority over the library might curtail freedom of speech and thought, and should be carefully limited.[40]

For the district court, the necessary process of book selection did not in itself violate first amendment rights unless it was shown to have been carried out unfairly.[41] This approach would place upon the

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[33] *See* Goldstein, *supra* note 25, at 1337. Goldstein points out the difference between the "archetypal professional" and a salaried employee, whose method and manner of performance may be regulated by the employer.

[34] *See* note 51 *infra*.

[35] *See* Goldstein, *supra* note 25, at 1340-41.

[36] 384 F. Supp. at 708-09.

[37] 541 F.2d at 579-81.

[38] *See* text accompanying note 28 *supra*.

[39] 541 F.2d at 579-80.

[40] *Id.* at 581.

[41] 384 F. Supp. at 706. The district judge wrote that "idėological conflicts" would go through "peaceful transition" in a classical dialectic of thesis-antithesis-synthesis,

plaintiffs the burden of showing an impermissible restriction of first amendment freedoms. The Sixth Circuit, however, rested its decision on an undefined right of access to books and ideas arising from the first amendment. Given this right, any removal of books would appear to violate first amendment protections unless explained in constitutionally neutral terms.[42] Thus the Sixth Circuit's approach places upon the defendant School Board the burden of justifying the exercise of its discretion to tailor the content of library acquisitions. In *Minarcini* the Board gave no justification, although some evidence pointed to personal displeasure of the Board members as the impetus for removing the books.[43] Therefore, the court of appeals reversed the trial court's dismissal of the library book acquisition issue.

Although the Sixth Circuit relied specifically upon a right to receive information, it did not discuss the content or the extent of this ill-defined concept.[44] While examining the way in which the protec-

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and the only role of the courts in this process would be to insure equal protection of the law and freedom from capricious action or abuse of authority by any participant. *Id.* at 704. Then, quoting from Presidents Council, Dist. 25 v. Community School Bd. No. 25, 457 F.2d 289, 293 (2d Cir.), *cert. denied,* 409 U.S. 998 (1972), the *Minarcini* district court held that "to suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept." 384 F. Supp. at 705.

[42] By use of the phrase "neutral in First Amendment terms," the Sixth Circuit recognized that there may be a number of reasons for the action of the Board. Some of these purposes would be permissible, while some would violate the rights of the students. The Sixth Circuit required only that the School Board give some valid reason for its action, a purpose that would not infringe the Constitution. 541 F.2d at 582.

[43] The only evidence as to the reason for the School Board's book removal was the minority report of the Citizen's Committee, characterizing *Mr. Rosewater* as "completely sick" and "garbage." *Id.* at 581. In place of *Mr. Rosewater,* the minority report recommended the use of "the autobiography of Captain Eddie Rickenbacker." *Id.* Recognizing the weakness of relying on a minority report, the Sixth Circuit nevertheless stated that it was "the only official clue," and termed the Board's silence "extraordinary in view of the intense community controversy." *Id.* at 582.

[44] The right to know or to receive information had its genesis in Martin v. City of Struthers, 319 U.S. 141 (1943). The Court there held a municipal ordinance forbidding door-to-door distribution of handbills violative of first amendment rights of speech because it substituted the community's judgment for the individual's as to what material was annoying. The Supreme Court recognized that "[t]he right of freedom of speech and press has broad scope. . . . This freedom embraces the right to distribute literature, [citation omitted] and necessarily protects the right to receive it." *Id.* at 143. Although the right to know had been mentioned and relied upon in subsequent cases, it has never been adequately discussed or grounded in the Constitution. *See* Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc., 425 U.S. 748, 757 (1976) ("If there is a right to advertise, there is a reciprocal right to receive the advertising. . ."); Bigelow v. Virginia, 421 U.S. 809, 829 (1975) ("The policy of the First Amendment favors dissemination of information and opinion"); Procunier v.

tion from this right was developed in *Minarcini* offers some understanding of the scope of the right, even after the decision there remain weaknesses in the definition of this asserted constitutional right.[45]

The most important issue still unresolved is the substance of the supposed right. In its most limited sense, the right to know may be no more than a grant of standing to listeners to challenge the denial of a speaker's right of speech.[46] The right to know encompassed more than this in *Minarcini,* however, for the students were asserting a claim of access, in a particular facility, to the books involved. Nevertheless, it would seem undesirable to interpret the right to receive information so broadly as to be an enforceable claim, for this would mean that a student, under the aegis of the right to know, could force the school library to purchase and place into circulation requested books. But the editorial judgment necessary to maintain classroom education is also essential to maintain a school library. The question here is whether there is a constitutional right that may sometimes override that editorial judgment. As between the student and the

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Martinez, 416 U.S. 396, 408 (1974) ("censorship of the communication between [parties] . . . necessarily impinges on the interests of each. Whatever the status of a prisoner's claim to uncensored correspondence with an outsider, it is plain that the latter's interest is grounded in the First Amendment's guarantee of freedom of speech"); Kleindienst v. Mandel, 408 U.S. 753, 763 (1972); Stanley v. Georgia, 394 U.S. 557, 564 (1969) ("[The] right to receive information and ideas, regardless of their social worth, [citation ommitted] is fundamental to our free society"); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969) ("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"); Lamont v. Postmaster Gen., 381 U.S. 301, 305 (1965) (regulation allowing delivery of foreign communist propaganda mailing only upon addressee's affirmative written request unconstitutional because it limited "the unfettered exercise of the addressee's First Amendment rights"); Thomas v. Collins, 323 U.S. 516, 534 (1945) ("that there was a restriction upon . . . the rights of the workers to hear what he [Thomas] had to say, there can be no doubt").

[45] For a general discussion of the right to know, and associated concepts, see 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); O'Neil, *Libraries, Librarians And First Amendment Freedoms,* 4 HUMAN RIGHTS 295 (1975); Steel, *Freedom To Hear: A Political Justification Of The First Amendment,* 46 WASH. L. REV. 311 (1971) [hereinafter cited as Steel].

[46] Several cases have allowed potential listeners to challenge statutes or institutional decisions denying invited guests the opportunity to speak at state institutions. Traditionally this would be seen as the speaker's cause of action, not the listener's, but the speakers did not sue in these cases. *See* Brooks v. Auburn Univ., 412 F.2d 1171 (5th Cir. 1969); Smith v. University of Tenn., 300 F. Supp. 777 (E.D. Tenn. 1969); Snyder v. Trustees of U. of Ill., 286 F. Supp. 927 (N.D. Ill. 1968).

professional librarian, the administration of the library must be left with the professional.[47]

The Sixth Circuit gave to the right to know an intermediate status, which may be characterized as that of a constitutionally-protected interest rather than of an affirmative right.[48] The court of appeals described the library as a privilege created by the state for the benefit of the students,[49] thus preventing students from enforcing claims for access to books not yet possessed by the library, and barred the school board from withdrawing books already in circulation except for good reason. Because the library was a privilege, neither the state nor the School Board was under any duty to provide a library, or any particular book.[50] Also, because the library was a benefit or

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[47] The presence of the professional librarian demonstrates the difficulty of the situation under consideration. A conflict between the school librarian and the school board as to what books to place in circulation may be analogized to the teacher/school board conflict over texts. Again because of the prescriptive purpose of secondary education, *see* note 28 *supra,* and thus the political nature of the decision, *see* note 31 *supra,* the resolution of the conflict should favor the school board. In the posited librarian/student disagreement, the decisionmaking authority clearly should reside with the librarian because of his professional training. However, the question in *Minarcini* was whether the student could dispute the determinations of the school board, and if so, then to what extent.

[48] The right/interest distinction was used by the District Court of Massachusetts in discussing the teacher's asserted right to determine teaching method. The court stated that:

> The so-called constitutional right is not absolute. It is akin to, and may indeed be a species of, the right of freedom of speech which is embraced by the concept of the "liberty" protected by the Fourteenth Amendment. Analytically, as distinguished from rhetorically, it is less a right than a constitutionally-recognized interest. Clearly, the teacher's right must yield to compelling public interests of greater constitutional significance.

Mailloux v. Kiley, 436 F.2d 565 (1st Cir.), *after dismissal,* 323 F. Supp. 1387, 1391 n.4 (D. Mass.), *aff'd,* 448 F.2d 1242 (1st Cir. 1971) (per curiam).

The usual forum in which the right/interest distinction appears is the equal protection case, where the level of the interest determines the judicial scrutiny of the challenged classification. Graham v. Richardson, 403 U.S. 365, 375-76 (1971); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Those restrictions which infringe fundamental rights or liberties are examined with "strict scrutiny," and a compelling state interest must be shown to justify the restriction. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 29 (1973); Shapiro v. Thompson, 394 U.S. 618, 634 (1969). Restrictions which infringe upon interests not "explicitly or implicitly guaranteed by the Constitution," and thus not fundamental rights, may be justified merely by showing a rational basis for the classification. San Antonio Independent School Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

[49] 541 F.2d at 581.

[50] *Id.* at 582.

privilege, the court could apply an analysis similar to the doctrine of unconstitutional conditions[51] to hold that the Board could not condition the use of the library upon terms related solely to the personal tastes of Board members.[52] Removal of the books would constitute a condition on or withdrawal of the privilege of the library, and could only be undertaken for reasons which were neutral in terms of the first amendment.

In response to the possible contention that the removal of one or two books would not rise to the level of a withdrawal of the privilege, the Sixth Circuit seemed to suggest two answers. First, an order removing books from school facilities was a much more serious burden on class discussion than an order restricting the wearing of political armbands, which had previously been declared unconstitutional by the Supreme Court.[53] If there was insufficient justification for that burden, apparently the present burden on class discussion could not be supported either. Second, the absolute impact of the restraint was itself irrelevant. The books may have been available to students from sources beyond the school, but that circumstance did not alter the fact that access to school resources had been restricted. This contention was amply supported by prior cases holding that the exercise of first amendment rights could not be abridged at certain times or places merely because they could have been exercised equally well at other times or places.[54] If the right to know does enjoy first amend-

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[51] The doctrine of unconstitutional conditions provides that a state may not condition the enjoyment of a privilege or benefit upon the surrender of a constitutional right. The doctrine essentially declares that the state cannot do indirectly what it is not allowed to do directly, that is, coerce a citizen into surrendering a constitutional right. *See* Van Alstyne, *The Demise of the Right-Privilege Distinction In Constitutional Law*, 81 HARV. L. REV. 1439, 1445-49 (1968).

[52] Stated conversely, the doctrine of unconstitutional conditions may mean that a privilege, once extended, may not be withdrawn without constitutionally justifiable reasons. On the *Minarcini* facts, the Sixth Circuit found that the School Board essentially withdrew the privilege, *see* text accompanying notes 53-55 *infra*, for reasons of its own social tastes. These reasons were not constitutionally justifiable. 541 F.2d at 582.

[53] *Id.* In Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503 (1969), three high school students were suspended for wearing black armbands in protest of the American war effort in Vietnam. The Supreme Court held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students." *Id.* at 506. Since the wearing of the armbands was not disruptive of class order, and did not impinge upon the rights of others, the activity fit within the strictures of that special environment and was protected by first amendment freedom of speech.

[54] Recently, the Supreme Court stated in Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc., 425 U.S. 748, 757-58 n.15 (1976), that "[w]e are

ment protection, it may not be restricted "on the plea that it may be exercised in some other place."[55]

Thus the Sixth Circuit's concept of the right to know is apparently more than a grant of standing, but less than a full affirmative right. While the scope of the interest has been somewhat vaguely defined,[56] there remain other undefined elements of the right to know. For example, it is unclear whether the right to receive information is a guarantee of a specific clause in the Bill of Rights,[57] or is a penumbral right[58] emanating from the Bill of Rights as a whole.[59] Alternatively, the right to know may arise from a broader theory of the first amendment, one which protects free expression as a means of achieving important societal values.[60] Neither the Sixth Circuit in *Minarcini*

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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. . . . Nor have we recognized any such limitation on the independent right of the listener to receive the information sought to be communicated." *See, e.g.*, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 556 (1975) ("Even if a privately owned forum had been available, that fact alone would not justify an otherwise impermissible prior restraint. Thus, it does not matter for purposes of this case that the board's decision might not have had the effect of total suppression of the musical in the community."); Spence v. Washington, 418 U.S. 405, 411 n.4 (1974) (Court summarily rejected the view that the "inhibition of appellant's freedom of expression [is] 'miniscule and trifling' because there are 'thousands of other means available to [him] for the dissemination of his personal views. . . .' "); Schneider v. State, 308 U.S. 147 (1939) (municipal ordinances banning distribution of handbills along streets or sidewalks not validated because distribution may be undertaken elsewhere).

[55] Schneider v. State, 308 U.S. 147, 163 (1939).

[56] *See* cases cited note 44 *supra.*

[57] The right to know may arise under the first amendment speech clause, *see* Van Alstyne, *Political Speakers At State Universities: Some Constitutional Considerations,* 111 U. PA. L. REV. 328, 331-32 (1963); the press clause, *see* Henkin, *The Right To Know And The Duty To Withhold: The Case Of The Pentagon Papers,* 120 U. PA. L. REV. 271 (1971); or the petition and assembly clauses, *see* Steel, note 45 *supra.*

[58] The Supreme Court stated in Griswold v. Connecticut, 381 U.S. 479, 484 (1965), that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."

[59] The right of privacy arose from a number of specific guarantees contained in the Bill of Rights. Among these were the first amendment right of association, the third amendment prohibition of quartering soldiers in houses without the consent of the owner, the fourth amendment in its entirety, the self-incrimination clause of the fifth amendment, and the ninth amendment. Griswold v. Connecticut, 381 U.S. 479, 484 (1965). *See also* Doe v. Bolton, 410 U.S. 179 (1973); Roe v. Wade, 410 U.S. 113 (1973); Eisenstadt v. Baird, 405 U.S. 438 (1972). In the same fashion, the right to know might arise from the first amendment guarantees of speech, press, and petition, as well as other constitutional interests such as the right to vote. *See* text accompanying note 68 *infra.* The right to receive information is vital to all of these rights.

[60] *See* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 593-626 (1970); T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT (1966). Professor Emer-

nor any other court has grounded this asserted right in the text of the Constitution, other than to allude vaguely to the first amendment.

One of the more important limiting factors may be the areas to which this asserted right extends. Boundaries may be drawn by asking what information a person has a right to receive. The Sixth Circuit was careful to point out that "we are concerned with the right of students to receive information which they and their teachers desire them to have."[61] The case involved a right to particular information designated for known recipients,[62] which is a more limited situation than a claim for information not specifically addressed to any one person or group. Support for this restraining consideration may be analogized from the association cases,[63] where organizations preserved a right of association to advance certain causes and to secure their right of access to particular information.[64] However, this inter-

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son states that the system of freedom of expression has, at its core, "a group of rights assured to individual members of the society." This group of rights achieves and preserves four values and functions of society. Freedom of expression is a means of assuring individual self-fulfillment, a process for advancing knowledge and discovering truth, a way of providing for participation in decisionmaking by all members of society, and a method of achieving a more adaptable, and hence a more stable, community. THE SYSTEM OF FREEDOM OF EXPRESSION, *supra*, at 3-9.

[61] 541 F.2d at 583.

[62] A number of the cases relied upon by the Sixth Circuit to support the right to know were of a limited nature, involving specific information for designated addressees. *See* Procunier v. Martinez, 416 U.S. 396 (1974) (right of addressees of mail sent by prisoners); Kleindienst v. Mandel, 408 U.S. 753 (1972) (right of listeners to hear lectures of invited speaker); Stanley v. Georgia, 394 U.S. 557 (1969) (right of citizen to read material he possessed); Lamont v. Postmaster Gen., 381 U.S. 301 (1965) (right of addressee to receive foreign communist propaganda mailings); Thomas v. Collins, 323 U.S. 516 (1945) (right of workers to hear union organizing appeal). *But see* Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969) (right of public to receive access to general social, political, and moral ideas); Martin v. City of Struthers, 319 U.S. 141 (1943) (right of citizen to receive advertising literature distributed door-to-door).

[63] The association cases upheld the right of citizens to associate to achieve desired goals, protected by broad first amendment guarantees of speech, assembly, and petition. *See* cases cited note 64 *infra*.

[64] *See* United Transp. Union v. State Bar, 401 U.S. 576, 585 (1971) ("collective activity undertaken to obtain meaningful access to the courts is a fundamental right within the protection of the First Amendment"); UMW Dist. 12 v. Illinois State Bar Ass'n, 389 U.S. 217 (1967) (first amendment protects program where union employs salaried attorney to represent any of its members on workmen's compensation claims); Brotherhood of R.R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964) (first amendment protects union program to advise members of need for legal assistance and to recommend specific attorneys); N.A.A.C.P. v. Button, 371 U.S. 415, 428 (1963) (right to "associate for the purpose of assisting persons who seek legal redress for infringements of their constitutionally guaranteed and other rights"). The analogy from these

pretation is not clear, for several of the cases cited by the Sixth Circuit concerned a right to receive general information.[65] For instance, *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*,[66] upon which the court of appeals placed primary emphasis, rested upon the right of consumers to know the generalized price information that pharmacists might wish to advertise to the public.

The theoretical basis of the right to know may influence the determination of what material falls within the reach of the right. If the right to know is predicated on a relatively narrow political justification of the first amendment,[67] its reach may be more circumscribed. Under this theory the right to speak and to know is a means to insure that the general populace, which controls the government, will be well and fully informed.[68] However, deriving the right from the political theory of the first amendment may lead to content-based criteria to determine when one is protected by the right.[69]

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cases seems particularly appropriate in view of the textual basis for the right of association. This right, like the right of privacy, arises from several constitutional guarantees, among which are the rights of petition, assembly, and speech. *See* Brotherhood of R. R. Trainmen v. Virginia State Bar, 377 U.S. 1 (1964). The right to know may be similarly drawn from several constitutional guarantees. *See* note 57 *supra.*

[65] Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc., 425 U.S. 748 (1976) (right of consumer to receive general drug price information); Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367 (1969) (right of public to receive access to general social, political, and moral ideas); Martin v. City of Struthers, 319 U.S. 141 (1943) (right of citizen to receive advertising literature distributed door-to-door).

[66] 425 U.S. 748 (1976). For a discussion of the commercial speech doctrine in this case, see *The Supreme Court, 1975 Term,* 90 HARV. L. REV. 56, 142 (1976); Note, *The Demise Of The Commercial Speech Doctrine And The Regulation Of Professional's Advertising: The* Virginia Pharmacy *Case,* 34 WASH. & LEE L. REV. 245 (1976).

[67] *See* Steel, note 45 *supra.* A political foundation for the first amendment was expressed by James Madison, when he stated that:

> A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives.

Letter from James Madison to W. T. Barry, August 4, 1822, in 9 WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

[68] Steel, *supra* note 45, at 314. This political end of seeking an enlightened electorate is similar to the rationale of value-inculcative secondary education. The values preferred by the community are taught to facilitate the student's entry into the informed, adult electorate. *See* text accompanying notes 29-31 *supra.*

[69] For example, one commentator suggested several criteria, one of which was "[t]hat the speaker must be disccussing public figures, public issues, or other matters of social importance." Steel, *supra* note 45, at 341.

More likely, the right to know should be placed on the marketplace of ideas rationale of the first amendment.[70] The trend of the Supreme Court has been to adopt this rationale generally,[71] and the right to know already has been specifically based upon promotion of the competition of ideas.[72] In *Minarcini,* the Sixth Circuit clearly adopted the marketplace concept, noting that the library was a valuable "resource in the free marketplace of ideas."[73] Under this more open theory of the first amendment, a person would have the right to know or receive any idea, regardless of its merit or its relation to the end of informed self-government.[74]

Another unresolved aspect of the right to know concept is the

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[70] The marketplace concept was first expressed by Mr. Justice Holmes in 1919 when he wrote that "the ultimate good desired is better reached by free trade in ideas— . . . the best test of truth is the power of the thought to get itself accepted in the competition of the market. . . ." Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). Therefore a free trade of all ideas is to be promoted, not merely for the political end of informed self-government, but for the general social value of an enlightened and open society. *See* cases cited note 71 *infra.* Ideas would not be protected because of their relation to self-government, but simply because open discussion of ideas is thought to promote the general welfare.

[71] *See, e.g.,* Red Lion Broadcasting Co. v. Federal Communications Comm'n, 395 U.S. 367, 390 (1969) ("It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. . . ."); Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("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."); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) ("[D]ebate on public issues should be uninhibited, robust, and wide-open. . . ."); Whitney v. California, 274 U.S. 357, 375-76 (1927), *overruled on other grounds,* Brandenburg v. Ohio, 395 U.S. 444 (1969) ("Believing in the power of reason as applied through public discussion, they [the framers of the Constitution] eschewed silence coerced by law. . . .").

[72] In Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Coun., Inc., 425 U.S. 748 (1976), the Supreme Court went beyond the political justification of the first amendment to demonstrate the social value of economically well-informed decisions. The Court seemed to adopt at least the underlying theory of the marketplace concept. The Court stated that

> [t]o this end [intelligent economic decisions], the free flow of commercial information is indispensable [citations omitted]. And if it is indispensable to the proper allocation of resources in a free-enterprise system, it is also indispensable to the formation of intelligent opinions as to how the system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal.

Id. at 765 (footnotes omitted).

[73] 541 F.2d at 582.

[74] *See* note 70 *supra.*

question of who is protected. Obviously the designated recipient should have access to communications sent particularly to him.[75] Even assuming that the protection extends to undifferentiated recipients of generalized information, there has been no indication of how this right may be applied to intermediaries in the information dissemination process, such as librarians[76] and booksellers.[77]

On the whole, then, the *Minarcini* court relied on an unsatisfactorily explained right to know. The number of unresolved questions limits the value of the asserted right to receive information, and leaves ambiguous those holdings specifically based upon the right. Closer analysis than has been forthcoming will be required to fix this right solidly in the Constitution. Courts will have to indicate more precisely who might be protected by this right, and why they are deserving of protection, before the meaning and applicability of the right becomes clear. Until courts make such analyses, the unresolved questions will outweigh the value of "the right to know."

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[75] *See* text accompanying notes 61-64 *supra.*

[76] One commentator has proposed that librarians should be given derivative protection to ensure the citizen's right to read and to receive information. *See* O'Neil, *Libraries, Librarians And First Amendment Freedoms,* 4 HUMAN RIGHTS 295 (1975); O'Neil, *Libraries, Liberties And The First Amendment,* 42 U. CIN. L. REV. 209 (1973). Professor O'Neil offers two arguments for this protection. First, the reader cannot read if there is no material available, and the librarian is the principal source of the material. Second, a librarian cannot be required to violate the constitutional rights of readers by withholding materials to which the first amendment ensures them access. 4 HUMAN RIGHTS, *supra* at 307.

[77] *See* Zeitlin v. Arnebergh, 59 Cal.2d 901, 383 P.2d 152, 31 Cal. Rptr. 800 (1963). In *Zeitlin* the California Supreme Court, granting standing to both the bookseller and the buyer, struck down a ban on Henry Miller's *Tropic of Cancer.* While it is true that the bookseller has traditionally been protected by his role in preserving the speaker's right to disseminate information, it would seem that, if the right to know were applied to this situation, the bookseller could derive the same kind of protection for his role in preserving the reader's right to receive such information.