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Noah T. Holloway

Indiana University Maurer School of Law, noah.holloway@dinsmore.com

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Incombustible Ideas: Evaluating the Impact of Federal Court Opinions Regarding Book Banning in Public-School Libraries

Noah T. Holloway

“A word to the unwise.
Torch every book.
Char every page.
Burn every word to ash.
Ideas are incombustible.
And therein lies your real fear.”¹

INTRODUCTION

In 2016, the American Library Association’s Office for Intellectual Freedom released a list of the Top 10 Most Challenged Books of the previous year.² At the top of the list was John Green’s debut novel *Looking for Alaska*, a young adult novel about an awkward teenager seeking to improve his self-confidence while attending an austere boarding school in Alabama.³ On his YouTube channel, Green promptly addressed his book’s inclusion on the list.⁴ Green acknowledged *Looking for Alaska* had been challenged by parents across the country for “offensive language” and “sexually explicit descriptions,” but he argued that complete bans from public school libraries were the result of mere cursory reviews, such as parents pointing school administrators to a sexually charged scene without context.⁵ Green stated:

Text is meaningless without context [I]n context, [*Looking for Alaska*] is arguing, really in a rather pointed way, that emotionally intimate kissing can be a whole lot more fulfilling than emotionally empty oral sex. Teenagers are critically engaged and thoughtful readers. They do not read *Looking for Alaska* and think “I should go have some aggressively unerotic oral sex.” . . . So far as I can tell,

¹ ELLEN HOPKINS, MANIFESTO (2010).

² “Challenged” in this context refers specifically to an “attempt to remove or restrict materials, based upon the objections of a person or group.” ALA Off. of Intell. Freedom, *Banned Books Week (September 26–October 2, 2021)*, BANNED AND CHALLENGED BOOKS (2020), <https://www.ala.org/advocacy/bbooks/banned>. By contrast, a “ban” refers to the actual removal or restriction of materials. *See id.* The full list of the Top Ten Most Challenged Books of 2015 is as follows: 1) *Looking for Alaska* by John Green, 2) *Fifty Shades of Grey* by E.L. James, 3) *I Am Jazz* by Jessica Herthel and Jazz Jennings, 4) *Beyond Magenta: Transgender Teens Speak Out* by Susan Kuklin, 5) *The Curious Incident of the Dog in the Night-Time* by Mark Haddon, 6) *The Holy Bible*, 7) *Fun Home* by Alison Bechdel, 8) *Habibi* by Craig Thompson, 9) *Nasreen’s Secret School: A True Story from Afghanistan*, by Jeanette Winter, and 10) *Two Boys Kissing* by David Levithan. ALA Off. of Intell. Freedom, *Top 10 Most Challenged Books List*, BANNED AND CHALLENGED BOOKS (2020), <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10>.

³ *See generally* JOHN GREEN, *LOOKING FOR ALASKA* (2005). *See also* Vlogbrothers, *On the Banning of Looking for Alaska*, YOUTUBE, (Apr. 12, 2016), <https://youtu.be/69rd-7vEF3s>.

⁴ Vlogbrothers, *supra* note 3.

⁵ *Id.* at 0:20.

that kind of narrow prescriptive reading seems only to happen inside the offices of school superintendents.⁶

Censorship in public school libraries is frequently debated by school administrators, parents, educators, and legal professionals because the issue involves a balancing act between protecting individual freedom of thought under the First Amendment and maintaining effective school systems.⁷ Both interests are significant in their own right and are firmly rooted in First Amendment doctrine.⁸ On one hand, the Supreme Court enunciated in *Tinker v. Des Moines Independent Community School District* that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁹ Interrelated with the First Amendment guarantee of freedom of expression protected in *Tinker* is a correlated right to *receive* information.¹⁰ However, the Supreme Court has proclaimed schools have legitimate and substantial interests in promoting respect for authority and instilling social, moral, and civic values in students.¹¹ Despite *Tinker*, courts throughout the country have construed the issue of public school book bans outside this context, misapprehending the issue as one that does not invoke the First Amendment whatsoever.¹² This Comment argues that book banning does invoke First Amendment concerns, seeing as removing books from the library has a chilling effect on discourse and ideas, including those regarding social justice, race, sexuality, gender, and class.

Lower courts and schools misapprehend the constitutional issue because the Supreme Court did not reach a majority view in *Board of Education v. Pico*, which is the only Supreme Court decision addressing whether there are limitations on a public school’s discretion to remove books from its libraries under the First Amendment.¹³ In *Pico*, a group of junior high and high school students challenged their school board’s decision to remove a selection of books from the school’s libraries, causing a plurality of Supreme Court justices to opine that school discretion is not absolute and is, in fact, subject to a First Amendment analyses.¹⁴

⁶ *Id.* at 0:53.

⁷ See *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 506 (1969) (balancing First Amendment rights of students to protest Vietnam War against school district’s interests in managing effectiveness of school system); *Ambach v. Norwick*, 441 U.S. 68, 76–77 (1979); *Griswold v. Connecticut*, 381 U.S. 479, 482–83 (1965) (identifying the right to receive information as a constitutional right that acts to strengthen the First Amendment guarantee of freedom of expression).

⁸ *Griswold*, 381 U.S. at 482.

⁹ 393 U.S. at 506.

¹⁰ *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982) (reasoning that the First Amendment protects a right to receive information just as it protects the sender’s right to send information); see also *Martin v. Struthers*, 319 U.S. 141, 143 (1943).

¹¹ *Pico*, 457 U.S. at 864; see also *Ambach*, 441 U.S. at 76–77 (noting that public schools are vitally important “in the preparation of individuals for participation as citizens,” and as vehicles for “inculcating fundamental values necessary to the maintenance of a democratic political system”).

¹² See *Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009) (ruling that a school board’s action in removing a book did not violate the First Amendment); see also *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 457 F.2d 289, 294 (2d Cir. 1972).

¹³ 457 U.S. at 855–56.

¹⁴ *Id.*

The plurality ultimately determined that a genuine issue of material fact remained as to the motive behind the book ban.¹⁵ Under the plurality's view, if the school banned the book because it disagreed with ideas within the book, the First Amendment prevented the school from removing it, but if the school was motivated by educational reasons, the removal was permissible.¹⁶ While the *Pico* holding seems protective on its face and prohibits schools from banning books simply for disagreeing with the ideas within them, the failure to obtain a majority means the holding is not binding law.¹⁷

Only three Justices—Justices Brennan, Marshall, and Stevens—agreed that students have a right to access information under the First Amendment that limits the discretion of public schools to remove books from the public-school library.¹⁸ Particularly, Justice Brennan opined:

[C]ourts should not “intervene in the resolution of conflicts which arise in the daily operation of school systems” unless “basic constitutional values” are “directly and sharply [implicated]” in those conflicts. But we think that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library.¹⁹

Despite Justice Brennan's view, the normative and legal arguments involving banned books emphasize the issue of salacious and explicit content, as exemplified by the attacks on Green's novel. But it would be far more accurate to litigate around books that are censored by school boards because they invoke important perspectives on social-justice-oriented topics, including racism, class, gender, sexuality, immigration, and politics.²⁰ From a legal perspective, such a focus would invoke stronger First Amendment arguments, as well as Equal Protection and Substantive Due Process arguments. This Comment argues that books, especially those involving social justice issues, invoke the First Amendment's strong preference to protect students as characterized in *Tinker* as well as the concept of

¹⁵ *Id.* at 872 (“We now turn to the remaining question presented by this case: Do the evidentiary materials that were before the District Court, when construed most favorably to respondents, raise a genuine issue of material fact whether petitioners exceeded constitutional limitations in exercising their discretion to remove the books from the school libraries? We conclude that the materials do raise such a question, which forecloses summary judgment in favor of petitioners.”).

¹⁶ *Id.* (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)) (“In brief, we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’ Such purposes stand inescapably condemned by our precedents.”).

¹⁷ “While adherence to majority decision precedent remains the norm, majoritarianism clearly is not talismanic. That is, the question of how many Justices joined a particular opinion is not dispositive of its precedential value. American jurisprudence needs a different approach to the plurality problem.” Adam S. Hochschild, *The Modern Problem of Supreme Court Plurality Decision: Interpretation in Historical Perspective*, 4 WASH. U. J. L. & POL'Y 261, 283 (2000); see also *Texas v. Brown*, 460 U.S. 730, 737 (1971) (describing lower federal courts' disregard of Supreme Court plurality opinions).

¹⁸ *Id.* at 866.

¹⁹ *Id.* (quoting *Epperson v. Arkansas*, 393 U.S. 97, 105 (1968)).

²⁰ See ALA Off. of Intell. Freedom, *supra* note 2.

interrelated, penumbral rights otherwise found in constitutional doctrine to address the need to protect information access in the public-school library.

Specifically, Part I contextualizes the issue of book banning by providing a brief overview of the First Amendment's purpose with respect to free speech, identifying cases that establish the correlated First Amendment right to receive information and cases establishing the traditionally broad discretion of public schools. These cases provide the necessary foundation to argue that the First Amendment right at stake is much stronger than the federal courts' characterizations suggest. Part II discusses the cases addressing book banning in public schools that led to the ideological split among the federal circuits and provides counterarguments to these cases' rationales. Part III examines the problematic effects of the *Pico* Court's inability to establish a binding standard, including an increased risk of litigation, fracturing relationships between school districts and their communities, standardless judicial decision making, and, most significantly, the stifling of students' access to information, perspectives, and ideas. Part IV advocates for a judicial standard that evaluates whether a school district conducted a holistic review of the challenged material. Part IV describes an administrative process that school districts could use to comply with the proposed standard. These recommended reforms aim to strike the necessary balance between students' rights and schools' interests in managing the educational process.

I. COMPETING PRINCIPLES: THE TENSION BETWEEN THE FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION AND DEFERENCE TO PUBLIC SCHOOLS

In *Tinker*, the Supreme Court characterized the First Amendment guarantee of free speech as a constitutional right necessitated by the inherent risks of disputation and disturbance.²¹ In other words, the Court has treated the right to free speech as enabling a culture of "hazardous freedom" that invigorates United States citizens to openly dispute ideas, better understand their personal values, and pursue informed understandings of the world by engaging with the viewpoints of others.²² All the aforementioned goals are direct predicates to the civic involvement of young people.²³ Considering this understanding of the free speech guarantee's importance, book banning begs a new question: Does the need for schools to control

²¹ *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508–09 (1969) ("[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.").

²² *See id.* at 508.

²³ *See* Miriam Tuohy, *Understanding and Promoting Social Justice Through Your Library*, NAT'L LIB. OF N.Z. (Feb. 14, 2018), <https://natlib.govt.nz/blog/posts/understanding-and-promoting-social-justice-through-your-library> (emphasizing the importance of the school library's role in educating students on the necessity of social justice participation and the promotion of participating in civic causes).

the educational process necessitate unlimited discretion as to which books line the library shelves? Conversely, should we instead presume that the *Tinker* Court's understanding of the First Amendment's purpose precludes a public school from removing books for content-based reasons?

The *Pico* Court's failure to resolve the circuit split on the issue of book removal from public-school libraries runs contrary to the *Tinker* Court's characterization of the First Amendment. The *Tinker* Court emphasized that the purpose of the free speech guarantee is to invigorate individual thought in the educational context despite a minor risk of disruption in the educational process.²⁴ While Justices Brennan, Marshall, and Stevens are to be commended for rendering a judgment in favor of the challengers and for drafting language in support of First Amendment protection,²⁵ the Supreme Court's inability to render a binding opinion in *Pico* creates a problematic double standard in and of itself. Since the Court was only able to render a judgment based on a plurality's opinion rather than a majority's, the opinion is nonbinding on federal courts.²⁶ It fails to prevent the chilling of individual thought among students who cannot access materials in schools committed to banning books on the basis of content.²⁷ As a result, the *Pico* Court failed to effectuate the "hazardous freedom" contemplated in *Tinker*.²⁸

To fully contextualize the *Pico* Court's divided analysis, it is necessary to provide an overview of the doctrine that established the competing principles implicated by book banning in public-school libraries. While there is a series of federal cases directly addressing book challenges in public schools, the competing interests of students and school districts are historically rooted in precedent

²⁴ Indeed, the *Tinker* standard requires that school districts cannot overcome the protections of the First Amendment unless the speech "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities." *Tinker*, 393 U.S. at 514.

²⁵ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 875 (1982) (affirming the Second Circuit's reversal and remand to the trial court for further determinations on the question of whether the school board's decision was based on constitutionally valid concerns).

²⁶ In November 2021, two members of the Spotsylvania County Public School Board in Virginia called for sexually explicit books to be thrown into a fire. Olivia B. Waxman, 'We're Preparing for a Long Battle.' *Librarians Grapple with Conservatives' Latest Efforts to Ban Books*, TIME (Nov. 16, 2021, 12:13 PM), <https://time.com/6117685/book-bans-school-libraries/> ("[T]hat SCOTUS ruling has not by any means stopped people from trying to get books banned from school libraries."); see also *Am. Civ. Liberties Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1230 (11th Cir. 2009) (ruling that a school board's action in removing a book did not violate the First Amendment).

²⁷ *Id.*

²⁸ While the *Pico* Court certainly cannot be said to have overruled *Tinker*, this Comment contends that the Court's inability to render a binding decision is itself a failure to uphold *Tinker*'s understanding of the First Amendment. As such, the *Pico* Court's indecisiveness should be viewed as contrary to the principle of stare decisis, if the doctrine of stare decisis applies to principles with the same force as it applies to judicial decisions. As Justice Elena Kagan famously stated:

Overruling precedent is never a small matter. *Stare decisis*—in English, the idea that today's Court should stand by yesterday's decisions—is "a foundation stone of the rule of law". . . . Respecting stare decisis means sticking to some wrong decisions. The doctrine rests on the idea, as Justice Brandeis famously wrote, that it is usually "more important that the applicable rule of law be settled than that it be settled right."

Kimble v. Marvel Ent., LLC, 576 U.S. 446, 455 (2015) (citations omitted).

addressing other speech-related issues.²⁹ An understanding of these cases is necessary to argue the *Pico* Court failed to adequately safeguard students' First Amendment rights because the analytical framework and reasonings of these opinions require a holding that is more protective of students' First Amendment rights. Specifically, two categories of cases frame the competing arguments regarding book removal. The first category encompasses cases establishing the correlated right to receive information under the First Amendment. The second consists of cases favoring or emphasizing broader discretion by public-school boards, administrators, and teachers in managing the effectiveness of the educational process.

A. *The Penumbra First Amendment Right to Receive Information*

Prior to its decision in *Board of Education v. Pico* in 1982, the Supreme Court had never addressed the precise issue of whether the First Amendment is implicated in the context of a public school removing certain books from its library.³⁰ However, early Supreme Court precedent has delineated the scope of the corollary right to receive information under the First Amendment.³¹ This correlated right is an instrumental component of the argument that public schools cannot simultaneously comport with the First Amendment guarantee of free speech while depriving students of access to certain books on the basis of content alone.

The Supreme Court's opinion in *Martin v. City of Struthers* in 1943 was the first to establish that the right to receive information necessarily underlies freedom of speech.³² In *Martin*, a Jehovah's Witness was arrested under a local ordinance for canvassing neighborhoods and knocking on doors to distribute leaflets.³³ The Supreme Court struck down the ordinance banning door-to-door solicitation and reversed the conviction, reasoning that the ordinance violated both the free speech guarantee as well as freedom of the press.³⁴

The *Martin* opinion logically provides an important framework for understanding the relationship between the correlated right to receive information and the enumerated right to expression.³⁵ The Court reasoned that the scope of the First Amendment is particularly expansive, stating that:

the [founders] 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 ever to

²⁹ See *infra* text accompanying notes 86–135.

³⁰ Susan N. Mart, *The Right to Receive Information*, 95 L. LIBR. J. 175, 176 (2003).

³¹ The correlated First Amendment right to receive information has also been referred to by federal courts as the right to “access” information. See *Pico*, 457 U.S. at 868. Throughout this Comment, I will be using these terms interchangeably.

³² 319 U.S. 141 (1943) (holding that a purpose of First Amendment protection is the “vigorous enlightenment” of the populace).

³³ *Id.* at 142.

³⁴ *Id.* at 149.

³⁵ See *id.* at 143.

triumph over slothful ignorance. This freedom embraces the right to distribute literature . . . and necessarily protects the right to receive it.³⁶

The First Amendment's guarantee of free expression cannot be effectuated if the listener's ability to hear the expression can be restricted.³⁷ The *Martin* Court treated the correlated right of the willing individual to receive information as so vital to the maintenance of a free and diverse society that it must be fully preserved.³⁸

The right to receive information under the First Amendment was again emphasized in *Thomas v. Collins*.³⁹ In *Thomas*, the Court held unconstitutional Texas's issuance of a temporary restraining order requiring a union member to obtain an organizer's card in order to hold a mass union meeting.⁴⁰ The Court viewed this requirement as an impermissible prior restraint on speech but also viewed the requirement as infringing upon the right of listeners "to hear what [Thomas] had to say."⁴¹ Justice Jackson's concurrence supported the clear establishment of a right to receive information under the First Amendment.⁴² He opined that the purpose of the First Amendment was to "foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion."⁴³ He explained that the state cannot be motivated by an interest in protecting "against . . . propagandizing by speech or press" and that such expression should be afforded a "great range of freedom."⁴⁴ In other words, one of the most significant purposes of the First Amendment is to prevent the government from influencing public thought by restricting speech. Therefore, if this purpose is to be respected, students' access to library materials cannot be restricted based on content, particularly when such materials are intended to inform students on hot-button issues regarding racial equality, gender equality, LGBTQ+ rights, and other important matters.

Justice Jackson's argument highlights that a government actor's restrictions on speech cannot survive First Amendment scrutiny when the government seeks to protect listeners from accessing certain ideas, which is precisely what occurs when a public school bans materials on the basis of content.⁴⁵ This is a phenomenon that should be impermissible under First Amendment principles in the context of public

³⁶ *Id.*

³⁷ *See id.* at 146–47.

³⁸ *Id.*

³⁹ 323 U.S. 516 (1945).

⁴⁰ *Id.* at 540.

⁴¹ *Id.* at 534.

⁴² *Id.* at 545.

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *See id.* at 544–47.

schools removing library materials but still occurs nationwide at an unprecedented rate and amount.⁴⁶

The seminal Supreme Court opinion addressing a right to receive information under the First Amendment is *Griswold v. Connecticut*.⁴⁷ In *Griswold*, the Court reviewed Connecticut statutes that criminalized the use of any drug, medical device, or other instrument in furthering contraception, as well as assisting, abetting, counseling, or otherwise helping a person to prevent conception.⁴⁸ In deeming the statutory scheme unconstitutional, the Supreme Court not only emphasized that a penumbral right to privacy exists within the Fourteenth Amendment but also stated that there are a multitude of correlated rights implicit within the First Amendment's guarantee of freedom of speech.⁴⁹ Citing *Martin* and a multitude of other supporting cases,⁵⁰ the Court identified the right to distribute, the right to receive, the right to read, the freedom of inquiry, the freedom of thought, and the freedom to teach as peripheral rights that strengthen enumerated First Amendment guarantees.⁵¹

The *Griswold* Court's characterization of correlated constitutional rights is not only logically sound in and of itself, but it also functions to clearly exemplify the principles previously applied in *Martin* and *Thomas*. The Court established that the right to receive information is historically rooted in Supreme Court precedent as a corollary to the First Amendment because it is a necessary predicate to freedom of expression.⁵² This characterization of the right to receive information as a right legitimizing the right to free speech is a key aspect of the legal disputes between public schools and students.⁵³ Such disputes are frequently characterized by federal courts as a balancing act between the penumbral right to receive information and

⁴⁶ See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 858–59 (1982) (stating that Respondents alleged that the school board “ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.”); see Waxman, *supra* note 26 (“We’re seeing an unprecedented volume of challenges,” says Deborah Caldwell-Stone, Executive Director of the American Library Association’s Office for Intellectual Freedom. “I’ve worked for ALA for 20 years, and I can’t recall a time when we had multiple challenges coming in on a daily basis.”).

⁴⁷ 381 U.S. 479, 482–83 (1965).

⁴⁸ *Id.* at 480.

⁴⁹ *Id.* at 482–83 (“The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read . . . freedom of inquiry, freedom of thought, and freedom to teach—indeed the freedom of the entire university community. Without those peripheral rights the specific rights would be less secure.”) (citations omitted).

⁵⁰ *Id.* at 482 (citing *Wieman v. Updegraff*, 344 U.S. 183, 195 (1952); *Sweezy v. New Hampshire*, 354 U.S. 234, 249–50, 261–63 (1957); *Barenblatt v. United States*, 360 U.S. 109, 112 (1959); *Baggett v. Bullitt*, 377 U.S. 360, 369 (1964)).

⁵¹ *Griswold*, 381 U.S. at 482 (citing *Martin v. Struthers*, 319 U.S. 141, 143 (1943)).

⁵² Other Supreme Court cases established this correlated right in addition to *Griswold*. See *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”); see also *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972) (citing *Martin* and *Stanley* for the proposition that the Court has recognized a correlated right to receive information and ideas).

⁵³ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

schools' wide discretion to manage the educational process.⁵⁴ While this balancing act is a necessary component of the First Amendment analysis implicated by book banning, this balancing act must consider the fact that the *Griswold* Court's determinations—in addition to those of the *Tinker* Court—are undermined when students are deprived of access to library books due to the substance of the ideas within them.

B. Doctrine Broadening the Scope of Schools' Discretion and Authority

Public schools retain a unique role within their local communities as transmitters of positive civic, moral, and social values.⁵⁵ The judicial system has enabled schools to fulfill this role by restraining itself from encroaching on schools' ability to conduct certain functions, such as predetermining the curriculum, selecting materials that support teaching that curriculum, ensuring lewd or vulgar expression is absent from the educational environment, and fulfilling other managerial responsibilities.⁵⁶ While schools maintain wide discretion with respect to overseeing the educational process, public schools' decisions must comport with First Amendment requirements.⁵⁷ Determining the contexts in which a school's discretion is properly limited by the First Amendment is the primary task of courts addressing book challenges in public schools. Courts in this context must reference federal doctrine and precedent that emphasizes schools' discretionary functions to appropriately balance the two interests.⁵⁸ As a result, an overview of the doctrine that determined the scope of a school's discretionary powers is appropriate. This line of cases is not only instructive in how the Supreme Court should understand book banning as a constitutional issue, but it also represents a series of missed opportunities by federal courts to clearly establish students' First Amendment rights in this context.

Specifically, the following subsections will consider the principles relied on by the Supreme Court in defining the functions encompassed by educator discretion: First, the function of public schools in supporting society at large will be discussed. Second, the importance of instilling positive moral values in students by prohibiting

⁵⁴ Indeed, the concept of a “penumbral” right embedded within the Constitution’s enumerated amendments has been used in a wide variety of cases involving the very topics that students looking to engage with social justice initiatives are interested in. See *Stanley*, 394 U.S. at 564; see *infra* text accompanying notes 55–85.

⁵⁵ Howard Kirschenbaum, *Clarifying Values Clarification: Some Theoretical Issues*, in MORAL EDUCATION . . . IT COMES WITH THE TERRITORY 41 (David Purpel & Kevin Ryan eds., 1976); see also Curtis G. Bentley, *Student Speech in Public Schools: A Comprehensive Analytical Framework Based on the Role of Public Schools in Democratic Education*, 2009 BYU EDUC. & L.J. 1, 31–32 (2009) (asserting “democratic education is not just the inculcation of basic democratic values, but is ultimately the preparation of citizens to be effective and responsible civic participants”).

⁵⁶ See *Epperson v. Arkansas*, 393 U.S. 97, 107, 115 (1968); see also *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986) (“The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.”).

⁵⁷ *Epperson*, 393 U.S. at 104.

⁵⁸ *Id.*

lewdness and vulgarity will be discussed. Finally, the third section will conclude by applying the previously discussed cases and by considering any doctrinal limitations on a school's discretion to ban library books under the First Amendment.

i. The Unique Role of Public-School Educators in Society

In *Epperson v. Arkansas*, the Supreme Court addressed schools' discretionary functions in the context of a public-school teacher claiming that her First Amendment right to free speech was violated by an Arkansas law prohibiting teaching human evolution in schools.⁵⁹ Susan Epperson, a teacher employed by the Little Rock school system to teach biology, was faced with a dilemma when the school provided her with a textbook that did not comply with the Arkansas legislature's prohibition.⁶⁰ Epperson was placed in the position of having to choose between refusing to teach the statutorily banned material or teaching it when doing so would be a criminal offense subjecting her to termination.⁶¹ In striking down the Arkansas statute as a violation of both the First and Fourteenth Amendments, Justice Fortas noted that the state has an "undoubted right to prescribe the curriculum for its public schools that does not carry with it the right to prohibit . . . where that prohibition is based upon reasons that violate the First Amendment."⁶² Justice Stewart also stated in his concurrence that "[t]he States are most assuredly free 'to choose their own curriculums for their own schools.'"⁶³

The *Epperson* opinion could reasonably be interpreted to support arguments on both sides of the censorship debate. While agreeing with the proposition that schools generally have wide discretion over their affairs, the *Epperson* Court appropriately characterized that discretion while considering First Amendment principles.⁶⁴ Parties that support banning books from public school libraries would be remiss not to cite *Epperson* because of the Court's emphasis on the discretionary authority of schools to choose curricular materials. However, the counterargument is that the *Epperson* Court's enlargement of school discretion, while appropriate in this context, should be confined to its own circumstances because the Court expressly stated that judicial intervention to protect First Amendment rights may appropriately supersede traditional deference.⁶⁵ The *Epperson* decision does not support an unfettered discretion of public schools to ban books from its libraries,

⁵⁹ *Id.* at 99.

⁶⁰ *Id.* at 99–100.

⁶¹ *Id.*

⁶² *Id.* at 107.

⁶³ *Id.* at 115 (Stewart, J., concurring).

⁶⁴ *See id.* at 108–09.

⁶⁵ *See id.* at 104 ("Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief. By and large, public education in our Nation is committed to the control of state and local authorities. Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

even though schools have broad discretion to select curricular materials for classroom use. Nevertheless, the proponents of book banning would turn to other precedent favoring schools' broad discretion, such as decisions characterizing teachers as uniquely responsible for inculcating students with civic virtues and moral values.

The state's discretionary powers with respect to the responsibilities of public-school teachers were enlarged in *Ambach v. Norwick*.⁶⁶ In *Ambach*, two foreign nationals applied for teaching certifications in New York but were barred from obtaining them under a New York statute prohibiting the certification of teachers who were not citizens nor had sought citizenship.⁶⁷ The Supreme Court determined that a citizenship requirement to become a teacher in a public school need only bear a rational relationship to a legitimate state interest.⁶⁸ The Court characterized the role of teachers as one intended to carry out a significant governmental function:

[I]t is clear that all public school teachers, and not just those responsible for teaching the courses most directly related to government, history, and civic duties, should help fulfill the broader function of the public school system. . . . More importantly, a State properly may regard all teachers as having an obligation to promote civic virtues and understanding in their classes, regardless of the subject taught.⁶⁹

While the constitutional claim in *Ambach* is rooted in the Fourteenth Amendment guarantee of equal protection rather than the First Amendment, the Court's language supports the proposition that all public teachers may be viewed as having an obligation to the public.⁷⁰ This obligation, according to the *Ambach* Court, encompasses the responsibility to instill positive morals and values in students and fulfill the broader function of the school system as a foundation upon which all of society rests.⁷¹

Ambach's emphasis on the responsibilities of educators can reasonably cut either way in disputes over whether book banning comports with the First Amendment. Proponents of book banning argue that trained educators must be afforded substantial deference in deciding what literature is appropriate for school libraries to fulfill their obligations.⁷² By contrast, opponents of book banning in schools could cite *Ambach* to argue that educators are obligated to enable voluntary freedom of thought under the First Amendment, and, therefore, may not remove

⁶⁶ 441 U.S. 68 (1979).

⁶⁷ *Id.* at 71.

⁶⁸ *Id.* at 80.

⁶⁹ *Id.* at 79–80.

⁷⁰ *See id.*

⁷¹ *Id.* Not only does this rationale support protecting students' ability to access library materials as a constitutional right, but the duties teachers owe to society at large likely create a responsibility to teach about and promote social justice and activism as a curricular component to aid marginalized students. *See* Tabitha Dell'Angelo, *Creating Classrooms for Social Justice*, EDUTOPIA (Sept. 29, 2014), <https://www.edutopia.org/blog/creating-classrooms-for-social-justice-tabitha-dellangelo>.

⁷² *See* *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982).

literature based on its content.⁷³ This argument could be supported by a characterization of the *Ambach* Court's language on this point as dicta that should be viewed in the context of the *Ambach* decision alone. While the *Ambach* Court was correct in highlighting the importance of teachers' responsibilities as a general principle, that does not equivocally mean that this importance can serve as a justification to overcome the First Amendment's embedded mandate that students' rights to access public school library materials must be protected.

ii. Lewdness and Vulgarity: A Widely Accepted Limitation on the First Amendment

In a significant, but necessary, diminution of the scope of First Amendment protection, the judicial system has afforded educators the discretion to exclude lewd or vulgar expression from the school environment in the interest of instilling positive moral values in students.⁷⁴ In *Bethel v. Fraser*, the Supreme Court addressed whether a public school violated the First Amendment when it suspended a student for presenting a speech using an elaborate sexual metaphor.⁷⁵ The student presented the speech to approximately 600 students that were required to either attend the assembly or report to study hall.⁷⁶ Citing *Ambach*, the Supreme Court determined that the suspension was permissible under the First Amendment.⁷⁷ The Court viewed the prohibition of vulgar and offensive terms in public discourse as a clearly appropriate function of public school education.⁷⁸ Justice Burger wrote, "[S]chools must teach by example the shared values of a civilized social order. . . . The schools, as instruments of the state, may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech"⁷⁹

The proponents of censorship in public libraries could read *Bethel* expansively, arguing that any book that includes lewd or vulgar language may be validly removed regardless of context. However, *Bethel* is readily distinguished from the issue of book banning in public-school libraries. The recipients of the restricted speech in *Bethel* were students required to attend the congregation and involuntarily subjected to vulgar speech as a captive audience.⁸⁰ By contrast, students voluntarily reading a library book that happens to contain lewd or vulgar language can hardly be characterized as forcibly subjected to immorality as a

⁷³ See *id.* (noting that petitioner school board has a substantial role to play in determination of school library content but that discretion is not absolute).

⁷⁴ See *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986); see also *FCC v. Pacifica Foundation*, 438 U.S. 726, 751 (1978) (ruling that FCC's determination to censor comedian's vulgar monologue over radio in interest of protecting children was permissible under the First Amendment).

⁷⁵ *Bethel*, 478 U.S. at 678.

⁷⁶ *Id.*

⁷⁷ *Id.* at 683.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ See *id.* at 678.

captive audience.⁸¹ More significantly, the *Bethel* Court’s rationale that students’ moral values and mental health are of the highest priority in fact supports, rather than diminishes, a need for heightened protection of library materials.⁸² Indeed, if the *Bethel* Court’s goal was to enable the protection of students’ sense of moral goodness to broadly reinforce the maintenance of civilized society, then this precedent requires protecting students’ ability to engage with social justice initiatives through their libraries.

iii. Responding to Arguments Relying on the Justification of Broad Discretion in Support of Book Banning

In sum, Supreme Court precedent has indisputably determined that schools maintain the discretion to ensure the effectiveness and efficiency of the educational process and to avoid condoning lewd or vulgar speech.⁸³ Moreover, the Court has emphasized that the justification for this discretion is rooted in schools’ responsibilities to inculcate students with positive civil, moral, and social values.⁸⁴ The proponents of book banning would rely on *Ambach* and *Bethel* to argue that teachers, administrators, and school librarians should be afforded entirely unlimited deference with respect to their decisions to remove library materials.⁸⁵ However, the *Epperson* decision supports the notion that educators’ discretion may be outweighed by the First Amendment principle of free expression, which suggests that courts reviewing book challenges must balance principles of educational authority against First Amendment rights.

⁸¹ This rationale cannot apply, however, to the issue of whether schools infringe upon First Amendment principles by assigning certain books as a part of the curriculum or by otherwise infringing on the students’ constitutional rights through a predetermined curriculum. *Epperson v. Arkansas*, 393 U.S. 97, 115 (1968) (quoting *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603–04 (1967)) (“[T]he First Amendment ‘does not tolerate laws that cast a pall of orthodoxy over the classroom.’”); see also *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923) (holding unconstitutional a state statute that required students below the eighth grade to learn entirely in English because the statute interfered with the students’ ability “to engage in any of the common occupations of life and to acquire useful knowledge” in violation of the Due Process Clause).

⁸² See *Bethel*, 478 U.S. at 678.

⁸³ See *id.* at 683–85.

⁸⁴ See *Ambach*, 441 U.S. at 79–80.

⁸⁵ See Mark Hemingway, *In Defense of Book Banning*, THE FEDERALIST (Mar. 11, 2014), <https://thefederalist.com/2014/03/11/in-defense-of-book-banning/> (“Your local community has simply decided that finite public resources are not going to be spent disseminating [objectionable books]. Judgments are made all the time about what goes on shelves for both practical and moral reasons. This is not book banning.”); see also *Banned Books – Top 3 Pros and Cons*, PROCON.ORG (Aug. 30, 2021), <https://www.procon.org/headlines/banned-books-top-3-pros-and-cons/#18> (describing arguments proffered by proponents of book banning, one of which argues that children should not be exposed to “sex, violence, drug use, or other inappropriate topics in school or public libraries”).

II. DOCTRINE DIRECTLY ADDRESSING BOOK CHALLENGES AND BANNING IN PUBLIC SCHOOLS

The principles identified above as the correlated First Amendment right to receive information and the duty of schools to instill positive values in students are in direct tension with one another in federal cases addressing book removal in public schools. While both principles are highly reputable standing alone, they clash dramatically in this context. The standard is unclear. The doctrine on book challenges and banning is still unsettled, and the Supreme Court's plurality decision in *Pico* failed to create a reliable standard that school administrators, teachers, parents, lawyers, and other interested parties can use to prevent disputes.

A. *Pico's Predecessors: The Circuit Split on Whether to Apply the First Amendment to Book Banning in Public School Libraries*

In *Presidents Council, District 25 v. Community School Board No. 25*, the Second Circuit affirmed the dismissal of plaintiff-students' § 1983 action. The students claimed that their First Amendment rights were violated when the school board removed a book from the school library.⁸⁶ The Board had voted to remove all copies of *Down These Mean Streets* by Piri Thomas from all junior high school libraries in the district.⁸⁷ Despite the book's important themes focusing on race and gender, the Board determined that the book's depictions of criminal violence and sex within an autobiographical account of a Puerto Rican youth growing up in Spanish Harlem were inappropriate.⁸⁸ This determination was made as the result of parents objecting to the school library stocking the memoir, arguing that doing so would have an "adverse moral and psychological effect on 11 to 15 year old [sic] children, principally because of the obscenities and explicit sexual interludes."⁸⁹ By contrast, the plaintiffs had submitted affidavits from psychologists, teachers, and even students claiming that the book has educational value and does not have psychologically adverse effects.⁹⁰

In affirming the district court's dismissal, the Second Circuit determined that the factual circumstances of removing a book from a public-school library was merely an "intramural strife" that could not be elevated to "[F]irst [A]mendment constitutional proportions," which demonstrates that federal courts are waffling around the constitutional issue.⁹¹ Citing *Epperson*, the Second Circuit ruled that book banning in public-school libraries simply did not "directly and sharply

⁸⁶ 457 F.2d 289, 290, 294 (2d Cir. 1972).

⁸⁷ *Id.* at 290–91. See generally PIRI THOMAS, *DOWN THESE MEAN STREETS* (Vintage Books eds., 13th ed. 1997).

⁸⁸ *Presidents Council*, 457 F.2d at 291.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 292.

implicate basic constitutional values.”⁹² After characterizing any potential violation of the plaintiffs’ First Amendment rights as “miniscule,” the Second Circuit stated:

The administration of any library . . . involves a constant process of selection and winnowing based not only on educational needs but financial and architectural realities. To suggest that the shelving or unshelving of books presents a constitutional issue, particularly where there is no showing of a curtailment of freedom of speech or thought, is a proposition we cannot accept.⁹³

The Second Circuit’s mischaracterization of the legal issue is puzzling.⁹⁴ The *Presidents Council* plaintiffs never characterized the decision to shelve or “unshelve” books as merely administrative.⁹⁵ The issue before the court was whether the school’s decision to remove *Down These Mean Streets* on the basis of the book’s content violated the First Amendment due to the potential for *chill*, regardless of whether actual harm could be shown.⁹⁶ This is a stark misapprehension of the issue because the court ignored the high potential for chilling the students’ freedom of inquiry and discourse, thereby failing to accurately characterize the purpose of the right to access information.⁹⁷ As a result, the court diminished the legal importance of the fact that students were unable to access valuable knowledge within the banned materials.⁹⁸

Moreover, there is a reasonable argument that the Second Circuit in *Presidents Council* undermined Supreme Court precedent when it claimed that schools, without regard for the First Amendment, can remove books from a public-

⁹² *Id.* at 291 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)) (“After a careful review of the record before us and the precedents we find no impingement upon any basic constitutional values.”).

⁹³ *Id.* at 292–93.

⁹⁴ *See id.* at 292. The Second Circuit’s emphasis on the fact that the student-plaintiffs failed to make an evidentiary “showing of a curtailment of freedom of speech or thought” is also strange when one considers that the chilling of individual thought is a cardinal First Amendment concern. As an example of how highly federal courts have prioritized preventing chill, one need only look at how overbreadth challenges to prior restraints contemplate the application of a government action to hypothetical third persons. In no other area of constitutional law does this widely occur. The Supreme Court emphasized, in cases preceding *Pico*, that the First Amendment requires the government to preclude the chilling of activities protected by the First Amendment when drafting laws addressing unprotected activities. *See*, *Speiser v. Randall*, 357 U.S. 513, 525–26 (1958); *see also NAACP v. Button*, 371 U.S. 415, 433 (1963); *see also Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603–04 (1967); *see also Blount v. Rizzi*, 400 U.S. 410, 417 (1971); *see also Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 244 (2002) (“The Constitution gives significant protection from overbroad laws that chill speech within the First Amendment’s vast and privileged sphere.”).

⁹⁵ *See Presidents Council*, 457 F.2d at 293.

⁹⁶ *See id.* *But see* *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (“The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in *Tinker* . . .”).

⁹⁷ *See Presidents Council*, 457 F.2d at 291 (“The plaintiffs . . . have supplied affidavits from psychologists, teachers, and even children who claim the book is valuable and had no adverse effect on the development of the children of the District. One thirteen year old [sic] boy solemnly swears and assures us that the book has ‘literary merits’ and is not a ‘corruptive influence.’”).

⁹⁸ *Id.*

school library that the school previously provided to that library.⁹⁹ That faulty conclusion ignores the foundational rationale applied in *Pickering v. Board of Education*, a decision in which the Supreme Court determined a schoolteacher's First Amendment rights could not be limited by virtue of that schoolteacher receiving a government-provided benefit.¹⁰⁰ In other words, when a government actor revokes a benefit it provided on its own initiative, that revocation may still amount to a constitutional violation even though the government actor provided the benefit in the first place.¹⁰¹ By ignoring this principle of Supreme Court precedent, the Second Circuit's *Presidents Council* opinion misses the mark. *Pickering* should squarely apply to the issue of book banning in *Presidents Council* and other similar cases to ensure that students' First Amendment right to access a government-provided benefit is sufficiently protected in order to encourage student involvement in social justice.

Four years after *Presidents Council*, the Sixth Circuit, in *Minarcini v. Strongsville City School District*, refrained from reading the Second Circuit's *Presidents Council* decision too expansively.¹⁰² In *Minarcini*, the Sixth Circuit reviewed a district court decision that similarly dismissed a complaint regarding the Strongsville City school board's decision to remove *Catch-22*¹⁰³ and *Cat's Cradle*¹⁰⁴ from a school library.¹⁰⁵ The district court judge strongly relied on the Second Circuit's determination that the First Amendment did not apply.¹⁰⁶ However, the Sixth Circuit faulted the district court for reading the Second Circuit's opinion as "upholding an absolute right on the part of th[e] school board to remove from the library and presumably to destroy any books it regarded unfavorably without concern for the First Amendment."¹⁰⁷ Moreover, the Sixth Circuit described the school library as "an important privilege created by the state for the benefit of the students in the school . . . [that is] not subject to being withdrawn by [a] succeeding school board[]."¹⁰⁸ As a result, the majority held that, in the absence of a

⁹⁹ *Id.* at 293 ("Appellants concede, or at least do not reject, the proposition that the Board has ultimate authority for the initial selection of the public school library collection. They suggest, however, that we have a different case where, as here, the book was once shelved and is now removed. They analogize the shelving and unshelving of a book to the constitutional right of a person to obtain public employment and his rights to retain such employment when it is sought to be terminated. This concept of a book acquiring tenure by shelving is indeed novel and unsupportable under any theory of constitutional law we can discover. It would seem clear to us that books which become obsolete or irrelevant or where improperly selected initially, for whatever reason, can be removed by the same authority which was empowered to make the selection in the first place.").

¹⁰⁰ 391 U.S. 563, 568 (1968). In *Pickering*, the Supreme Court determined that a schoolteacher's letter to a newspaper editor regarding the allocation of school funds to athletics rather than academics was speech subject to First Amendment protection. *Id.* at 566, 568.

¹⁰¹ *See id.* at 568.

¹⁰² 541 F.2d 577, 581 (6th Cir. 1976).

¹⁰³ *See generally* JOSEPH HELLER, *CATCH-22* (Simon & Schuster Paperbacks ed., 2011).

¹⁰⁴ *See generally* KURT VONNEGUT, JR., *CAT'S CRADLE* (Dial Press Trade Paperbacks ed., 1991).

¹⁰⁵ *Minarcini*, 541 F.2d at 579.

¹⁰⁶ *See id.* at 581.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

content-neutral explanation, the Strongsville School Board had impermissibly infringed on the student-plaintiffs' First Amendment right to access information.¹⁰⁹

The Sixth Circuit's characterization of the school library as a state-created benefit for students is not only logically consistent with history but appropriately upholds the "government-provided benefit" principle of *Pickering v. Board of Education* ignored by the Second Circuit.¹¹⁰ The Sixth Circuit's understanding and application of *Pickering* is critical for preventing the chilling of student involvement in social justice and civic initiatives and is far more consistent with the underlying purpose of the First Amendment's free speech guarantee discussed in *Tinker*.¹¹¹ If the purpose of the free speech guarantee is to enable a culture of "hazardous freedom" in which citizens are invigorated to engage with a wide variety of ideas, it would be consistent with constitutional principles to preclude a public school from revoking the materials it has already chosen to provide.¹¹² The Sixth Circuit's approach was correct in applying this line of reasoning.

Considering the split between the Second and Sixth Circuits, it would appear that the issue of book banning in public school libraries was ripe for resolution by the *Pico* Court. While the Supreme Court certainly attempted to establish a clear solution that would help mitigate an increasing amount of federal litigation and the stifling of students' right to access information, the vastly different priorities of the Supreme Court Justices precluded such a resolution.

B. *Board of Education Island Trees Union Free School District v. Pico: A Standardless, Non-Binding Opinion*

In September of 1975, members of the Board of Education of the Island Trees Union Free School District attended a conference sponsored by Parents of New York United, a conservative organization of parents concerned about New York's education legislation.¹¹³ At the conference, attending parents gave the Board members a list of books that they viewed as "objectionable" and "improper fare for school students."¹¹⁴ The list included titles such as *Slaughterhouse Five*, *Best Short Stories of Negro Writers*, *Go Ask Alice*, and *Down These Mean Streets*.¹¹⁵

It was determined that the Island Trees High School library contained nine of the listed books and the Island Trees Junior High School library contained one of

¹⁰⁹ *Id.* at 582–83 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumers Council*, 425 U.S. 748, 756–57 (1976)).

¹¹⁰ *See id.* at 582–83. ("A library is a mighty resource in the free marketplace of ideas. . . . It is specially dedicated to broad dissemination of ideas. It is a forum for silent speech.")

¹¹¹ *See id.* at 582 ("The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in *Tinker* . . .").

¹¹² *See Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

¹¹³ *Bd. of Educ. v. Pico*, 457 U.S. 853, 856 (1982).

¹¹⁴ *Id.*

¹¹⁵ University of Cincinnati, *Banned Books Week*, UC LIBRS., <https://guides.libraries.uc.edu/c.php?g=1084786&p=7908524> (last visited Oct. 10, 2021); *see generally* KURT VONNEGUT JR., *SLAUGHTERHOUSE FIVE* (Dial Press Trade Paperback ed., 2009); JAMES BALDWIN ET. AL., *BEST SHORT STORIES OF NEGRO WRITERS* (Langston Hughes ed., 1st. ed. 1967); THOMAS, *supra* note 87.

the listed books.¹¹⁶ The Board then removed the books from the library shelves for the duration of its Book Review Committee's review.¹¹⁷ The Board stated in a press release that it believed the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy" and proclaimed that "[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers."¹¹⁸ This conflation between literature that is morally objectionable and literature that creates discourse around social equality has enabled school boards to preclude important stories from school bookshelves. Notably, the Board appointed a "Book Review Committee" consisting of four parents and four staff members to read the books and recommend whether they should be retained in consideration of "educational suitability," "good taste," "relevance," and "appropriateness to age and grade level."¹¹⁹ The Committee returned with a recommendation that five of the listed books should be retained.¹²⁰ However, the Board rejected the Committee's recommendations outright and decided that only one of the previously removed books should be retained without restriction.¹²¹

As a result, a group of teenage students sued the Board under § 1983, alleging a violation of their First Amendment rights.¹²² After the case made its way through the District Court for the Eastern District of New York and the Second Circuit Court of Appeals, the Supreme Court granted certiorari with the intention of resolving the ideological disagreement between the federal circuits.¹²³ The Supreme Court addressed the question of whether the First Amendment forbids the Board's decision by turning to the aforementioned precedent establishing the correlated right to receive information and the traditional deference that has typically been afforded to public school administrators and staff.¹²⁴ Justice Brennan, joined by Justices Marshall and Stevens, opined that the correlated First Amendment right to receive information established in *Martin v. Struthers*, *Griswold v. Connecticut*, and related cases outweighs the discretion of schools in fulfilling their obligations to instill moral values.¹²⁵ Moreover, the plurality relied on *Tinker* for the proposition

¹¹⁶ *Pico*, 457 U.S. at 856.

¹¹⁷ *Id.* at 857.

¹¹⁸ *Id.* (alterations in original).

¹¹⁹ *Id.*

¹²⁰ *Id.* at 858.

¹²¹ *Id.*

¹²² *Id.* at 856, 858–59.

¹²³ See Mart, *supra* note 30, at 180 n.40 ("In *Presidents Council, District 25 v. Community School Board 25*, 457 F.2d 289 (2d Cir. 1972), and *Bicknell v. Vergennes Union High School Board of Directors*, 475 F. Supp. 615 (D. Vt. 1979), the courts found that there was no First Amendment right to receive information that would prevent removal of 'offensive' books in a school library. But *Minarcini v. Strongsville City School District*, 541 F.2d 577 (6th Cir. 1976), *Right to Read Defense Committee v. School Committee of Chelsea*, 454 F. Supp. 703 (D. Mass. 1978), and *Salvail v. Nashua Board of Education*, 469 F. Supp. 1269 (D. N.H. 1979), all upheld the students' right to receive information.").

¹²⁴ *Pico*, 457 U.S. at 866. The *Bethel* decision was not implicated in the *Pico* Court's analysis because *Bethel* was decided four years afterward, in 1986. See *id.* at 853; *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 683 (1986).

¹²⁵ *Pico*, 457 U.S. at 853, 866–67.

that students, too, are beneficiaries of the First Amendment right to receive ideas as a necessary predicate to their right to expression.¹²⁶

Out of all the Justices' submitted positions in *Pico*, the plurality's opinion best characterizes the relationship between the First Amendment's purpose of encouraging a "hazardous freedom" and the problematic nature of public schools banning books from their libraries. The plurality's application of *Tinker* stands for the assertion that the government cannot infringe on First Amendment rights in the interest of preventing a *potential* interference with the educational process.¹²⁷ If Supreme Court doctrine has gone to great lengths to protect this freedom in the past, there is little justification not to interpret the First Amendment as sufficiently protective in the book-banning context. The goal of maintaining the "hazardous freedom" that comes with respecting students' ability to access library materials should be the dominant goal of the doctrine going forward. A clearly established purpose rendered through a binding opinion, rather than a plurality opinion, would better inform the practices of school administrators facing this issue.

Justice Blackmun joined in the judgment denying summary judgment for the Board, but he disagreed that students had an absolute right to receive information in the public school library.¹²⁸ He argued that the balance between First Amendment requirements and broad state authority could be struck by holding that schools may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed within them, so long as that action was motivated by the officials' disapproval of those ideas.¹²⁹

While his attempt to balance the interests at stake is commendable, Justice Blackmun's prioritization of government motive is arguably problematic for plaintiffs from an evidentiary perspective. It would be incredibly difficult for plaintiffs to prove that a school had an impermissible motivation for banning a book, and a judicial standard requiring as such would likely be insufficient in protecting students' First Amendment rights. If plaintiffs were required to obtain evidence in discovery of an impermissible, content-based motive to succeed, their pursuit to protect their constitutional right of access would be an overwhelmingly uphill battle.¹³⁰ As a result, plaintiffs' claims would be subject to dismissal at the summary judgment stage in almost every instance.

Vulgarity and age appropriateness could serve as potentially legitimate, content-neutral justifications to remove a book, but these aspects ought to be evaluated in light of the challenged book's entire context. Otherwise, an unfettered

¹²⁶ *Id.* at 868.

¹²⁷ *See id.* at 866 (quoting *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508–09 (1969)).

¹²⁸ *See id.* at 878 (Blackmun, J., concurring in part and concurring in the judgment).

¹²⁹ *See id.* at 878–79.

¹³⁰ The pragmatic difficulty of succeeding on a claim requiring the plaintiff to demonstrate the presence of an improper, intentional motive can be seen in the context of racial discrimination. There, plaintiffs are required by federal circuit courts to show some direct evidence of discrimination to succeed. Michael Selmi, *Why Are Employment Discrimination Cases So Hard to Win?*, 61 LA. L. REV. 555, 556 (2001) (noting that many federal circuits require some direct evidence of discrimination for plaintiffs to succeed on employment discrimination claims).

discretion to remove books for lewdness alone would be far too broad and would chill students' ability to engage with social causes. As previously discussed, *Looking for Alaska*, for example, contains sexually charged scenes, but those scenes are narrowly directed at making a compelling argument that emotionally detached sex is far less fulfilling than affectionate kissing.¹³¹ The mere presence of sexual activity within the novel, despite presenting a positive moral value that could serve to help young people navigate their sexual and emotional wellbeing, was enough as a matter of law to justify its removal. Thus, the potential for overbroad, contextless evaluations that lead to banning potentially beneficial works of literature should be prevented even though lewdness should remain a consideration in the First Amendment balancing act.

Justices Burger, Powell, Rehnquist, and O'Connor dissented, arguing that a school's decision to remove books from a school library should not be subjected to federal review at all.¹³² The dissent emphasized that the student-plaintiffs could just as easily obtain the challenged books at a bookstore, and, therefore, the school had not violated the students' First Amendment rights.¹³³ The dissent's argument is somewhat puzzling in light of contradicting Supreme Court precedent stating that the availability of information elsewhere does not preclude the possibility of a First Amendment violation.¹³⁴ Not only does this argument run contrary to the *Tinker* Court's commitment to protecting students' constitutional rights, but the dissent's argument ignores the chilling effect on students' freedom of thought in addition to other problematic effects of enabling censorship in public-school libraries across the country.¹³⁵

III. THE PROBLEMATIC EFFECTS OF THE *PICO* COURT'S LACK OF CONSENSUS

Justice Powell, dissenting in *Pico*, opined that the plurality's proposed standards were essentially worthless.¹³⁶ Justice Powell stated:

The plurality does announce the following standard: A school board's "discretion may not be exercised in a narrowly partisan or political manner." But this is a standardless standard that affords no more than subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular

¹³¹ See Vlogbrothers, *supra* note 3.

¹³² See *Pico*, 457 U.S. at 885 (Burger, J., dissenting).

¹³³ *Id.* at 915.

¹³⁴ See Helen M. Quenemoen, Board of Education v. Pico: *The Supreme Court's Answer to School Library Censorship*, 44 OHIO ST. L.J. 1103, 1123–24 (1983); see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 757 n.15 (1976) ("As for the recipients' great need for the information sought to be disseminated, if it distinguishes our prior cases at all, it makes the appellees' First Amendment claim a stronger rather than a weaker one."); *Schneider v. State*, 308 U.S. 147, 163 (1939) (rejecting argument that local ordinances banning distribution of printed material in streets and alleys are valid because persons are free to distribute them elsewhere).

¹³⁵ See *Tinker*, 393 U.S. at 508–09; see *infra* text accompanying notes 136–60.

¹³⁶ See *Pico*, 457 U.S. at 895 (Powell, J., dissenting).

decision was made in a “narrowly partisan or political manner.” Even the “chancellor's foot” standard in ancient equity jurisdiction was never this fuzzy.¹³⁷

The lack of a binding standard that clearly delineates the First Amendment limitations in this context has indeed had considerable effects on schools, educators, counsel, parents, and, most importantly, students.¹³⁸ Identifying the specific effects of the *Pico* plurality's lack of clarity is necessary to advocate for an urgent resolution of this issue and to improve the ability of students throughout public schools to exercise their freedom of individual thought.

One risk posed by the Court's refusal to establish an applicable standard is an increased likelihood of emotionally draining and expensive litigation.¹³⁹ If the number of disputes between community members opposing book banning and school districts increases, there could be a higher potential for litigation and even liability arising from a school board's decision to remove a book.¹⁴⁰ Litigation costs, attorneys' fees in particular, are becoming increasingly expensive and could pose significant financial risk to school districts as well as parent and student plaintiffs.¹⁴¹ Moreover, an increasing amount of book challenges, regardless of whether that dispute results in litigation, could fracture what would otherwise be an amicable relationship between the local community and the school board.¹⁴² The chance of communal relationships turning sour because of disputes over book banning is even higher where a school board's decision to censor a book is highly publicized, as was the case in *Pico*.¹⁴³

One of the starkest effects of the *Pico* Court's indecisiveness is an increase in arbitrary judicial methodology caused by the inability of federal courts to apply a binding standard, which is an apparent problem in a recent Eleventh Circuit opinion.¹⁴⁴ That court addressed the removal of books about oppressive conditions in Cuba from a school library due to factual inaccuracies.¹⁴⁵ The plaintiffs urged the Eleventh Circuit to apply the *Pico* plurality's proposed standard: “[l]ocal school boards may not remove books from school library shelves simply because they

¹³⁷ *Id.* “Chancellor's foot” is a historic term of art referring to the act of English Chancellors exercising discretion to make decisions in equity. See Diva Rai, *The Chancellor's Foot: Know Equity in Modern Times*, PLEADER (Apr. 17, 2020), <https://blog.ipleaders.in/the-chancellors-foot-know-equity-in-modern-times/>.

¹³⁸ See Quenemoen, *supra* note 134, at 1120 (“One clear legacy of *Pico* will be more litigation over school library book removals.”).

¹³⁹ See *id.*

¹⁴⁰ See Gordon Sommers, Note, *The End of the Public Interest Exception: Preventing the Deterrence of Future Litigants with Rule 82(b)(3)(I)*, 31 ALA. L. REV. 131, 159 (2014) (“But when the real source of the problem is the law's imprecision, litigation costs may just be the price we pay for the flexibility of a common law system.”).

¹⁴¹ See, e.g., *id.*; see also *School District Liability in 2020: What Every Superintendent Should Prepare for*, FINALFORMS (Mar. 3, 2020), <https://www.finalforms.com/blog/school-district-liability-in-2020-what-every-superintendent-should-prepare-for>.

¹⁴² See FINALFORMS, *supra* note 141.

¹⁴³ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 857 (1982).

¹⁴⁴ See generally *Am. Civ. Liberties Union v. Mia.-Dade Cnty. Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009).

¹⁴⁵ *Id.* at 1183–84.

dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”¹⁴⁶ Rather than relying on this language as a binding pronouncement, the court referenced the *Pico* plurality’s standard in a subversive manner, stating that *Pico* has no precedential value as a plurality opinion and implying that it was unclear whether the First Amendment even applies.¹⁴⁷ Instead of conducting a primarily objective analysis by relying on First Amendment precedent, historic understandings of the First Amendment’s purpose, or the policy rationales regarding the immediate effects of book removal, the Eleventh Circuit opted to count the number of times each Justice on the *Pico* Court used the word “removal” instead of the word “ban”:¹⁴⁸

Instead, the one thing that every one of the justices agreed on in *Pico* is that a school board’s action in removing a book from school library shelves is more accurately described as removing the book instead of as banning it. In describing what the board did the *Pico* plurality opinion used “removal” or a derivative of that word forty-eight times. It did not use the word “ban” or any derivative of it once.¹⁴⁹

The Eleventh Circuit proceeded to count the exact number of times each individual Supreme Court justice used the word “removal” or a derivative of that word instead of “ban”.¹⁵⁰ While the Eleventh Circuit certainly identified cases addressing book banning in public schools to support its analysis of “educational suitability,”¹⁵¹ there should be cause for concern when a federal appellate court relies on a simple word search rather than objective constitutional standards. This method of judicial analysis is strikingly simplistic and provides very little, if not zero, guidance to school administrators and legal professionals grappling with the constitutionality of book banning. Not only is this method of judicial reasoning problematic on its own, but it is also a microcosm of the more widespread problem of federal courts characterizing the freedom of speech as something less than a constitutional right in the context of book banning.¹⁵²

In the long run, the parties most impacted by the *Pico* decision are students themselves.¹⁵³ While federal circuit opinions have exemplified the difficulty of making an evidentiary showing of constitutionally offensive harm to students when

¹⁴⁶ *Id.* at 1199 (quoting *Pico*, 457 U.S. at 872) (alteration in original).

¹⁴⁷ *Id.* at 1200, 1230.

¹⁴⁸ See *Pico*, 457 U.S. at 857.

¹⁴⁹ *Id.* (citation omitted).

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 1219 & n.16.

¹⁵² See *Bd. of Educ. v. Pico*, 457 U.S. 853, 885 (Burger, J., dissenting).

¹⁵³ See Quenemoen, *supra* note 134, at 1123–24 (emphasizing that students are significantly benefited by having access to books in a public-school library).

books are banned from the public-school library,¹⁵⁴ that does not mean that students are unharmed by book banning. The *Pico* Court failed to appreciate the fact that most K-12 students today spend little time outside of school voluntarily pursuing knowledge and information,¹⁵⁵ which makes the function of the school library that much more significant.¹⁵⁶ By removing a book from a public-school library, students are prevented from accessing material that may have otherwise had a tremendously positive impact on their individual development and values.¹⁵⁷ In the case of *Looking for Alaska*, for example, school administrations precluded their students from engaging with the novel's positive thematic elements encouraging adolescents to be confident in who they are as individuals and engage with social causes that they are passionate about resolving.¹⁵⁸

The act of banning books from a public-school library sends a message to students that the school administration does not support the voluntary pursuit of knowledge.¹⁵⁹ It conveys the message that the stories and perspectives of minority or marginalized groups are unimportant or inappropriate, which presents a

¹⁵⁴ See, e.g., *Presidents Council v. Cmty. Sch. Bd. No. 25*, 457 F.2d 289, 293 (2d Cir. 1972) (“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.”).

¹⁵⁵ See VICTORIA RIDEOUT & MICHAEL B. ROBB, *THE COMMON SENSE CENSUS: MEDIA USE BY TWEENS AND TEENS 3* (2019), <https://www.common sense media.org/sites/default/files/research/report/2019-census-8-to-18-full-report-updated.pdf> (finding that teens use an average of just under seven-and-a-half hours of entertainment screen media per day—not including time spent on school work or homework); see also Julia Jacobo, *Teens Spend More than 7 Hours on Screens for Entertainment a Day: Report*, NBCNEWS (Oct. 29, 2019, 2:06 PM), <https://abcnews.go.com/US/teens-spend-hours-screens-entertainment-day-report/story?id=66607555>.

¹⁵⁶ See Quenemoen, *supra* note 134, at 1124 (“Time outside of school is often spent at part-time jobs, sporting activities, or general socializing, and the informational input outside of school is frequently negligible. Lack of transportation to public libraries and bookstores, as well as the cost of purchasing materials, imposes further limitations on students’ access to books outside of the school environment. The public school is responsible for students’ intellectual growth and development, and it is there that the ideas and information should be available.”).

¹⁵⁷ Moreover, many students may not have a public library near them that is easily accessible and, therefore, the public-school library is the sole conduit of such information for those individuals. This fact is even more essential to understand with respect to students who live in poverty, are in foster care, or are otherwise displaced. See *Access to Library Resources and Services*, AM. LIBR. ASS’N (Oct. 2021), <https://www.ala.org/advocacy/intfreedom/access> (“People experiencing poverty or homelessness constitute a significant portion of users in many libraries today and this population provides libraries with an important opportunity to change lives. As the numbers of poor children, adults, and families in America rises, so does the urgent need for libraries to effectively respond to their needs.”); Susan B. Neuman & Naomi Moland, *Book Deserts: The Consequences of Income Segregation on Children’s Access to Print*, 54 URB. EDUC. 126, 143 (2019).

¹⁵⁸ See GREEN, *supra* note 3; see also Ellie Diaz, *Spotlight on Censorship: ‘Looking for Alaska’*, Intell. Freedom Blog (Apr. 13, 2017), <https://www.oif.ala.org/spotlight-censorship-looking-alaska/>.

¹⁵⁹ See Robert Pondicio & Deborah Caldwell-Stone, *Point-Counterpoint: Book Banning at Public Schools and Libraries*, YAKIMA HERALD-REPUBLIC (Nov. 28, 2021), https://www.yakimaherald.com/opinion/columnists/point-counterpoint-book-banning-at-public-schools-and-libraries/article_f5e1b62e-2e7e-53a1-aa19-1dd256191890.html (“Publicly funded libraries are community institutions that must serve the interests and information needs of every child, every family and every individual in the community. By necessity, their collections must reflect the diversity of thought and values that exist in every community.”).

significant risk of emotional harm to students who are members of such groups.¹⁶⁰ In sum, the Supreme Court's failures to articulate and agree upon a clear standard leaves the scope of students' First Amendment right to receive information from a school library in a state of utter confusion. Reform through the creation of a more appropriate judicial standard would prevent an increase in expensive litigation, the drafting of arbitrary judicial decisions, and the chilling of students' voluntary pursuit of knowledge and individual freedom of thought.

IV. PROPOSING A JUDICIAL STANDARD AND A PROCESS OF HOLISTIC REVIEW

To balance the competing principles implicating broad school authority and the First Amendment free speech guarantee, I advocate for the Supreme Court to adopt a judicial standard similar to that which was adopted by the Sixth Circuit in *Minarcini* and by Justices Brennan, Marshall, and Stevens in *Pico*. While issues of book banning would still be adjudicated on a case-by-case basis, a binding standard operating under a presumption that the legal system should prioritize the First Amendment would prevent disputes and protect students' constitutional rights. In adopting the presumption that the right to access information outweighs the discretion of schools in this context, my proposed standard specifically evaluates whether the public school conducted a holistic review of the challenged material in good faith. Such a standard would place the burden of proof on the school district to demonstrate by clear and convincing evidence that its decision to remove a book from its library was not based on an impermissible, content-based motive.

My reform proposal additionally recommends a procedure of holistic review that considers factors such as age appropriateness, obscenity, violence, or immorality that may, in exceptional circumstances, render material so unsuitable for consumption by younger students that the First Amendment cannot protect it. Moreover, my proposal requires schools to presume that materials discussing racial inequality, LGBTQ+ initiatives, poverty, and other social justice initiatives are entitled to heightened protection. To the end of striking the necessary balance, I propose two recommendations: First, I propose that a more robust, but clear, standard be established by the Supreme Court in a future case. Such a standard would then be applied by reviewing courts to inquire whether a school board that chose to ban library material took sufficient measures to protect students' First Amendment interests. Second, I propose a normative argument to encourage school boards to create book review committees that would have specially delegated authority to determine whether it is appropriate to remove challenged material in consideration of the First Amendment.

¹⁶⁰ *Id.* ("Designating a broad range of books dealing with the lives of those who are gay, queer or transgender, or that tell the stories of persons who are Black, Indigenous or persons of color as inappropriate or worse not only inflicts trauma on vulnerable young persons and their families who are members of those groups, it also threatens our democratic values.").

A. Proposing a Three-Part Standard Incorporating a Robust Factors Test

I propose that the following three-part standard be established in a future constitutional determination on the issue of book banning by the Supreme Court:¹⁶¹

- 1) Public-school boards, administrators, librarians, or educators may not remove books from public-library shelves on the basis of content, unless the school can demonstrate by clear and convincing evidence that it has a legitimate and substantial basis for doing so. Such bases include, but are not limited to, age appropriateness, obscenity, lewdness, vulgarity, or violence. Books discussing or encouraging social justice reform (*e.g.*, books discussing racial inequality, discrimination on the basis of gender or sex, religious discrimination, poverty, xenophobia, or other social issues) are presumed to be entitled to heightened First Amendment protection.
- 2) Schools cannot remove books simply because they dislike the ideas contained in a book or seek by its removal to prescribe what shall be orthodox in politics, nationalism, or religion.
- 3) Removal of a book from a public-school library must be accompanied by a good faith, reasonable, and holistic review of the challenged material in formulating a legitimate and well-informed reason for deciding that the material is not suitable for retainment in the school library.

B. School Board Delegations of Authority to Book Review Committees

Even if the judiciary were to refrain from adopting my proposed approach in the future, I advocate that school boards should normatively delegate decision-making authority to a book review committee evenly consisting of faculty and parents from the local community. School boards should retain the discretion to structure their book review committee in various ways according to the needs of their specific district. For example, rural communities or districts with smaller school sizes could adjust the size of their delegated committee accordingly. Moreover, school districts could opt to delegate decisions with respect to particular books to the community at large via a district-wide referendum rather than a committee if the district's needs require it.

While the school board is itself an elected body, delegating authority to a separate committee would mitigate any biasing influence of the school board, thereby demonstrating to the local community that the board has a trusting relationship with local parents. Committee members should be elected by the attendees of local school board meetings. However, if only a small percentage of the

¹⁶¹ While a legislative pronouncement establishing the same standard could also be an effective mechanism for reform, interpretations and application of the Constitution are best left to the Supreme Court. *See* *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). Although a trend among the federal circuits using my advocated standard could accomplish widespread reform as well, a majority decision by the Supreme Court applying the standard would bind all the nation's courts and would enable school administrators across the country to effectuate the "hazardous freedom" mandated by First Amendment principles. *See* *Tinker v. Des Moines Sch. Dist.*, 393 U.S. 503, 508–09 (1969).

community typically attends such meetings, the school board should conduct the election through electronic ballots emailed to parents in the community. Committee members, once elected, would be tasked with reviewing a challenged book in its entirety and have the delegated authority to bind the actions of the board with their recommendations.

Book review committees should refer to a set of specific inquiries in conducting a holistic review of challenged library material. Reference to this set of inquiries would assist the Committee in easily evaluating challenged material holistically under the accompanying judicial standard while addressing the core concerns of schools seeking to remove books for legitimate, content-neutral reasons. These inquiries would serve to maintain the First Amendment's purpose in protecting the dissemination of a wide variety of ideas while balancing schools' legitimate interest in effectively educating students. Answering "yes" to a substantial amount of these inquiries would put a school in a better position to defend against a claim that it violated the First Amendment, though these considerations should be taken into account regardless. Such considerations ought to include:

- 1) Does the challenged material contain graphic images depicting obscenity, including, but not limited to, nudity, sexual intercourse, sexual violence, or other sexual activity?¹⁶²
- 2) Does the challenged material contain text explicitly depicting sexual activity that is so prurient and improper as to render the material, when considered as a whole, unsuitable for library retention?
- 3) Does the challenged material contain graphic images depicting violence?
- 4) Does the challenged material contain text explicitly depicting violence that is so abhorrent and shocking as to render the material, when considered as a whole, unsuitable for library retention?
- 5) Does the text expressly advocate for the reader to commit acts of violence?
- 6) Does the challenged material contain easily verifiable factual inaccuracies?
- 7) Does the challenged work, when viewed as a whole, contain lewdness or vulgarity that is so abhorrent and shocking that it renders the entire work unsuitable for library retention?
- 8) Does the school library in which the challenged work is available primarily serve younger students, such as kindergarten, elementary, or middle school students?

¹⁶² In considering obscenity as a justification for removing a book, the definition of obscenity provided by the Supreme Court in *Miller v. California* should be incorporated into this inquiry. Namely, Book Review Committees should consider:

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

Miller v. California, 413 U.S. 15, 24 (1973) (citing *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)) (citation omitted).

- 9) Does the challenged work advocate for the adoption of immoral values that are blatantly inconsistent with the educational objectives of the school?
- 10) Does the objectionable aspect of the challenged work blatantly outweigh any educational, societal, economic, scientific, personal, cultural, or academic value that the work may have when viewed as a whole?
- 11) Is the work being objected to for a reason unrelated to political ideology, nationalism, or religious views?

Book review committees must consider these factors in good faith, with an open mind, and in a timely manner, which would depend on the length and density of the challenged work. Challenged materials should not be removed from the library during an interim period while the committee's review is ongoing unless the committee can easily predict that it will find the book should not be retained. The decision whether to do so should be made by the committee.

Overall, the entire process should be conducted with reference to the following timeline:

- 1) A school board becomes aware of a parent or educator's objection to a book shelved in the public-school library.
- 2) The school board addresses the issue at a board meeting as a part of its meeting agenda, establishes a timeline for the entire process, and announces that it will conduct an election to determine the members of the book review committee. The school board should expressly clarify whether it is delegating decision-making authority to the committee.
- 3) The book review committee is elected by electronic ballot or by the in-person attendees of a local school board meeting. The decision as to how to conduct the election should be made by the school board, but the determination should be reasonable considering the total population of parents in the school district. An odd number of committee members should be elected.
- 4) Once the committee is elected, the committee determines a timeline as to how long it will spend conducting its review. The committee should consider the occupations and limitations of its members as well as the length of the challenged work in making this decision.
- 5) The committee decides at the outset whether to remove the work from the school library during an interim period while it conducts its review. The committee must cautiously make this determination considering the First Amendment principles at stake and age appropriateness. The committee should also consider the question of whether the material contains objectionable images or text. If graphically violent or sexual images are at issue, there would be a stronger justification in removing the book during the pending review.
- 6) The book review committee members read the challenged material in its entirety. Committee members should reference the above-listed inquiries while doing so and should make annotations and personal notes throughout this process.

- 7) The committee conducts a second meeting to discuss its findings. Committee members should apply the above-listed inquiries concurrently and should have their notes and annotations in front of them during this meeting.
- 8) The committee members vote on whether the challenged material should be removed from the library considering the above-listed inquiries.

The counterargument to my proposed standard and framework for book review would be that this approach is too burdensome on school districts' resources and would cost school administrators time that could be spent on other matters implicating school management. However, the judicial system has already determined that effectuating the First Amendment's requirements is not always entirely free from administrative burden. K-12 institutions are tasked with effectuating the First Amendment's principles with respect to student expression when those principles outweigh administrative burden.¹⁶³ For example, public universities and colleges are required to undertake a specific framework of inquiry to determine whether faculty may be punished for their speech under the First Amendment.¹⁶⁴ More broadly, there is an argument that a burden is placed on a government actor any time that actor's decisions are subject to strict scrutiny under a First Amendment analysis requiring narrow tailoring.¹⁶⁵ This inflicted burden does not diminish the significance of the First Amendment principle at stake under constitutional doctrine.¹⁶⁶

CONCLUSION

*"So now do you see why books are hated and feared? They show the pores in the face of life. The comfortable people want only wax moon faces, poreless, hairless, expressionless."*¹⁶⁷

Considering the widespread nature of book banning nationwide, it is imperative that the judicial system unequivocally protects students' First Amendment right to access knowledge in their schools' libraries and prevents chilling social justice reform. This Comment's propositions to establish a binding judicial standard and implement a process of holistic review would ensure that public schools retain authority to remove books for legitimate reasons while

¹⁶³ See *Tinker*, 393 U.S. at 740–41.

¹⁶⁴ See *Pickering v. Bd. of Educ.* 391 U.S. 563, 568–71 (1968); see also *Connick v. Myers*, 461 U.S. 138, 142 (1983).

¹⁶⁵ See *Reed v. Town of Gilbert*, 576 U.S. 155, 182 (2015) ("We apply strict scrutiny to facially content-based regulations of speech, in keeping with the rationales just described, when there is any 'realistic possibility that official suppression of ideas is afoot.'"); see also THE FIRST AMENDMENT: CATEGORIES OF SPEECH, CONG. RSCH. SERV. 1–2 (Jan. 16, 2019), <https://sgp.fas.org/crs/misc/IF11072.pdf> (describing application of strict scrutiny and the fact that the Supreme Court has required government actors to regulate speech because of its content but must do so evenhandedly).

¹⁶⁶ See CONG. RSCH. SERV., *supra* note 165.

¹⁶⁷ RAY BRADBURY, *FAHRENHEIT* 451 79 (Simon & Schuster, Reissue ed., 2018).

protecting students' access to information on social causes that interest them. These reforms would allow schools to maintain the effectiveness of the educational process so long as they demonstrate that reasonable, good faith efforts were made to consider challenged works as a whole and whether they can contribute educational value to students. As John Green noted in addressing the issue of book banning:

[Public-school libraries] exist[] for the benefit of the social order. We are all better off with a well-informed, well-educated population because that population is more likely to start successful businesses and develop treatments for cancer I believe books challenge and interrogate, they give us windows into the lives of others, and give us mirrors so that we can better see ourselves.¹⁶⁸

The judiciary has drastically undervalued the positive benefits felt by society when information sources in public school libraries are afforded First Amendment protection. Indeed, the Supreme Court has itself recognized that education is a foundational enterprise of society.¹⁶⁹ While school boards are afforded a tremendous amount of deference in most contexts, they must still comport with the “transcendent imperatives of the First Amendment,” the spirit of which necessitate that students freely pursue knowledge to influence change in the world around them.¹⁷⁰

¹⁶⁸ Vlogbrothers, *supra* note 3.

¹⁶⁹ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982).

¹⁷⁰ *Id.* at 864–65.