BURNING BOOKS OVER POLITICS: WHY FEDERAL GUIDANCE IS ESSENTIAL TO PROTECT LITERATURE IN PUBLIC SCHOOLS

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"*There is more than one way to burn a book. And the world is full of people running about with lit matches.*"[1]

On September 13, 2023, a teacher at the Hampshire-Fannett Independent School District in Texas was terminated from her position for assigning a passage from *Anne Frank's Diary: The Graphic Adaptation* to her eighth-grade class.[2] The graphic novel had not been approved by the school board prior to its inclusion in the classroom and had been removed from other school districts in Texas and Florida.[3] Despite the graphic novel's depiction of Anne Frank's experience of living in hiding during the Holocaust as explained through her diary, parents have objected to it being taught to students because it mentions female and male genitalia, as well as potential same-sex attraction.[4] Parents of students complained about their children having to read aloud passages referencing Frank's exploration of her body during puberty.[5] The book ban happened despite Anne Frank's diary being a "staple" in Holocaust history lessons because of its value in demonstrating the plight of Jewish people in Nazi Germany.[6]

This situation is not unique. An elementary school teacher from Mississippi was fired for reading a book called *I Need a New Butt!* to second grade children.[7] The teacher was asked to read to the students by his principal when another school

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1. RAY BRADBURY, FAHRENHEIT 451, 209 (Simon & Schuster Paperbacks 2018) (1978).

2. Timothy Bella, *Texas Teacher Fired After Assigning Graphic Novel Based on Anne Frank's Diary*, WASH. POST (Sept. 20, 2023, 11:45 AM), https://www.washingtonpost.com/education/2023/09/20/texas-teacher-anne-frank-fired/.

3. *Id.*

4. *Id.*

5. Bevan Hurley, *Texas Teacher Fired for Assigning Students Anne Frank Graphic Novel*, INDEP. (Sept. 20, 2023, 15:48 BST), https://www.independent.co.uk/news/world/americas/anne-frank-texas-book-ban-b2415067.html.

6. *Id.*

7. Paul Waldman & Greg Sargent, *Teachers are Under Fire in Increasingly Bizarre Ways,* WASH. POST (March 10, 2022, 4:49 PM) https://www.washingtonpost.com/opinions/2022/03/10/teachers-under-fire-censorship-books/.

official failed to appear.[8] After completing the reading, he was warned by the principal that parents were going to complain about the inappropriateness of the book, and was placed on administrative leave before being terminated.[9] Though the teacher did admit the book included words like "fart" and "butt," he had read the book to other children before without incident. While this may have reflected a "lack of professional judgement,"[10] one may question the reasonableness behind a teacher being fired over such an innocent book. While the contents were immature for a reading to a second-grade class, it was meant to garner laughs, not disapproval.

There are many rights implicated by book bans in public schools, including the rights of authors, teachers, parents, students, and the community. Despite the involvement of these important rights in book bans, there is little guidance provided about what books can and cannot be banned. The federal government has left this decision to the states, which determine what topics students have access to in public school libraries.[11] While it is worth mentioning the federal government contributes financially to public schooling, further involvement historically has been only in emergent situations.[12] The main guidance regarding book bans that applies to schools across the nation was provided by the United States Supreme Court in *Board of Education, Island Trees School District No. 26 v. Pico*, the details of which will be discussed in Section I of this Note. The overall holding of *Pico* is, under the First Amendment, public school districts may not remove books because they "dislike the ideas contained in those books."[13] While the basics of this holding are helpful, the Court failed to set a standard on how to evaluate the motivations of a school district removing books that is applicable outside this case. Arguably, the Court did not go far enough to protect the First Amendment rights they found "directly and sharply implicated" by book removals.[14] The *Pico* Court was also unable to provide a single, clear rule and the plurality opinion leads to confusion about what the rule should be.

It is important to acknowledge the complexity of book banning and the inability to cover each nuance involved. This Note cannot take a comprehensive approach and looks at the issue with a narrowed scope. In Section I, this Note discusses the history behind book banning in the United States. Section II discusses the political nature that book bans have developed and gives three specific examples of how different states have approached the issue. In Section III, the rights of parents and students are evaluated. Finally, Section IV proposes a solution to the problem of political book bans by arguing a federal statute is necessary to protect the rights of students and balance parental rights to influence the education of their children.

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8. *Id.*
9. *Id.*
10. *Id.*
11. *The Federal Role in Education*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/overview/fed/role.html (May 23, 2024).
12. *Id.*
13. Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982).
14. *Id.* at 866.

Despite the intention of the *Pico* Court, its vague standard continues to allow school districts to ban books based on viewpoint, rather than obscenity or inappropriateness for students. Additionally, the holding in *Pico* is made questionable because the decision was published as a plurality opinion.[15] It is therefore necessary to push for additional guidelines to protect First Amendment rights. The best method for creating these guidelines is through federal statute. While education would, and should, remain a local issue, this would ensure that all students are able to access perspectives different from their own, which should be the goal of a public education.

I. THE HISTORY OF BANNED BOOKS

The practice of banning books is not new. The first book ban occurred in 1637 in what is now Quincy, Massachusetts, when the Puritan government banned Thomas Morton's *New English Canaan* for critiquing Puritan culture.[16] The Puritan government also banned pamphlets for expressing "heretic" religious beliefs.[17] These bans were fronted by religious leaders to protect the morals and religious views of their societies.[18] Later, prior to the Civil War, materials discussing anti-slavery sentiments or humanizing enslaved people were censored in the South.[19] In 1873, the Comstock Act was a federal ban on obscene materials being sent in the mail and was used to fight immorality in "the war against books."[20] Under the Comstock Act, immoral material included information about sexuality and birth control.[21] Though each of these historical bans had justifications involving the wellbeing of society, they were also motivated by a group's ideologies and beliefs that they wished to enforce upon others. Regardless of whether these beliefs were held by the majority, these bans were intended to censor information available to some or all the public.

Moving forward to present day, book bans are restricted by the First Amendment of the Constitution, which is applicable to state governments through the Fourteenth Amendment.[22] The First Amendment holds the freedom of speech

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15. A plurality opinion makes the holding of a case questionable because it is not binding on lower courts. Additionally, a plurality opinion indicates that the Court could not reach a majority common view. This results in the case not having a single legal rule to follow in later cases, though the holding can provide helpful precedent in resolving future legal issues.

16. *Book Banning in the United States and Beyond*, GUTMAN LIBR., https://guides.library.harvard.edu/c.php?g=1269000&p=9306840 (Sept. 18, 2023, 4:29 PM).

17. Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, NAT'L GEOGRAPHIC (Apr. 24, 2023), https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states.

18. *Id.*

19. *Id.*

20. *Id.*

21. *See generally* Michelle Goldberg, *The Hideous Resurrection of the Comstock Act*, N.Y. TIMES (Apr. 8, 2023), https://www.nytimes.com/2023/04/08/opinion/comstock-laws-abortion-texas.html (describing the recent use of the Comstock Act in Texas to prevent abortion pills from being sent in the mail).

22. *First Amendment and Censorship*, AM. LIBR. ASS'N, https://www.ala.org/advocacy/intfreedom/censorship (Oct. 2021).

and freedom of the press as fundamental rights that cannot be intruded upon by the government.[23] This protection does not apply to material banned by private individuals or businesses.[24] Most book bans in public libraries and public schools are proposed by parents or groups concerned about the material's contents, but have also been influenced by state legislation.[25] In public schools, which are the focus of this Note, the challenges are debated by parents and school administrators, teachers, librarians, and board members.[26] When the ban is approved, despite the wishes of some parents, the courts have been forced to mediate between what reasons are permissible for banning books and what reasons are not.[27] Challenges to books have increased dramatically since 2021, with 1,477 instances of books being banned in the first half of the 2022-2023 school year.[28] This is comparable to the 238 requested book bans in 2019, which resulted in only 190 book bans overall.[29]

While it is unclear what has caused the increase in challenges, the difference in the ways books are being challenged is easy to see and provides insight into what is driving the bans. Though parents are still fronting some of the challenges to books, 74% of book bans in 2022 were brought forth by advocacy groups, elected officials, or enacted legislation.[30] One organized group, Moms for Liberty, was responsible for 58% of the advocacy group-led book challenges around the country.[31] The activist group was founded by two former school board members and aims to fight for the survival of America by "unifying, educating, and empowering parents to defend their rights at all levels of government."[32] One of their methods in achieving this goal is challenging what they deem to be obscene

23. U.S. CONST. amend. I.

24. *First Amendment and Censorship*, *supra* note 22.

25. Kasey Meehan & Johnathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/.

26. *Id.*

27. *See* Bicknell v. Vergennes Union High Sch. Bd. of Dirs., 475 F. Supp. 615 (D. Vt. 1979) (holding books may be removed by a school board for being vulgar or indecent); Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864 (D. Kan. 1995) (holding a school board may not remove a book because they disagree with the subject matter, so long as it is not obscene); C.K.-W v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906 (E.D. Mo. 2022) (holding school boards must provide students the ability to challenge book removals, but ultimately that the student would not be harmed by the book's removal. This ended in a mediation between the school board and the students about book removal policy); L.H. v. Indep. Sch. Dist., 2023 WL 2192234 (W.D. Mo.) (holding plaintiffs must demonstrate they have a fair chance of success and face irreparable harm regarding First Amendment claims against school boards for book removals when requesting a preliminary injunction).

28. Meehan & Friedman, *supra* note 25.

29. Parker Leipzig, *Requests to Ban Books Hit a 21-Year High. See Which Titles Were the Most Challenged*, CNN (Aug. 27, 2023, 4:00 AM), https://www.cnn.com/2023/08/27/us/school-library-book-ban-increase-dg/index.html# (noting book bans in 2021 were also much lower than in 2022, but the COVID-19 pandemic resulted in many schools being closed during this year, which possibly led to lower challenges during that year).

30. Meehan & Friedman, *supra* note 25.

31. *Id.*

32. *Who We Are*, MOMS FOR LIBERTY, https://www.momsforliberty.org/about/ (last visited July 20, 2024).

and inappropriate books in public school libraries. Rather than banning books, however, the founders argue they are "curating content" in the libraries to ensure it is fit to be read by school children.[33]

Opponents to Moms for Liberty, as well as book bans in general, argue that these attempts to create "appropriate" libraries in schools are a form of censorship and strip students of their access to literature.[34] PEN America and the America Library Association ("ALA") are just two of the organizations concerned about the impact book banning can have on democracy and the freedom of expression. Though the ALA's purpose is not specifically to oppose book bans, they aim to defend the "right of library users to read, seek information, and speak freely as guaranteed by the First Amendment."[35] The ALA believes that intellectual freedom is a basic right and works to protect it.[36] To achieve this goal, the ALA compiles lists of attempted book bans and challenges in schools, universities, and libraries across the country and "works to ensure free access to information".[37] In addition to condemning censorship, the organization works to provide a code of ethics for librarians.[38]

The lines drawn by both sides of the book banning debate, parental rights and First Amendment protections, indicate the challenges are influenced by political ideologies, but there is little authority to guide the nation on what is permissible under the First Amendment. Beyond the Constitution, the Supreme Court has weighed in on the topic only once. The controlling case, discussed briefly in this Note's introduction, was decided in 1982. In *Pico*, the Court addressed whether the First Amendment provided restrictions on school boards attempting to remove books from school libraries.[39] The school board in this case had created a list of books they found objectionable for their "'anti-American, anti-Christian, anti-[Semitic], and just plain filthy'" nature.[40] The Court made clear that this case was only applicable to the removal of books from school libraries, not the acquisition of new books or books being taught in school curriculum.[41] Ultimately, the Court decided "First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."[42] The right being protected for students is the right to receive ideas, which informs one's

33. Tyler Wornell, *Moms for Liberty Founders: 'No One is Looking to Ban Books'*, NEWS NATION (Apr. 25, 2023, 11:14 PM), https://www.newsnationnow.com/cuomo-show/moms-for-liberty-founders-book-bans-school-libraries/.

34. Meehan & Friedman, *supra* note 25.

35. *Key Action Areas,* AM. LIBR. ASS'N, https://www.ala.org/aboutala/missionpriorities/keyactionareas (last visited July 20, 2024).

36. *Id.*

37. *Banned Book FAQ*, AM. LIBR. ASS'N, https://www.ala.org/bbooks/banned-books-qa (last visited Aug. 22, 2024).

38. *ALA Code of Ethics*, AM. LIBR. ASS'N, https://www.ala.org/tools/ethics (last visited July 28, 2024).

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

40. *Id.* at 857 (quoting Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

41. *Id.* at 862.

42. *Id.* at 866.

rights to speech, press, and overall political freedom.[43] Additionally, *Pico* sets the standard that school boards may not remove books from school libraries merely because they dislike the ideas within them. Instead, book removals are only permissible if the books are vulgar or obscene.[44]

This rule set by the Court appears to prohibit book bans based on political ideologies and beliefs. This may not be effective, however. Book bans have become a localized issue and seem to be more common in conservative parts of the country. For example, as will be discussed in detail in Section II, states like Texas and Florida have been leading the push to ban books in schools. On the other side, Illinois has banned the practice of banning books. This leads to the question of who or what mediates book bans to ensure that they follow the Supreme Court decision.

II. BOOK BANS HAVE BECOME POLITICAL

As discussed previously, there appears to be a link between political or personal ideologies and book bans. This is not a new phenomenon. In 1924, the Supreme Court of California ruled on a challenge to the King James version of the Bible being purchased for a public school library.[45] The parents who challenged this purchase argued that this specific version of the Bible was of a denominational character that violated state statutes, the Constitution of California, and the United States Constitution.[46] In its decision, the court found for the school district because the use of the Bible "for reference and library purposes" was not a violation of their state laws or either constitution.[47] Were the Bible being used in classrooms or used to force children to practice the religious view held within it, this would violate not only the state statutes in California, but the First Amendment.[48] Regardless, the parents challenging the purchase of the King James version of the Bible were mainly concerned with the sectarian nature of that translation.[49] Though this case is not binding on all jurisdictions, it demonstrates the balancing that must happen when weighing First Amendment rights and personal beliefs about what is appropriate for a school library.

The political divide over book bans has only become more apparent in recent years. Liberals and conservatives have been at opposite ends of the book banning spectrum and continue to accuse each other of furthering the problem. Conservatives argue they are protecting parental rights to have a say in their children's

43. *Id.* at 867.

44. Miller v. California, 413 U.S. 15, 24 (1973). Generally, obscenity is determined through the test set forth in *Miller*, which takes into consideration whether, by community standards, the work, as a whole, appeals to prurient interests, describes or depicts sexual conduct, and lacks artistic, scientific, literary, or political value. It considers both national and local standards.

45. Evans v. Selma Union High Sch. Dist. of Fresno Cnty., 222 P. 801, 801 (Cal. 1924).

46. *Id.*

47. *Id.* at 802.

48. *Id.* at 803.

49. *Id.* at 801.

education while protecting liberty and freedom.[50] Many of the books targeted by conservative groups involve discussions about identifying as LGBTQ+ and other minority representation, though the justification behind the bans tends to be that the books include sexual themes or violence.[51] Liberals, however, argue these bans are aimed at silencing minority voices and are rooted in homophobia and racism.[52] Some conservatives counter that the books include "pornographic" material and are inappropriate for children.[53]

Books targeted by liberal groups, though fewer than conservative challenges, tend to focus on racist imagery or stereotypes.[54] For example, liberal groups have challenged books such as *The Adventures of Huckleberry Finn* by Mark Twain for use of racially inappropriate language and various racial stereotyping.[55] While this accusation against the book is true, it can also be argued that the purpose of the novel is to examine institutionalized racism in the Deep South. Therefore, the banning of the book in school districts for concerning imagery of African Americans and the use of slurs mischaracterizes the reason Twain included such language. Despite the educational value the novel may serve, there are still those who argue this does not justify it being taught in schools. The debate over whether the value of the novel outweighs the potential harmful effects of its racist language is one that has been ongoing for decades and is likely to continue.[56] One's perspective of the novel being available in school libraries or taught in classrooms hinges on their opinion about the potential harmfulness of the language within it, but many of the bans originate with liberal advocacy groups.[57]

While *The Adventures of Huckleberry Finn* has been banned many times over the decades for its racial stereotypes, recent bans of other books have been justified because the book is "harmful" or "explicit".[58] One of the most banned books in 2022 was *Gender Queer: A Memoir* by Maia Kobabe for its LGBTQ+ themes and allegedly sexually explicit language. While the book discusses sexual content that might be inappropriate for young children, the intention behind including details about crushes on classmates and intimate medical examinations is to demonstrate the normalcy of these feelings, especially for teenagers struggling with their

50. Kiara Alfonseca, *How Conservative and Liberal Book Bans Differ Amid Rise in Literary Restrictions,* ABC NEWS (Jan. 12, 2023, 5:08 AM), https://abcnews.go.com/US/conservative-liberal-book-bans-differ-amid-rise-literary/story?id=96267846.

51. *Id.*

52. *Id.*

53. *See* Dave Seminara, *The Left Twists the Meaning of "Book Ban"*, CITY J. (June 26, 2023), https://www.city-journal.org/article/the-left-twists-the-meaning-of-book-ban.

54. Alfonseca, *supra* note 50.

55. *Id.*

56. *See generally* Alvin Powell, *Fight Over Huck Finn Continues: Ed School Professor Wages Battle for Twain Classic,* HARV. GAZETTE (Sept. 28, 2000), https://news.harvard.edu/gazette/story/2000/09/fight-over-huck-finn-continues-ed-school-professor-wages-battle-for-twain-classic/ (demonstrating that the battle over *Huckleberry Finn* has spanned decades).

57. Alfonseca, *supra* note 50.

58. Meehan & Friedman, *supra* note 25.

identity.[59] The memoir's inclusion on school library shelves, therefore, holds value in helping students, especially those who think they might be LGBTQ+, navigate confusing moments in their adolescence. Kobabe explains that the purpose of the memoir is to help young people find the words to explain what they are feeling.[60] Despite this potential value, the sexual content within the memoir has caused it to be banned in more states than any other book because it was deemed obscene.

Though the banning of these books has been justified for non-political reasons, it can be inferred that the motivation behind the challenges rests on politics. The National Association for the Advancement of Colored People ("NAACP") has historically opposed *The Adventures of Huckleberry Finn* being used in schools. In 1957, the organization stated the novel contained "belittling racial designations" and "racial slurs" which could perpetuate racial stereotyping.[61] The Pennsylvania chapter of the NAACP reaffirmed this position in 2000, when they argued the language of the novel should either not be taught or the offensive language should be removed.[62] The NAACP is not affiliated with a political party, but its aim at protecting civil rights of minorities and defeating social injustice suggests the organization holds liberal, opposed to conservative, ideologies.[63]

Some states have made their political opinions clear through their legislation about book bans and challenges for public schools. Though this Note focuses on the actions of Florida, Texas, and Illinois, these are not the only states whose actions towards book bans reveal their political leaning. California, for example, notoriously has been known as left-leaning and is thought to be one of the most progressive states.[64] LGTBQ+ community members and racial minorities are widely accepted in California,[65] making it no surprise the California legislature enacted a law prohibiting book bans targeting books dealing with race and sexual orientation.[66] This prohibition appears to be motivated by California's political standing, which is a trend among other states as well.

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59. *See* Rachel Martin & Reena Advani, *Banned Books: Maia Kobabe Explores Gender Identity in 'Gender Queer*,*'* NPR (Jan. 4, 2023, 5:07 AM), https://www.npr.org/2023/01/04/1146866267/banned-books-maia-kobabe-explores-gender-identity-in-gender-queer.

60. *Now the Most Challenged and Banned Book, Gender Queer Was Written to Give Teenagers the Guidance that Author Maia Kobabe Never Had,* PEN AMERICA (May 3, 2023), https://pen.org/press-release/now-the-most-challenged-and-banned-book-gender-queer-was-written-to-give-teenagers-the-guidance-that-author-maia-kobabe-never-had/.

61. *About the Book: Adventures of Huckleberry Finn,* PBS, https://www.pbs.org/wgbh/cultureshock/teachers/huck/ aboutbook.html (last visited July 20, 2024).

62. Powell, *supra* note 56.

63. *Our History,* NAACP, https://naacp.org/about/our-history (last visited July 20, 2024).

64. Tyler Kingkade et al., *California Has a Reputation for Progressive Politics. Don't Tell that to the State's Progressives*, NBC NEWS (Oct. 13, 2020, 6:00 AM), https://www.nbcnews.com/politics/2020-election/california-has-reputation-progressive-politics-don-t-tell-state-s-n1243023 (discussing the reputation of California as a liberal and progressive state, even though its legislation is not as progressive as it claims to be).

65. *California's Equality Profile*, MOVEMENT ADVANCEMENT PROJECT, https://www.lgbtmap.org/equality-maps/profile_state/CA (last visited July 20, 2024) (demonstrating California has few laws discriminating against members of the LGTBQ+ community).

66. Mia Russman et al., *Book Banning Is Now Banned in California*, USC ANNENBERG MEDIA (Sept. 26, 2023, 6:01 PM), https://www.uscannenbergmedia.com/2023/09/26/book-banning-is-now-banned-in-california.

A. Florida's Book Bans Disproportionately Effect Books with Racial Minorities and LGBTQ+ Characters

The banning of *Gender Queer: A Memoir* also has political undertones, as it is accompanied with a variety of state legislative actions to reduce the presence of books in schools that involve themes of LGBTQ+ issues. Florida, for example, just one of the many states the memoir was banned in, enacted multiple statutes regarding parental rights within schools and requiring transparency from teachers about selection of all instructional materials.[67] Florida House Bill 1467 requires school districts to be transparent about instructional materials used in classrooms and in libraries, and creates a procedure that must be followed if a parent objects to a material.[68] Additionally, it requires all elementary schools to publish lists of instructional materials on its website.[69] This Florida statute works with Florida State Statute Section 847.012, which makes it a third-degree felony to distribute pornographic or inappropriate material to a minor.[70]

These Florida statutes had a dramatic impact on Florida public school classrooms in the beginning of 2023. Some Florida teachers, in fear of facing felony charges, covered up their classroom libraries or removed all the books from them until they were approved by their district.[71] Manatee County in Florida even ordered the teachers in their school district to cover all books in their classrooms.[72] The books are to remain covered until vetted by a librarian or "certified media specialist," which makes the process of getting books back on the shelves a lengthy one.[73]

In addition to books being removed or covered prior to being vetted, books in Florida have been banned at one of the highest rates in the country.[74] This has sparked litigation alleging the books are being removed not for obscenity, but because school districts disagree with the ideas within them.[75] In *PEN America v. Escambia County School District*, which was filed in May 2023, PEN America and the joining plaintiffs allege the board of Escambia County School District disproportionately targeted books about or by people of color or LGBTQ+ people.[76] In doing so, Escambia County School District has "prescribed an ortho-

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67. *See generally* H.R. 1467, 2022 Leg., 54th Sess. (Fla. 2022); *see also* H.R. 1557, 2022 Leg., 54th Sess. (Fla. 2022).

68. Fla. H.R. 1467.

69. *Id.*

70. FLA. STAT. § 847.012(3)(a) (2013).

71. Tesfaye Negussie & Rahma Ahmed, *Florida Schools Directed to Cover or Remove Classroom Books that Are Not Vetted*, ABC NEWS (Feb. 6, 2023, 2:08 PM), https://abcnews.go.com/Politics/florida-schools-directed-cover-remove-classroom-books-vetted/story?id=96884323.

72. *Id.*

73. Erum Salam, *Florida Teachers Forced to Remove or Cover up Books to Avoid Felony Charges,* GUARDIAN (Jan. 24, 2023, 12:06 PM), https://www.theguardian.com/us-news/2023/jan/24/florida-manatee-county-books-certified-media-specialist.

74. *PEN America v. Escambia County School District,* PEN AM. (Jan. 31, 2024), https://pen.org/pen-america-v-escambia-county/.

75. Complaint at 2-3, PEN Am. Ctr. Inc. v. Escambia Cnty. Sch. Bd., No. 3:23-cv-10385-TKW-ZCB (N.D. Fla. May 17, 2023).

76. *Id.* at 4.

doxy of opinion," which is a violation of the First and Fourteenth Amendments, as PEN America's complaint argues.[77] The complaint also relies on *Pico*, stating school districts may not remove books for partisan or political reasons, yet this is what appears to be happening in Escambia County School District. PEN America remarks that Escambia County School District's actions are motivated by a "clear agenda" to remove all discussion of race discrimination and LGBTQ+ issues from schools.[78]

The lawsuit is still ongoing, with the court most recently deciding that the plaintiffs have standing in the case, meaning it can continue forward.[79] One of the main arguments in the motion is that school districts, under Florida law, have ultimate authority in choosing what books are allowed in public school libraries.[80] The school district also argues that the actions complained of by the plaintiffs qualify as government speech, which would mean that the plaintiffs are not granted protection under the First Amendment or Equal Protection Clause.[81] This is because, under *Pleasant Grove City v. Summum*, the government is able to speak for itself and choose the views it wants to express.[82] Under this perspective, even if Escambia County School District was found to be discriminatory in their removal of books from public school libraries, they argue they have the right to do so because it is government speech.

In response to the motion to dismiss, the plaintiffs argue that each of the defendant's points are incorrect and point out that the motion to dismiss does not negate the fact the removals are motivated by hostility towards minorities.[83] The plaintiffs are not the only group to respond in opposition to the motion to dismiss; a group of First Amendment law professors, the NAACP, and Equality Florida submitted amicus briefs to the court to explain why the motion to dismiss should be denied. On January 12, 2024, the district court denied the defendant's motion to dismiss, finding the plaintiffs do have standing to bring the claims against the school board.[84] Additionally, the court rejected the defendant's argument that the removal of the books qualifies as government speech.[85] While the case is still ongoing at the time this Note is being published, the result will be monumental in demonstrating the authority, or lack thereof, that Florida school districts have in deciding what viewpoints students are permitted to access.

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77. *Id.* at 3-4.

78. *Id.* at 3.

79. *In a Win for Free Expression, Judge Rules Lawsuit Challenging Escambia County, FL Book Bans Can Move Forward,* PEN AM. (Jan. 10, 2024), https://pen.org/press-release/in-win-for-free-expression-judge-rules-lawsuit-challenging-escambia-county-fl-book-bans-can-move-forward/. (detailing the most recent occurrence in the case as of February 6, 2024).

80. Defendant's Dispositive Motion to Dismiss at 2-3, PEN Am. Ctr. Ind. v. Escambia Cnty. Sch. Bd., No. 3:23-cv-10385-TKW-ZCB (N.D. Fla. Aug. 21, 2023).

81. *Id.* at 3, 23.

82. *Id.* at 24.

83. Plaintiffs' Opposition to Defendant's Motion to Dismiss at 2-3, PEN Am. Ctr. Ind. v. Escambia Cnty. Sch. Bd., No. 3:23-cv-10385-TKW-ZCB (N.D. Fla. Sept. 18, 2023).

84. PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., 2024 WL 133213, at *1 (N.D. Fla. Jan. 12, 2024).

85. *Id.*

B. Like Florida, Texas Has Implemented Legislation Strengthening the Ability to Ban Books from Public School Libraries

In April 2023, Texas passed an act creating guidelines for rating material in public school libraries that is arguably less restrictive than Florida's statute.[86] In Texas, a library material vendor, defined as someone who sells library materials to primary or secondary schools, is now responsible for rating the material on its sexual content prior to selling it to the school.[87] To rate the material, the vendor is meant to balance three different factors: the explicitness of description or depiction of sexual conduct, the amount or repetition of sexual conduct, and whether "a reasonable person" would think the material "intentionally panders to, titillates, or shocks the reader."[88] After weighing the three factors, the vendor is forbidden from selling anything deemed sexually explicit to a public school library.[89] Additionally, the vendor is to submit a list of all materials deemed sexually explicit to the Texas Education Agency ("TEA"), which may review any materials sold to school libraries to ensure it is correctly rated and, if it is not, have it removed from the school.[90]

The Texas statute places restrictions on the reasons library material may be removed. Under House Bill 900, also known as the READER Act, material may not be removed because of the ideas contained within the book or the background of the authors or characters depicted.[91] Put differently, the Texas legislature followed, or at least attempted to follow, the guidelines set forth in *Pico*. These guidelines appear to be an attempt to prevent viewpoint discrimination by the library material vendors and school boards when deciding what books may be kept in school libraries. However, the rating system has flaws that might make it easier for vendors, school boards, and TEA to use personal beliefs to influence the rating the material is given. One major flaw is the statute incorporates a "reasonable person" standard, which is vague and subjective. What one reasonable person may find titillating or shocking might not bring forth the same feelings in another reasonable person. Additionally, what is reasonable to a person can be dependent on their background, education, economic status, gender, race, and other various factors.

Despite the Texas legislature's attempt to restrict viewpoint discrimination by prohibiting certain reasons for book removal, the READER Act has already been challenged. In July 2023, three months after the statute was passed, a coalition of book publishers, sellers, and authors sought to enjoin the enforcement of the bill on the grounds that it violates the First and Fourteenth Amendments in *Book People, Inc. v. Wong*.[92] In *Book People,* the plaintiffs base their complaint on three

86. *See generally* H.B. 900, 88th Leg., Reg. Sess. (Tex. 2023).

87. H.B. 900 § 35.001(1), 88th Leg., Reg. Sess. (Tex. 2023); H.B. 900 § 35.002(a), 88th Leg., Reg. Sess. (Tex. 2023).

88. H.B. 900 § 35.0021(b)(1)-(3), 88th Leg., Reg. Sess. (Tex. 2023).

89. H.B. 900 § 35.002(b), 88th Leg., Reg. Sess. (Tex. 2023).

90. H.B. 900 § 35.003(a), 88th Leg., Reg. Sess. (Tex. 2023).

91. H.B. 900 § 33.021(d)(2)(G), 88th Leg., Reg. Sess. (Tex. 2023).

92. Complaint at 2, Book People, Inc. v. Wong, No. 1:23-cv-858 (W.D. Tex. July 25, 2023).

issues: the rating system prescribed by the READER Act is vague and subjective, they could be punished for refusing to use the rating system, and the statute blocks the distribution and access to books in public school libraries that are deemed inappropriate.[93] Furthermore, the plaintiffs argue the violation of the First Amendment right is not narrowly tailored to a compelling state interest, which would render the statute unconstitutional if found to be a violation.[94]

Book People has been ongoing for longer than *Escambia*, thus, there have been decisions handed down by the court. On September 18, 2023, the court denied the defendants' motion to dismiss, granted the plaintiff's motion for preliminary injunction, and enjoined the defendants from enforcing four sections of the READER Act.[95] In doing so, the court indicated its intent to block the statute from going into effect altogether and admonished the statute's burden on third parties with "totally insufficient guidance."[96] Beyond vague instructions, the court also noted the requirements placed on the third parties to comply with the statutes are costly and time consuming.[97]

This injunction was appealed by the defendants and reviewed by the Fifth Circuit Court of Appeals in January 2024. The Fifth Circuit affirmed the preliminary injunction against Texas Commissioner Mike Morath, who oversees TEA, effectively preventing the READER Act from being enforced against book vendors.[98] This means the book rating system imposed on book vendors cannot go into effect. The court reasoned the READER Act has the potential to violate the vendors' First Amendment free speech protections by prescribing standards by which they must sell their books to public schools.[99] Though the court did not speak to whether this is a violation, it found that it has free speech implications.[100] While *Book People* is ongoing, the decisions thus far have indicated that the READER Act is likely a violation of First Amendment rights.[101]

C. Illinois Has Taken the Opposite Approach from Florida and Texas

While states like Florida and Texas have been enforcing strong book bans and guidelines in public schools, others have restricted the power of school boards and administrators to remove library books. Most notably, in June 2023, Illinois passed a bill incentivizing libraries to prohibit book banning.[102] Specifically, the

93. *Id.*

94. *Id.*

95. *Book People, Inc. v. Wong*, CT. LISTENER, https://www.courtlistener.com/docket/67633706/book-people-inc-v-wong/ (June 26, 2024, 2:19 PM).

96. Order at 2, Book People, Inc. v. Wong, No. 1:23-cv-858 (W.D. Tex. July 25, 2023) (Doc. 43).

97. *Id.* at 18.

98. Book People, Inc. v. Wong, 91 F.4th 318, 324 (5th Cir. 2024).

99. *Id.* at 330.

100. *Id.* at 329.

101. At the time this Note was completed for publication, the parties were engaged in discovery. By the time this Note is published, it is likely that there will be more progress in the case; Book People, Inc. v. Wong, 98 F.4th 657, 659 (5th Cir. 2024).

102. H.R. 2789, 103rd Gen. Assembly, Reg. Sess. (Ill. 2023).

law requires public libraries to "develop a written policy prohibiting the practice of banning books"[103] within their library system. If a public library fails to develop such a policy, they become ineligible to receive state grants.[104] In other words, if public libraries do not develop the written policy and permit books to be banned or removed, they will lose their state funding. This would be a large hit to libraries' funding, as public libraries in Illinois are funded by annual system area and per capita grants from the Illinois State Library.[105] It is unclear whether the law will be enforced for public school libraries, as they are not mentioned as exempt or included in the language of the law.[106] However, comments made by Illinois politicians indicate that the Illinois government will work to fight censorship in schools and is motivated to protect the education of young people.[107]

Illinois's response to the increased push for censorship is interesting when compared to those of Florida and Texas, displaying the potential that politics can play in the battle on books. Illinois, unlike the latter states, is thought to be a liberal state and has voted with the Democratic Party in recent history.[108] The apparent values of the state and the motivations behind the bill support the inference Illinois is a blue state.[109] In her remarks about the bill's passage, Lieutenant Governor Juliana Stratton stated "we cannot let extreme views harm LGBTQ+ communities or BIPOC authors… simply because of who they are or who they love."[110] While this is not expressly a comment against conservative politics, it sits in contention with conservative laws being passed throughout the country, such as Florida's Don't Say Gay Bill.

The Illinois bill is the first of its kind and, as it only went into effect on January 1, 2024, its impact is yet to be seen. However, it has already sparked controversy from Republicans in the state who believe it goes too far and others who believe the ban on book censorship does not go far enough.[111]

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103. *Id.*

104. *Id.*

105. *Illinois Library Systems,* OFF. OF THE ILL. SECR'Y OF STATE, https://www.ilsos.gov/departments/library/libraries/libsystems.html (last visited July 20, 2024).

106. H.R. 2789, 103rd Gen. Assembly (Ill. 2023).

107. *Gov. Pritzker Signs Bill Making Illinois First State in the Nation to Outlaw Book Bans,* ILLINOIS.GOV (June 12, 2023), https://www.illinois.gov/news/press-release.26575.html.

108. *What the Last 14 Presidential Elections Reveal About Illinois,* CTR. FOR ILL. POL. (Dec. 20, 2020), https://www.centerforilpolitics.org/articles/what-the-last-14-presidential-elections-reveal-about-illinois.

109. Noah Berlatsky, *Illinois Has Banned Book Bans, but Activists Say There's More to Be Done to Fight Censorship,* PRISM (Oct. 10, 2023), https://prismreports.org/2023/10/10/illinois-banned-book-bans/.

110. *Gov. Pritzker Signs Bill*, *supra* note 107.

111. Claire Savage, *'First of its Kind' Illinois Law Will Penalize Libraries that Ban Books*, AP NEWS (June 12, 2023, 5:12 PM), https://apnews.com/article/book-ban-library-lgbtq-illinois-f5516941473e474712eaaafda084de76 (discussing the comments made by Tony McCombie about his vote against the law); Gretchen Sterba, *Illinois Outlaws Book Bans—But Not for Incarcerated People,* S. SIDE WKLY. (July 27, 2023), https://southsideweekly.com/illinois-outlaws-book-bans-but-not-for-incarcerated-people/ (criticizing the Illinois legislature for not including incarcerated peoples' right to access books in the new law).

D. Rationalizing Political Book Banning Under Pico

The laws in Florida, Texas, and Illinois are on opposite ends of the book ban debate and represent more extreme responses to the issue. It must be noted there are other states without book ban legislation altogether, potentially because challenges to books rarely happen in those states.[112] The varying regulations of book bans across the nation reflect the fact that there is no federal guideline for states to follow. While the education of children is a power left to the states, the rights implicated by the removal and banning of books are constitutionally guaranteed. The Court in *Pico* made it clear 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."[113] This makes it unclear as to why such important rights are left unprotected from state intrusion.

The Supreme Court has neither rationalized the use of book bans or removals for seemingly political reasons under the *Pico* standard, nor clarified their opinion. Other courts have applied *Pico* as a clear test, but their standards are not binding on other courts.[114] For example, in *Case v. Unified School District*, a Kansas District Court found the removal of two books about gender and sexual orientation, *Annie on My Mind* and *All American Boys*, unconstitutional.[115] The books were donated to the Kansas Olathe School District by a LGBTQ+ activist group in an attempt to ensure students had access to "diverse information regarding gender and sexual orientation."[116] Neither book, according to the court, contained vulgarity, obscenity, or explicit sexual content.[117] Regardless, both books were eventually removed because homosexuality was discussed within them and the books created controversy in the community. More specifically, *Annie on My Mind* was removed because it allegedly glorified the lifestyle of being LGBTQ+ and was thought to corrupt students' ideas of a healthy life.[118] The board members who voted against the removal of the book claimed to do so on the ground it violated the First Amendment.[119]

Relying on the *Pico* decision, the Kansas District Court in *Unified School District* evaluated the motivations behind the removal to determine its

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112. Jenna Cohen & Joshua Barajas, *How Many Book Bans Were Attempted in Your State? Use This Map to Find Out,* PBS.ORG (April 24, 2023, 3:27 PM), https://www.pbs.org/newshour/arts/how-many-book-bans-were-attempted-in-your-state-use-this-map-to-find-out (demonstrating that there are states in which there were zero book challenges or bans in 2022).

113. Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982).

114. ACLU of Fla., Inc. v. Miami-Dade Cty. Sch. Bd., 557 F.3d 1177, 1207 (11th Cir. 2009) (holding banning a nonfiction book for inaccuracies was not a violation of the *Pico* standard); Tatel v. Mt. Lebanon Sch. Dist., No. 22-837, 637 F. Supp. 3d 295, 355 (W.D. Pa. 2022) (holding it is a violation of parental rights for a teacher to teach about the topic of transgender identity to first-grade students without parental consent); Sund v. City of Wichita Falls, Texas, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (holding it is impermissible to remove books from a children's section of a public library merely because the challengers' disliked them, not because they were obscene).

115. Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 876 (D. Kan. 1995).

116. *Id.* at 866.

117. *Id.*

118. *Id.* at 870.

119. *Id.* at 871.

constitutionality.[120] The court agreed with the board members who resisted the removal and concluded the motivation behind the removal of *Annie on My Mind* was intended to deny students the ideas contained within it because the board disliked them, not because the book was obscene.[121] It was also noted by the court that there was "overwhelming evidence" of viewpoint discrimination, which made it clear the removal of the book had nothing to do with its suitability for education.[122] The numerous statements from school board members that the book was "shallow" and merely intended to promote a gay lifestyle, which was not acceptable in their opinions, made it obvious they were not concerned with obscenity.

The easy application of the *Pico* standard in *Unified School District* was made possible because of the clear evidence of viewpoint discrimination by the school board. However, the problems with the *Pico* standard arise when the motivations behind removing or banning a book are not as obvious. Additionally, because *Pico* was written as a plurality opinion, some courts have concluded only the narrowest rules from the concurrent opinions are binding.[123] It has also been stated that the actual rule of *Pico* is unclear because the plurality opinions are so conflicting.[124] While a few justices found students have a fundamental right to be exposed to new ideas, other justices only intended to limit states from removing books in school libraries based on political reasons and made no mention of First Amendment protections.[125] As mentioned, lower courts have attempted to reconcile the issues created by the plurality opinion and the vague standard left as a result. This leaves the *Pico* standard in the dangerous position of potentially being unbinding, as discussed in *Unified School District*.[126]

Considering the rights that *Pico* was intended to protect, it is concerning its holding is so unclear. However, it makes it easier to understand how the laws regarding book removals and bans can vary so widely between states. By the *Pico* standard, the removal of a book from a school library is permissible if the removal can be justified by a proper motivation. Put differently, if the school board can demonstrate to the court they were concerned about educational quality or found the book to be obscene, the removal will likely be upheld. Given that judges' decisions are influenced by public opinion and their own backgrounds,[127] demonstrating that a book is obscene or holds no educational value might not be difficult for some school boards depending on the judge. This means the rights of students may not be protected equally across the nation, even though they were presented as fundamental in *Pico*. Therefore, a better standard that can be applied to all book removals and bans is necessary.

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120. *Id.* at 875.

121. *Id.* at 876.

122. *Id.* at 875.

123. C.K.-W v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 913 (E.D. Mo. 2022) (quoting Jones v. Jegley, 947 F.3d 1100, 1106 n.3 (8th Cir. 2020)).

124. Griswold v. Driscoll, 616 F.3d 53, 57 (1st Cir. 2010).

125. Bd. of Educ. v. Pico*,* 457 U.S. 853, 869-79 (1982).

126. *Case*, 908 F. Supp. at 875 (citing United States v. Friedman, 528 F.2d 784 (10th Cir. 1976)).

127. *See generally* Ryan J. Owens & Patrick C. Wohlfarth, *The Influence of Home-State Reputation and Public Opinion on Federal Circuit Court Judges*, 7 J. L. & CTS. 187 (2019).

III. PARENTAL RIGHTS V. FIRST AMENDMENT PROTECTIONS

Two of the driving factors fueling the debate over book bans are parental rights to make decisions about their child's education and First Amendment protections for students, teachers, and authors. The right of parents to make decisions about their child's education has been established by Supreme Court cases, state court decisions, and state statutes.[128] The landmark case for these parental rights is *Pierce v. Society of Sisters*, in which the Court held there is a "liberty of parents and guardians to direct the upbringing and education of children under their control."[129] While this decision is nearly 100 years old, it continues to shape discussions about what rights parents have to make decisions about their child's education. Now, people who support banning books that are thought to be inappropriate argue it falls within the rights of parents to decide what their child is exposed to in public school.

Another case handed down by the Court that solidifies parental rights in education is *Wisconsin v. Yoder*. It must be noted this case was heavily based on First Amendment protection of the free exercise of religion, which is outside the purview of this Note. However, the Court also noted, even though states have a responsibility for educating their citizens, there are "values of parental direction of the… education of their children in their early and formative years."[130] Put differently, there must be balance between state regulations in public schools and parents being able to direct their child's education. This concept is easily seen in the process of book banning, as parents are, in most states, able to bring challenges to educational materials to the school district board. The board is then able to review the challenge and decide whether to remove the book from the school library and classrooms. Of course, this is a basic explanation, and many states have more specific guidance for the process.

This is not to imply parental rights take priority over state responsibility and authority to educate minors. The Court has vested great authority in states to control the acts of children compared to the authority they have over adults.[131] Furthermore, as previously mentioned, it is the responsibility of the states to educate their population. While parents can make decisions about their own child's education, it is the responsibility of states and school administrations to decide what and how students learn. Courts have given schools broad, though not complete, discretion to determine what books are appropriate for children to have access to at school.[132]

The rights of children in schools are not obsolete, however. The Court has held that "the vigilant protection of constitutional freedoms is nowhere more vital

128. Meyer v. Nebraska, 262 U.S. 390, 400 (1923).

129. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925).

130. Wisconsin v. Yoder, 406 U.S. 205, 214-15 (1972).

131. Prince v. Massachusetts, 321 U.S. 158 (1944).

132. Virgil v. Sch. Bd., 677 F. Supp. 1547, 1550 (M.D. Fla. 1988); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 344 (6th Cir. 2010); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 272-73 (1988). *See also* Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976).

than in the community of American schools."[133] This is because schools are a "marketplace of ideas," where exposure to different perspectives is needed to influence the future leaders of the country.[134] Put differently, if states had the ability to dictate what ideas students are exposed to, the founding principles of America would be jeopardized. To protect against an authoritarian regime, the Court has worked to protect the First Amendment rights of students in schools. In *Tinker v. Des Moines Independent Community School District*, the Court stated that First Amendment rights for students are not shed when they cross the school threshold.[135] While the rights are not at their full extent when a student is at school, they are still afforded First Amendment protections.[136] The issue is when the students' rights conflict with the authority of school officials.[137]

The rights are limited, however, as held in *Ginsberg v. New York*. Decided just a year before *Tinker*, the Court in *Ginsberg* concluded it is permissible for states to restrict minors' access to obscene material.[138] The Court supports this decision by stating parents have the right to direct the upbringing of their children and the legislature is permitted to create laws supporting parents in their decisions.[139] It is also noted states have "an independent interest in the well-being of its youth."[140] The goal of states is to assist in the raising of independent citizens who can be active, contributing members in society.[141] Therefore, states have the ability to require schooling of young children and regulate their access to certain materials, including books. This authority goes beyond access to these materials, extending to alcohol, tobacco, and the ability to drive motor vehicles. However, states must ensure they are restricting minors' access to certain things within the bounds of what they are permitted to regulate.[142]

While it may seem strange that book banning violates the First Amendment rights of students, the complaint in *PEN America v. Escambia County School District* explains this concept clearly. As the First Amendment does not permit the suppression of ideas by the government or government actors, school districts cannot remove books based on "political disagreement with the ideas they express…."[143] Students should have the opportunity to be exposed to perspectives

133. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960)).

134. *Id.*

135. *Id.* at 506.

136. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 685 (1986); Ginsberg v. New York, 390 U.S. 629, 637 (1968); Engel v. Vitale, 370 U.S. 421, 430 (1962); B.L. v. Mahanoy Area Sch. Dist., 964 F.3d 170, 177-78 (3d Cir. 2020).

137. *Tinker*, 393 U.S. at 507.

138. *Ginsberg*, 390 U.S. at 637.

139. *Id.* at 639.

140. *Id.*

141. *Id.* at 640.

142. Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 794 (2011) (holding states may not create new categories of unprotected speech to regulate only when directed at children).

143. Plaintiffs' Opposition to Defendant's Motion to Dismiss at 1, PEN Am. v. Escambia Cnty. Sch. Dist., No. 3:23-cv-10385-TKW-ZCB (N.D. Fla. Sept. 18, 2023).

that are different from their own.[144] It has also been argued that book bans harm students by diminishing the quality of their education, as they are unable to think critically about their own worldviews compared to others.[145] Preventing students from learning about and accessing different ideas reduces the country's chances of having an informed democracy in the future.

IV. THE NEED FOR ADDITIONAL GUIDANCE FROM THE FEDERAL GOVERNMENT

As this Note has discussed, states and school officials have found ways to bypass the vague standard set forth by *Pico*. Though decisions to ban and remove books are justified because certain books are said to contain obscene or sexually explicit content, many of the removals appear to target minority authors and character representations. As mentioned previously, the teacher in Texas who read a passage from *Anne Frank's Diary: The Graphic Adaptation* was fired because there was discussion of Anne having potential attraction to another female.[146] *Gender Queer: A Memoir* has been repeatedly banned in multiple states for its discussion of LGBTQ+ topics.[147] Though there are books banned or removed from public schools for obscene content between a heterosexual couple, data suggests bans focus on minority representation in books.[148] This form of viewpoint discrimination violates the First Amendment and prevents students from accessing different ideas and perspectives. Additional guidance is thus necessary to ensure that public schools remain a "marketplace of ideas" and continue to promote democracy.

A. Potential Solutions from Other Law Students

At least two other law review student authors, one from Pennsylvania and another from Indiana, have also commented on the issue. Both take the position of this Note; *Pico* does not go far enough to protect the First Amendment rights of students.[149] However, each suggests a different solution to solving the problem of *Pico*'s standard. The first suggests the Supreme Court should implement additional First Amendment doctrine to prevent censorship.[150] Morris argues the Court should integrate the substantial truth doctrine to regulate book bans, which originates from defamation law.[151] The doctrine prevents reporters in libel cases from being liable

144. *Id.*

145. *What You Need to Know About the Book Bans Sweeping the U.S.,* TCHRS. COLL. COLUM. UNIV. (Sept. 6, 2023), https://www.tc.columbia.edu/articles/2023/september/what-you-need-to-know-about-the-book-bans-sweeping-the-us/.

146. Bella, *supra* note 2.

147. Martin & Advani, *supra* note 59.

148. Meehan & Friedman, *supra* note 25.

149. Shane Morris, Note, *The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right*, 13 DREXEL L. REV. 787, 791 (2021); Jensen Rehn, Note, *Battlegrounds for Banned Books: The First Amendment and Public School Libraries*, 98 NOTRE DAME L. REV. 1405, 1407 (2023).

150. Morris, *supra* note 149, at 791.

151. *Id.*

for defamation if what they reported was "generally factual."[152] This doctrine, when applied to censorship law, could prevent school boards from pulling pages from books out of context to support their claim that the book is inappropriate.[153] In other words, the book would have to be substantially obscene or unsuitable for education to be banned, rather than containing just a few instances.

This solution is an interesting one and does have potential in preventing books from being removed by school boards because they disagree with the ideas found within them. If the school board must demonstrate the entire novel lacks educational suitability or is substantially obscene, this could prevent them from discriminating based on viewpoint. However, this solution relies on the Supreme Court to hear a case about book banning in schools, which is a topic they rarely issue opinions about.[154] There is also no guarantee that the current Court would implement additional restrictions on school boards regarding book removals and bans. This topic is a divisive one, which is apparent from the plurality opinion in *Pico*. As the current Court has largely upheld state's rights and is mostly comprised of conservative ideologies, it is likely they would defer to the states on the issue. Additionally, if the Court were to adopt the substantial truth doctrine for censorship, the standard could also grant courts too much discretion in weighing what is truth and what is opinion regarding the obscenity of a book.

The second Note commenting on this topic suggests courts should rely on other First Amendment precedent when deciding the constitutionality of a book being removed.[155] Two specific precedents mentioned by Rehn are *West Virginia State Board of Education v. Barnette* and *Brown v. Entertainment Merchants Association*, both of which Rehn believes would create stability in public school libraries across the country.[156] In *Barnette*, the Court held school boards cannot "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" after finding the forced salute of the flag unconstitutional.[157] Rehn suggests this rule combined with *Pico* creates a better standard for how to determine the constitutionality of a book ban.[158] However, as Rehn discusses, forcing a student to salute the flag is more obvious in its prescription of an opinion than removing or banning a book might be. This solution does have potential, though it might prove difficult to litigate if the viewpoint discrimination by the school board is nonobvious.

Rehn also suggests combining *Pico* and *Barnett* with *Brown v. Entertainment Merchants Association*, in which California attempted to ban the sale of violent videogames to minors.[159] The Court found California was attempting to create a new category of unprotected speech, which was a violation of the First

152. *Id.* at 811.
153. *Id.*
154. Bd. of Educ., v. Pico, 457 U.S. 853, 864 (1982).
155. *See generally* Rehn, *supra* note 149.
156. *Id.*
157. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).
158. Rehn, *supra* note 149, at 1430.
159. *Id.* at 1431; Brown v. Ent. Merchs. Ass'n., 564 U.S. 786, 794 (2011).

Amendment.[160] It also stated children should not be shielded from ideas merely because they are uncomfortable. Rehn argues adopting the rule from *Brown* should lead courts to not uphold book bans that are based on "free-floating restrictions upon the ideas contained in."[161] The holding in *Brown* expands upon the rights of children to be exposed to ideas, but it does not mention education. Combining *Brown* with *Pico* might not lead to a better standard, however, because the states possess such great authority over the education of children. It must also be mentioned that California's law was attempting to ban violent material, which is protected under the First Amendment. The main justification for book removals or bans is that they are obscene, which is not protected speech. It could be difficult for courts to determine whether the school board was uncomfortable with an idea and if the book is obscene, even when applying *Barnett*, *Brown*, and *Pico*.

B. Relying on the Court to Solve this Issue Is Problematic—A Federal Statute Is Ideal

While the solutions proposed by Morris and Rehn have merit to solve the problem caused by *Pico*, they rely on the courts to mediate the battle over book bans. This might have been a viable option prior to book bans becoming influenced by politics, but now it is likely that politicians will continue trying to restrict access to information they disagree with despite the decisions courts might make. There are already attempts in states to restrict education about topics they disagree with, such as Florida's attempts to ban critical race theory in schools and universities.[162] There is no indication as to what impact such laws could have on the books available to students and they might lead to more book challenges that are successful. If teachers are not permitted to teach students about race, books with themes surrounding race discrimination and inequality will likely still be restricted.

Relying on courts to implement these proposed standards may also lead to unequal application. As previously mentioned, it is unlikely that the Supreme Court will take a case on the topic. For the standards to be adopted, appellate courts and district courts would have to apply them, but their decisions would not be binding on other districts. Courts may be resistant to adopt such standards, as it is not the guidance the Supreme Court has given. Furthermore, as previously mentioned, courts are responsive to public opinion. Courts making decisions in states that support book removals or bans are unlikely to adopt the standards unless they are required to by binding precedent. Certainly, both Rehn's and Morris's proposals could be effective on a case-by-case basis, but ultimately, they fail to create a uniform standard that would be applied in the same way across the country without the Supreme Court's input.

The solution suggested by this Note is based on a resolution proposed in the House of Representatives in August 2022. Federal House Resolution 1392 was

160. *Brown*, 564 U.S. at 794.

161. Rehn, *supra* note 149, at 1432.

162. Olivia B. Waxman, *A Florida Education Bill Would Ban Gender Studies and Diversity Programs at Universities. Here's What to Know,* TIME (Feb. 25, 2023, 7:00 AM), https://time.com/6258304/florida-bill-ban-dei-crt-universities/.

proposed during "Banned Books Week" by Jamie Raskin, a representative from Maryland. The resolution called for local governments to create best practice guidelines and protect the rights of students to learn when considering book banning.[163] Unfortunately, the resolution died during a session of Congress and did not receive a vote.[164] However, the concept behind the resolution is promising. Rather than relying on the courts to enforce a standard created by the judiciary, it would be more beneficial if the federal government created base guidelines to protect against violations of the First Amendment.

Resolution 1392 did not propose guidelines for preventing unconstitutional book bans, but it raised many of the issues discussed in this Note to bring awareness to lawmakers. It detailed the consequences of book bans, including the rights of students that are violated, parents who want their children exposed to new ideas, and educators and authors.[165] The disproportionate impact bans have on books with characters who are LGBTQ+ or part of a minority group was also noted. Interestingly, the resolution also mentions that books for young adults discussing difficult emotions, such as grief, mental illness, and suicide are often targeted.[166] In mentioning these consequences of censorship, the resolution called upon states and local governments to create best practice guidelines for challenges to books and to protect the plethora of rights that are implicated by book bans and removals.[167]

The awareness the resolution hopefully brought to lawmakers is a step in the direction of improving guidelines across the country. However, its call for local governments to protect the rights implicated by book bans is not enough. While it is unlikely that the current Congress would pass a law implementing guidelines, this is the most ideal solution. Again, it is unlikely the Supreme Court would take a case discussing this topic, limiting the judiciary's capability to solve the issue. The legislature is better equipped to implement a universal guideline that forms the boundaries for removing or banning books from public libraries. Furthermore, perhaps it should be the responsibility of the legislature to protect the rights that are implicated in book bans, as they are elected officials.

V. CONCLUSION

In his novel *Fahrenheit 451*, Ray Bradbury painted a picture of a dystopian world in which the government actively burns books to control knowledge possessed by the public. The novel, written in 1953, demonstrates the dangers of censorship and gives a horrifying glimpse of what can happen when exposure to ideas or knowledge is restricted. Despite the novel being written more than seventy years ago, the dangers of censorship that it warns against still loom over our

163. H. Res. 1392, 117th Cong. § 2., 2d Sess. (2022).

164. *H. Res. 1392 (117th)*, GOV TRACK, https://www.govtrack.us/congress/bills/117/hres1392 (last visited Oct. 11, 2024).

165. H.R. Res. 1392, 117th Cong. § 2., 2d Sess. (2022).

166. *Id.*

167. *Id.*

society. Though school boards and advocacy groups are not physically burning books, banning or removing books solely because they disagree with ideas contained within them is equivalent to lighting a match. The Court certainly intended to protect against such censorship through the *Pico* decision, but it failed to sufficiently guide school boards and parents on the limits of banning books.

Regardless of the intentions or justifications offered by certain school boards, it is apparent that school materials are being removed because of viewpoint discrimination. In Florida, book bans reflect state lawmakers' attempts to prevent students from learning about critical race theory and LGBTQ+ identities. In Texas, the state's book banning guidelines are less obvious in their violation of rights but result in a slow process of rating every book in the library. It also creates criminal liability if the person permitting a book to be on the shelves makes the wrong decision. Conversely, in Illinois, public libraries are unable to remove books from their shelves if they wish to be given state grants.

Banning books for the ideas contained within them violates the First Amendment. Parents have the right to shape their child's education, but this right must be balanced with minors' rights to be exposed to new ideas. Students also have the right to have a full education, which is impeded if they are prevented from learning new perspectives. The rights implicated, therefore, should be equally protected in every state. Thus, to create stability across the country regarding book bans and to protect the First Amendment rights of both parents and students, Congress should pass a law that creates basic guidelines for book banning. In passing the law, Congress would be able to prescribe how school boards should balance parental rights in education with student First Amendment rights. Blatant censorship of minority groups and their perspectives should not be permitted in the United States. A law such as the one proposed in this Note would ensure that minorities can be represented in public school libraries and students' right to learn diverse opinions is protected.