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Political Advocacy Groups: The Puppet Masters Behind Public School Boards' Banning of Books

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POLITICAL ADVOCACY GROUPS: THE PUPPET MASTERS BEHIND PUBLIC SCHOOL BOARDS' BANNING OF BOOKS

I. Introduction

"You don't have to burn books to destroy a culture. Just get people to stop reading them."[1] The mission of a public-school library is to "provid[e] services and resources to meet the diverse interests and informational needs of the communities they serve."[2] Unfortunately, this mission was interrupted in America's schools during 2022 by a precipitous increase in book bans in large part because of political advocacy groups' heavy focus on banning books dealing with LGBTQ and race issues.[3]

Part II of this Note will discuss the history of book banning, the various motivations behind the practice, and the recent data concerning the unprecedented rise in book bans. Next, Part II will explore the core values of First Amendment free speech and when restrictions on free speech may be permissible. Part II will then provide an overview of the cases that laid the groundwork for the decision in *Board of Education v. Pico*. Finally, Part II will examine the Court's reasons and rationales that led to its decision in *Pico*.

Part III of this Note will analyze how circuit courts have used and interpreted *Pico* in their decisions. Next, Part III will argue that *Pico* is ineffective because it allows unconstitutional discrimination for book removals driven by the political whims of parents and advocacy groups. Finally, Part III will compare public-school libraries to social media platforms and propose a new framework governing book banning, which should be constructed by looking at the framework governing content moderation for social media platforms, like Twitter and Facebook.

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1. Misha Berson, *Bradbury Still Believes In Heat of 'Fahrenheit 451'*, The Seattle Times (Mar. 12, 1993), https://archive.seattletimes.com/archive/?date=19930312&slug=1689996, [https://perma.cc/LD86-2UQ6] (quoting Ray Bradbury in an interview); *see* Ray Bradbury, Fahrenheit 451 (1953), for a dramatized and dystopian depiction of a society that overly restricts what books may be read.

2. *Access to Library Resources and Services for Minors: An Interpretation of the Library Bill of Rights*, Am. Libr. Ass'n, https://www.ala.org/advocacy/intfreedom/librarybill/interpretations/minors, [https://perma.cc/H4PS-GRRA] (last visited Mar. 28, 2023).

3. Adam Gabbatt, *'A streak of extremism': US book bans may increase in 2023*, The Guardian (Dec. 24, 2022), https://www.theguardian.com/us-news/2022/dec/24/us-book-bans-streak-of-extremism [https://perma.cc/MP66-T4DU].

Part IV of this Note will assess the impact that continued book banning under the current law will have on students, teachers and libraries, and the United States as a whole. Finally, this Note will conclude that a change in the legal landscape surrounding public school book bans is needed to control the rampant book banning stretching across the United States.

II. Background

This Part will explore the history of book banning in the United States. In addition, this Part will discuss general First Amendment free speech principles and examine the relevant precedent in conducting the First Amendment analysis for book banning. Next, this Part will examine the key cases laying the foundation for book banning. Finally, this Part will recount *Pico*, the seminal case that provides the current legal framework for book banning in public-school libraries.

A. The History of Book Banning

> *"[A] student can literally explore the unknown and discover areas of interest and thought not covered by the prescribed curriculum* . . . That student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom."[4]

The destruction of (i.e., the functional equivalent of banning) books to protect against various ideas contained in them has been happening since 212 B.C.[5] The Chinese emperor, Shih Huang Ti, destroyed every book and record in his kingdom in an attempt to control history and "thought history could be said to begin with him."[6] In 1650, a Massachusetts Bay colonist, William Pynchon's *The Meritorious Price of Redemption* pamphlet was banned for containing ideas that contrasted with Puritan religious ideas.[7] In the buildup to the American Civil War in the 1850s, states banned anti-slavery materials, including Harriet Beecher Stowe's *Uncle Tom's Cabin*, "a novel that aimed to expose the evils of slavery."[8] In the 1950's, there were proposed bans of books that

4. Right To Read Def. Comm. of Chelsea v. Sch. Comm. of Chelsea, 454 F. Supp. 703, 715 (D. Mass. 1978).

5. *Bannings and Burnings in History*, Freedom to Read https://www.freedomtoread.ca/resources/bannings-and-burnings-in-history/ [https://perma.cc/ULJ2-BABQ] (last visited Mar. 28, 2022).

6. *Id*.

7. Erin Blakemore, *The history of book bans—and their changing targets—in the U.S.*, National Geographic (Apr. 24, 2023), https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states [https://perma.cc/F92L-QSVM].

8. *Id*.

contained ostensible depictions of miscegenation or encouragement of Communist or socialist ideas.[9] During the 1980's Reagan Administration, book bans increased rapidly because "[his] election encouraged challenges by people who were unhappy with books in schools and libraries that were increasingly realistic in their depiction of life."[10]

Fast forward to book banning today, a 2022 study conducted by PEN America from July 1, 2021, to March 31, 2022, tracked that as many as 1,145 unique book titles were banned.[11] As of August 31, 2022, the American Library Association reported that the number of attempted book bans will break the previous record, set in 2021.[12] The vast majority of the books subject to such bans, or attempted bans, deal with either LGBTQ topics or race, with at least fifty groups involved in pushing similar book bans.[13] One current example of this trend is the most frequently banned book by school districts between July 2021 and June 2022: Maia Kobabe's book, *Gender Queer: A Memoir*.[14] This graphic memoir concerns growing up "nonbinary and asexual," and contains "no sex scenes," but it is the most targeted book by school districts.[15]

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9. *Id*.

10. Amy Brady, *The History (and Present) of Banning Books in America*, Literary Hub (Sept. 22, 2016), https://lithub.com/the-history-and-present-of-banning-books-in-america/ [perma.cc/N6UQ-BTW3].

11. Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights*, Pen Am. (Apr. 2022), https://pen.org/banned-in-the-usa/#trends [https://perma.cc/G55K-WZX4] [hereinafter Friedman & Johnson, *Rising School Book Bans*]; *see also* Jonathan Friedman & Nadine Farid Johnson *Banned in the USA: The Growing Movement to Censor Books in Schools*, Pen Am. (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/ [perma.cc/627G-URC4] [hereinafter Friedman & Johnson, *The Growing Movement to Censor Books in Schools*] ("[A] school book ban [is] any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other governmental officials, that leads to a previously accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished.").

12. Friedman & Johnson, *The Growing Movement to Censor Books*, *supra* note 11; *see also* Valerie Strauss, *This wave of book bans is different from earlier one*s, Wash. Post (Feb. 10, 2022, 8:30 AM), https://www.washingtonpost.com/education/2022/02/10/book-bans-maus-bluest-eye/ [perma.cc/SH3X-K3TW] ("Advocacy groups are working to nationalize book challenges, this time with the help of conservative TV and talk shows, that for the past few decades have been mostly local events.").

13. Friedman & Johnson, *The Growing Movement to Censor Books*, *supra* note 11; *see also Media Factsheet on School Censorship*, Nat'l Coal. Against Censorship & Gay & Lesbian All. Against Defamation, https://ncac.org/wp-content/uploads/2021/12/NCAC-GLAAD-Media-Factsheet-FOR-NCAC-WEB.pdf [perma.cc/DM42-8XLF] (last visited Mar. 28, 2023) (listing examples of political activist parent groups pushing for the banning of books that touch on LGBTQ and racially consciously topics).

14. Abby Monteil, *4 in 10 Books Banned in 2022 Are LGBTQ+-Related*, Them (Sept. 20, 2022), https://www.them.us/story/banned-books-lgbtq-2022 [perma.cc/884V-NSX7].

15. *Id.*; *see generally* Maia Kobabe, Gender queer: A Memoir (2019).

Kobabe, however, describes her book as providing "good, accurate, safe information" for queer students in a time of mass misinformation.[16]

In opposition to the ban on books, "librarians, booksellers, authors, teachers, and readers of all types" joined together in celebration of Banned Books Week in September 2022, as it has since 1982, to celebrate and support the idea shared in the book community that they have the right to read what they want, even if those ideas which they read are considered "unorthodox or unpopular."[17]

B. First Amendment Free Speech Principles

1. Core Philosophies

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech."[18] Central to understanding how the First Amendment applies to everyday life is recognizing the Supreme Court's consistently held belief that the terms "abridging" and "the freedom of speech" are subject to interpretation, and that restrictions on one's freedom of speech may be permitted only for permissible reasons.[19] When assessing the scope of the freedom of speech, the Court typically focuses on at least one of three rationales for the protection of free speech: (1) the marketplace of ideas; (2) self-governance; or (3) autonomy or individual self-fulfillment.[20]

The marketplace of ideas philosophy first entered into the Court's jurisprudence in *Abrams v. United States* when Justice Oliver Wendell Holmes stated "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."[21] Essentially, the marketplace of ideas protects the First Amendment freedom because it encourages all types of ideas and "creates a competitive environment in which good ideas flourish and bad ideas fail."[22] This philosophy still

16. Olivia B. Waxman, '*We're Preparing For a Long Battle.' Librarians Grapple with Conservatives' Latest Efforts to Ban Books*, Time (Nov. 15, 2021, 5:45 PM), https://time.com/6117685/book-bans-school-libraries/ [perma.cc/7EY5-TAE5].

17. Banned Books Week, https://bannedbooksweek.org/about/#:~:text=Banned%20Books%20Week%20brings%20together,be%20held%20September%2018%20%E2%80%93%2024 [perma.cc/F44Y-UJSZ] (last visited Mar. 28, 2023).

18. U.S. Const. amend. I.

19. Geoffrey R. Stone et al., The First Amendment 3 (6th ed. 2020).

20. Amanda Shanor, *First Amendment Coverage*, 93 N.Y.U. L. Rev. 318, 328 (2018).

21. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). For a more thorough explanation behind the marketplace of ideas, *see generally* John Stuart Mill, On Liberty (1859).

22. Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 Duke L.J. 821, 824 (2008).

plays an integral role in the Court's decisions on First Amendment issues.[23]

The self-governance rationale is most closely tied to Alexander Meiklejohn, who took the view "that self-government depends for its survival on a free and robust democratic dialogue."[24] Meiklejohn found that "[the] Constitution [ordains] that all authority [to] determine common action, belong to 'We, the People.' [Under this system, free men are governed] by themselves."[25] Ultimately, the idea behind this theory is that no citizen should be denied the opportunity to espouse their views regarding public policy so that citizens may be as informed as possible to effectively participate in the political process.[26]

The self-fulfillment rationale is much broader than the previous rationales and essentially finds that the communication of ideas between different people and listening to different ideas allows people to continually learn, evolve, grow, and achieve self-fulfillment by becoming who and what they want to be.[27]

2. Restrictions on Free Speech

There are three major restrictions to the First Amendment's free speech principles; each restriction has a distinct standard of scrutiny that controls the analysis of constitutionality.[28]

First, are *content-neutral* restrictions, government restrictions on speech that can be "justified without reference to the content of . . . [such] speech."[29] In analyzing the constitutionality of a content-neutral restriction, the restriction must be "narrowly tailored to serve a significant government interest," and "leave open ample alternative channels for communication of the information."[30] For example, in *McCullen v. Coakley*, the Supreme Court analyzed the constitutionality of a Massachusetts statute that made "it a crime to knowingly stand on

23. *See* Mahanoy Area Sch. Dist. v. Levy ex rel. B.L., 141 S. Ct. 2038, 2046 (2021).

24. Patrick M. Garry, *Self-government Rationale*, The First Amend. Encyclopedia (2009), https://www.mtsu.edu/first-amendment/article/1018/self-government-rationale [perma.cc/2LSU-WJKB].

25. Stone et al., *supra* note 19 (citing Alexander Meiklejohn, Free Speech and its Relation to Self-Government 15–16, 24–27, 39 (1948)).

26. *Id.*; *see also* Police Dept. of Chi. v. Mosley, 408 U.S. 92, 96 (1972) ("There is an 'equality of status in the field of ideas,' and government must afford all points of view an equal opportunity to be heard.").

27. *See* David A. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. Pa. L. Rev. 45, 62 (1974).

28. Marisa Shearer, *Banning Books or Banning BIPOC?,* 117 Nw. U. L. Rev. Online 24, 31 (2022).

29. McCullen v. Coakley, 573 U.S. 464, 480 (2014) (quoting Renton v. Playtime Theatres, Inc., 475 U.S. 41, 48 (1986)).

30. Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989).

a 'public way or sidewalk' within 35 feet of an entrance or driveway" to any reproductive health care facility.[31] The Court found that the statute was facially content-neutral because violation of the statute does not depend on what one says and was justified by interests in "public safety, patient access to healthcare, and unobstructed use of public sidewalks and streets."[32] Yet, the Court held that, because the statute burdened more speech than necessary, it was not narrowly tailored, and thus was unconstitutional.[33]

Second, are *content-based* restrictions, government restrictions on speech "that cannot be 'justified without reference to the content of . . . [such] speech'" or were implemented in response to disagreement with the speech at issue.[34] In analyzing the constitutionality of such a restriction, the government must satisfy strict scrutiny by proving that the restriction is narrowly tailored to serve a compelling government interest.[35] For example, in *Reed v. Town of Gilbert*, the Supreme Court analyzed the constitutionality of a comprehensive signage law imposing different restrictions on signs between temporary directional signs and other types of signs for the purpose of aesthetic appeal and traffic safety.[36] The Court held that the law was content-based because it could not be justified without reference to the content of the sign, and it did not pass strict scrutiny because the town failed to show that a restriction on temporary directional signs was necessary for aesthetic appeal and traffic safety.[37]

Third, there are various categories of *unprotected* speech, partly because they are of so little value to society's search for truth, democratic self-governance, and self-expression that the benefit of protecting such speech cannot outweigh its cost to society.[38]

In the book banning context, obscenity is the most relevant category of unprotected speech.[39] The Supreme Court first decided that obscenity

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31. *Coakley*, 573 U.S. at 469.
32. *Id.* at 480.
33. *Id*. at 487, 493, 496.
34. Reed v. Town of Gilbert, 576 U.S. 155, 164 (2015) (quoting *Ward*, 491 U.S. at 791).
35. *Id*. at 163.
36. *Id.* at 171.
37. *Id*. at 172.
38. United States v. Stevens, 559 U.S. 460, 470 (2010). To explore the other categories of unprotected speech, *see also* Chaplinksy v. New Hampshire, 315 U.S. 568, 571–72 (1942) (holding fighting words unprotected speech); Gertz v. Robert Welch, Inc., 418 U.S. 323, 339–40 (1974) (holding certain false statements of facts unprotected speech); New York v. Ferber, 458 U.S. 747, 765 (1982) (holding child pornography unprotected speech).
39. "[T]here is a growing tendency to label material in schools as 'obscene,' 'pornographic,' and a corresponding push by politicians, parents, and administrators alike to use these labels as justification for the swift removals of books as well as circumvention of normal reconsideration processes." Friedman & Johnson, *Rising School Book Bans*, *supra* note 11.

was unprotected by looking at the history of First Amendment jurisprudence and finding "obscenity as utterly without redeeming social importance."[40] Sixteen years later, in *Miller v. California*, the Court analyzed whether a mass mailing advertisement campaign consisting of brochures that showed people engaging in sexual activities and displaying their genitals was obscene.[41] In its holding, the Court developed the current test for whether speech can be prohibited as obscene:

> (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.[42]

C. The Path to Book Banning

In 1967, the Supreme Court first recognized the classroom as a key forum of free expression.[43] In *Keyishian v. Board of Regents of University of New York,* the Court considered a state plan that required teachers, like Keyishian, and faculty members to sign a certificate stating that they were not communists, and if they were, they had discussed that with the president of the university.[44] Ultimately, the Court held the plan unconstitutionally vague and a violation of the First Amendment.[45] While this case does not deal with book banning, the reasoning helped lay the path for the Court's special treatment and view of schools.[46] The Court found that, when the government seeks to restrict freedom of expression in the classroom, it may do so "only with narrow specificity."[47] In restricting

40. Roth v. United States, 354 U.S. 476, 484 (1957).
41. Miller v. California, 413 U.S. 15, 17–18 (1973).
42. *Id*. at 24 (internal citations omitted).
43. *See* Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967).
44. *Id.* at 592.
45. *Id*. at 604, 609–10.
46. *Id.* at 603. Specifically, the Court noted:

> Our Nation is deeply committed to safeguard academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. 'The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.' The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out a multitude of tongues (rather) than through any kind of authoritative selection.'

Id. (internal citations omitted).

47. *Id.* at 604. The court further stated, "Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise, our civilization will stagnate and die." *Id*. at 603 (quoting Sweezy v. State of New Hampshire, 354 U.S. 234, 250 (1957)).

a school's ability to restrict free speech, the Supreme Court recognized that the exchange of diverse ideas is of the utmost importance, because "[t]he classroom is peculiarly the 'marketplace of ideas.'"[48] In recognizing the value of exchanging ideas through academic freedom, the Court held that the First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."[49]

In *Tinker v. Des Moines*, the Supreme Court continued its path toward increasing protection of students' constitutional rights to freedom of speech while in public school.[50] In *Tinker*, a group of students planned to protest the Vietnam War by wearing black armbands to their schools.[51] The schools' principals heard of the plan and subsequently adopted a policy prohibiting any student from wearing an armband to school, and if a student wore an armband to school, and refused to take it off, they would be suspended.[52] Subsequently, the students wore the armbands to school, refused to take them off, and were suspended.[53] At the outset of analyzing the constitutionality of the schools' conduct, Justice Abe Fortas famously said, "[i]t can hardly be argued that . . . students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[54] But Justice Fortas recognized the need "of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools."[55] The Court ultimately held that, because there was no evidence "which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred," the schools' conduct violated the students' First Amendment right of expression of opinion.[56] In reaching the holding, Justice Fortas explored and explained the student and school relationship:

> In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. *In our system, students may not*

48. *Keyishian*, 385 U.S. at 603.
49. *Id.*
50. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
51. *Id.* at 504.
52. *Id.*
53. *Id.*
54. *Id*. at 506.
55. *Id.* at 507 (*see also* Epperson v. Arkansas, 393 U.S. 97, 104 (1968)); *see also* Meyer v. Nebraska, 262 U.S. 390, 402 (1923).
56. *Tinker*, 393 U.S. at 514.

> *be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views*.[57]

Justice Fortas further explained that past precedent governing a student's right to freedom of expression at school explains that this right extends to the accommodations that schools provide "students during prescribed hours for the purpose of certain types of activities," like students talking to one another at recess or in the cafeteria.[58] Thirteen years later, the Supreme Court wrestled with the extent of students' First Amendment protections while students are in school.[59]

D. Board of Education v. Pico – The Unclear Guide to Book Banning

Pico is the seminal case in the book-banning realm because it was the first, and so far the last, time the Supreme Court addressed the power of local public-school boards in utilizing their discretion to remove library books from public school libraries under the First Amendment.[60] The Supreme Court was unable to achieve a majority to sign on to Justice Brennan's opinion for the Court.[61] Instead, the Court issued a plurality decision, the guidance of which remains unclear over forty years later.[62]

In 1975, three members, including the President of the Board of Education of the Island Trees Union Free School District No. 26 in Long Island, New York, took part in a conference sponsored by a politically conservative organization.[63] At the conference, the board members

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57. *Id*. at 511 (emphasis added).

58. *Id.* at 512–13. Some of the principles from past precedent that Justice Fortas looked to include: "[S]chool officials cannot ignore 'expressions of feelings with which they do not wish to contend.'" *Id.* at 511 (quoting Burnside v. Byars, 363 F.2d 744, 749 (1966)). The United States "repudiat[es] . . . the principle that a State might so conduct its schools . . . to 'foster a homogeneous people.'" *Id.* at 511 (quoting Meyer v. Nebraska, 262 U.S. 390, 402 (1923)). "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." *Id*. at 512 (quoting Keyishian v. Bd. of Regents of Univ. of N.Y., 385 U.S. 589, 603 (1967)) (internal quotations and citations omitted).

59. *See generally* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853 (1982).

60. *Id*. at 863.

61. *Id.* at 855. Justice Brennan's opinion was joined by Justice Marshall and Justice Stevens, and by Justice Blackmun, except for Part II-A-(1).

62. *See* Kelley R. Taylor, *Taking Book Banners to Court: A Look at a Student Lawsuit in Missouri and Impact of the 1982 'Pico' Supreme Court Decision*, Sch. Libr. J. (Apr. 1, 2022), https://www.slj.com/story/taking-book-banners-to-court-a-look-at-a-student-lawsuit-in-missouri-and-impact-of-the-1982-pico-supreme-court-decision [perma.cc/A48K-TW8R].

63. *Pico*, 457 U.S. at 853, 856.

obtained a list of "objectionable" books that were "improper fare for school students."[64]

In February 1976, the board decided to remove ten books on the list already in its district's school libraries, for the rest of the board members to read.[65] Publicity surrounded this removal of books, and the board justified its actions by claiming the books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[66] A "Book Review Committee" was subsequently created, consisting of various school district parents and staff.[67] In reviewing the list of books, the committee judged whether the books should be kept based on "educational suitability, good taste, relevance, and appropriateness to age and grade level."[68]

The committee ultimately recommended five of the books should be retained, and only two of the listed books should be removed from the libraries.[69] However, the board, without explanation for denying the committee's recommendations, decided to permanently remove nine of the listed books.[70] Subsequently, students filed suit against the board, claiming removal of the books violated their First Amendment rights.[71]

Writing for the plurality, Justice Brennan's opinion started out cautiously and immediately narrowed the issue of the case to the removal of library books—"books that by their nature are *optional* rather than required reading."[72] The Court then explicitly posited the sole substantive question to be answered: are there any First Amendment limitations on a school board's choice to remove library books from its public school libraries' shelves?[73]

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64. *Id*.

> The nine books in the High School library were: Slaughter House Five, by Kurt Vonnegut, Jr.; The Naked Ape, by Desmond Morris; Down These Mean Streets, by Piri Thomas; Best Short Stories of Negro Writers, edited by Langston Hughes; Go Ask Alice, of anonymous authorship; Laughing Boy, by Oliver LaFarge; Black Boy, by Richard Wright; A Hero Ain't Nothin' But A Sandwich, by Alice Childress; and Soul On Ice, by Eldridge Cleaver. The book in the Junior High School library was A Reader for Writers, edited by Jerome Archer. Still another listed book, The Fixer, by Bernard Malamud, was found to be included in the curriculum of a twelfth-grade literature course.

Id. at 856–7 n.3 (citation omitted).

65. *Id*. at 856–57 ("[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." (citation omitted)).

66. *Id*. at 857 (alteration in original).

67. *Id*.

68. *Id*. (internal quotations omitted).

69. *Pico*, 457 U.S. at 857–58.

70. *Id.* at 858.

71. *Id*. at 858–59 (specifically alleging 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." (citation omitted)).

72. *Id*. at 862 (emphasis added).

73. *Id.* at 863.

In analyzing whether the school board's discretion was limited, the Court began by recognizing the substantial interest and authority of State officials, and school boards, in promoting "community values" and preparing their students to become effective members of the political process.[74] However, the Court also recognized the power and discretion of State officials and school boards is not absolute; that exercise of power and discretion must still align with the values the First Amendment protects.[75] The Court maintained that, in this context, the First Amendment rights of students are affected by the removal of books, which was akin to "contract[ing] the spectrum of available knowledge."[76] The Court noted the freedom to disseminate knowledge is made insignificant without the prerequisite freedom to receive that knowledge, which had been protected in various contexts.[77] Further, the Court explicitly emphasized the "unique role of the school library," and that the free choice students have in selecting a library book was wholly distinct from the things in which students have no freedom of choice or option in, which State and school officials typically control, such as the curriculum.[78] The Court reasoned that the "special characteristics of the school *library* make that environment especially appropriate for the recognition of the First Amendment rights of students."[79] Ultimately, the plurality held that there are some First Amendment limitations on a public school board's choice to remove library books from its public school libraries, and students in this context have a protected right to both receive and share ideas.[80]

Next, the Court considered to what extent the First Amendment limits a school board's choice to remove library books from its public school libraries.[81] The Court again recognized local school boards have a substantial interest in its school libraries' content, but, at the same time, recognized a fundamental First Amendment principle: "If there is any

74. *Id*. at 864.

75. *Pico*, 457 U.S. at 864–65 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943)) ("That [States and local school boards] are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.").

76. *Id.* at 866 (quoting Griswold v. Connecticut, 381 U.S. 479, 482 (1965)).

77. *Id.* at 867; *see also* Lamont v. Postmaster Gen. of the U.S., 381 U.S. 301, 308 (1965) (Brennan, J., concurring) ("The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.").

78. *Pico*, 457 U.S. at 869 ("[T]he libraries afford [students] an opportunity at self-education and individual enrichment that is wholly optional.").

79. *Id.* at 868.

80. *Id*. at 867, 869.

81. *Id.* at 853, 869.

fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]"[82] The Court then explored its precedent reaffirming the idea that laws with the effect of controlling the content available to students in a classroom in a manner guided to a pre-determined idea of "orthodoxy" are prohibited under the First Amendment.[83] After examining the precedent, the Court concluded the exercise of discretion by local school boards must not be exercised in a "narrowly partisan or political manner," and the "Constitution does not permit the official suppression of ideas."[84] Notably, the students conceded that if the books were removed because they were "pervasively vulgar" or because they lacked "educational suitability," that would be constitutionally permissible.[85] Ultimately, with the concern of suppression of the ideas at the forefront, the plurality held that it is an unconstitutional exercise of discretion when a public school board "remove[s] 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.'"[86] The Court further held that if the school board's decision behind the book removal was intended to deny the students access to ideas that the school board disagreed with, and if that intent was the decisive factor behind the decision, then the school board exercised its discretion in violation of the Constitution.

Finally, the Court looked at the school board's rationalization of its removal decision by calling the books "anti-American" and the contradictory decision to ignore the findings of the book review committee established by the school board, and ultimately found there was a genuine issue of material fact.[87]

III. Analysis

First, this Part analyzes how different circuit courts have interpreted the precedential value of *Pico*. Second, this Part argues and explains why *Pico*'s holding is insufficient. Third, this Part proposes a modern model for analyzing book bans that recognizes that the public-school libraries of today are similar to social media platforms. Thus, public school libraries should be afforded a similar level of immunity and insulation, for the

82. *Id.* at 869–70 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).
83. *Id.* at 870.
84. *Pico*, 457 U.S. at 870–71.
85. *Id.* at 871.
86. *Id.* at 872 (quoting W. Va. State Bd. Of Educ. V. Barnette, 319 U.S. 624, 642 (1943)).
87. *Id.* at 872, 875.

content they curate and filter, that social media platforms enjoy. Finally, this Part discusses the vast impact *Pico*'s decision has had, and may continue to have, on students, librarians, and the United States as a whole.

A. The "Value" of Pico (To Some)

"An initial problem raised by the *Pico* decision concerns the weight it is to be given as a precedent. Because a majority of justices did not concur in any one opinion, the authority of *Pico* is limited."[88] Both the Ninth and Eighth Circuits have found Justice Brennan's plurality opinion to be of some precedential value in dealing with public school libraries and book banning.[89]

1. The Ninth Circuit

In the Ninth Circuit case *Monteiro v. Tempe Union High School,* a high school student was required to read two novels—*The Adventures of Huckleberry Finn* and *A Rose for Emily*.[90] Her parent sought the removal of the books from the student's class curriculum, and all future classes, because of racially insensitive language.[91] Although the court found *Pico* distinguishable, because this action was brought upon by a parent seeking to alter the curriculum, the court reasoned that *Pico* was "helpful in identifying the First Amendment interests that are involved in this case."[92] Additionally, the court identified *Pico*'s holding as stating that "students' First Amendment right of access to information is violated when schools remove books from library in content-based manner,"[93] specifically, "in a narrowly partisan or political manner."[94] Here, the Ninth Circuit expressed the views of the plurality in *Pico*, and even though the Court in *Pico* was careful to forewarn that it was not deciding any issues pertaining to curriculum, this circuit still used *Pico* to identify the First Amendment issues.[95]

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88. Helen M. Quenemoen, *Board of Education v. Pico: The Supreme Court's Answer to School Library Censorship,* 44 Ohio State L.J. 1103, 1113 (1983).

89. Euguene Volokh, *Does The First Amendment Bar Public Schools from Removing Public Library Books Based on Their Viewpoints?*, Reason (May 18, 2022, 8:01 AM), https://reason.com/volokh/2022/05/18/does-the-first-amendment-bar-public-schools-from-removing-library-books-based-on-their-viewpoints/ [perma.cc/P47R-D5N6].

90. Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1024 (9th Cir. 1998).

91. *Id.*

92. *Id.* at 1027 n.5.

93. *Id.* at 1027.

94. *Id.* at 1027 n.5 (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870–71 (1982)).

95. *Pico*, 457 U.S. at 861; *see also Monteiro*, 158 F.3d at 1027 n.5.

2. The Eighth Circuit

The Eighth Circuit case *Turkish Coalition of America, Inc. v. Bruininks* involved a college student that wanted to use the plaintiff's, the Turkish Coalition of America (TCA) website, which was part of a list on the college's cultural center website called "Unreliable Websites" for a project.[96] Afterwards, the plaintiff sent a demand to the college alleging the "Unreliable Websites" list containing plaintiff's website and warnings to students against using it was a violation of the First Amendment.[97] The professor, who was in charge of the college's website, subsequently removed the "Unreliable Websites."[98] The plaintiff relied on *Pico* and argued "that the Center's intent in warning students about the TCA website was to deny access to ideas with which the Center disagreed."[99] According to the court, *Pico* ruled that the First Amendment right to receive ideas "was violated if the school board members intended by their removal decision to deny [students] access to ideas with which [the school board] disagreed, and if this intent was the decisive factor in [the] decision."[100] The Eighth Circuit quickly distinguished the plaintiff's claim from *Pico*, reasoning that the students' right to access the ideas in the books was only impaired when "the books actually were removed from the libraries."[101] Here, the court pointed to the absence of any facts in the record indicating the students were unable to access the plaintiffs' website via a website, other than the college's.[102]

3. Conclusion

These Ninth and Eighth Circuit cases showcase the difference between what each court pulled from *Pico* as having precedential value.[103] In *Monteiro*, the court's invocation of *Pico* was very brief and was only used in part to inform the Ninth Circuit's analysis in identifying an issue that was not presented and that Justice Brennan specifically disclaimed was not affected by his holding.[104] Thus, *Pico* played a very minor role in the Ninth Circuit's analysis, on a subject Justice Brennan specifically disclaimed was not affected by his holding without

96. Turkish Coal. of Am., Inc. v. Bruininks, 678 F.3d 617, 620 (8th Cir. 2012).
97. *Id.* at 620–21.
98. *Id.* at 621.
99. *Id.* at 623.
100. *Id. (*quoting *Pico*, 457 U.S. at 871) (internal quotations omitted).
101. *Id.* at 623 (citing *Pico*, 457 U.S. at 866).
102. *Turkish Coal. of Am., Inc.*, 678 F.3d at 624.
103. *Id.* at 623–24 (citation omitted); *see* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998).
104. *Monteiro*, 158 F.3d at 1027 n.5.

the force of a majority opinion.[105] In *Turkish Coalition of America, Inc.*, the Eighth Circuit cited a different formulation of *Pico*'s holding than the Ninth Circuit, and it did not mention for what reasons disagreement with an idea would be improper.[106] As is evident from the rampant book banning across the United States, and the tepid reliance on *Pico* from the above cases, *Pico* is subject to different interpretations on key aspects and cannot be relied on to battle against those seeking to censor what the public school students of America can read in their libraries.

B. Pico Who?

On the other hand, the Fifth, First, and Eleventh Circuits disagree with the above circuits about even minor and inconsequential uses of *Pico*, the precedential force or even clarity of Justice Brennan's plurality holding in *Pico*, "and have recognized . . . that *Pico* didn't resolve the issue."[107] These circuits are clear: *Pico* lacks precedential effect.[108] Further, these cases, and those discussed above, illustrate the application, guidance, and precedential force of *Pico* are not clear to lower courts. As a result, many political advocacy groups have taken, and currently are still taking, advantage.

1. The Fifth Circuit

The Fifth Circuit case *Muir v. Alabama Educational Television Commission*[109] attempted to decipher *Pico*, but "conclude[d] that the Supreme Court decided neither the extent nor, indeed the existence . . . of First Amendment implications in a school book removal case."[110] Further, because there was no majority, and because the court found Justice White's concurrence to be the narrowest for judgment, the court concluded "*Pico* is of no precedential value as to the application of the First Amendment to these issues."[111]

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105. *Id.* at 1023, 1027; *see also Pico*, 457 U.S. at 861–62.

106. *Monteiro*, 158 F.3d at 1023, 1027; *see also* Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1052 (5th Cir. 1982) (Rubin, J., concurring); Am. Civ. Liberties Union of Fla., Inc., v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202, 1204 (11th Cir. 2009).

107. Volokh, *supra* note 89.

108. *See Muir*, 688 F.2d at 1045 n.30; Griswold v. Driscoll, 616 F.3d 53, 57 (1st Cir. 2010); *Am. Civ. Liberties Union of Fla., Inc.*, 557 F.3d at 1202.

109. *Muir*, 688 F.2d at 1033.

110. *Id.* at 1045 n.30.

111. *Id.* ("Being instructed by Marks v. U.S., 430 U.S. 188, 192–93, and Gregg v. Georgia, 428 U.S. 153, 169 n.15 (plurality opinion), that in no-clear majority cases we should look to that position taken by those members who concurred in the judgment on the narrowest grounds.").

2. The First Circuit

Similarly, the First Circuit in *Griswold v. Driscoll* gave little precedential value to Justice Brennan's plurality opinion from *Pico*.[112] In *Griswold*, the First Circuit addressed whether the "removal of contra-genocide references from subtopic of Armenian genocide in board's advisory curriculum guide" by the Commissioner of Elementary and Secondary Education of Massachusetts violated the First Amendment rights of school members, parents, and the Assembly of Turkish American Associations.[113] But, the First Circuit was unable to tell what issues pertaining to library censorship warranted special consideration and further stated:

> *Pico*'s rule of decision, however, remains unclear; three members of the plurality recognized and emphasized a student's right to free enquiry in the library, but Justice Blackmun disclaimed any reliance on location and resorted to a more basic principle that a state may not discriminate among ideas for partisan or political reasons, and Justice White concurred in the judgment without announcing any position on the substantive First Amendment claim.[114]

The First Circuit held the curriculum guide was a part of the school curriculum, and thus, the Commissioner's discretion was not violative of the First Amendment.[115] In a footnote, the court expressed its hesitancy in applying *Pico* to the decision due to its imprecision.[116]

3. The Eleventh Circuit

In the Eleventh Circuit case *ACLU of Florida, Inc. v. Miami-Dade School Board*, the court stated that "[t]he question of what standard applies to school library book removal decisions is unresolved."[117] The court concluded:

> the standard that *failed* to attract a majority in the *Pico* case [is]: school officials may not remove books from 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."[118]

Yet, even after identifying what it believed to be the standard Justice Brennan proposed, the Eleventh Circuit signaled the limited

112. *Griswold*, 616 F.3d at 57.
113. *Id.* at 55–56.
114. *Id*. at 57 (citations omitted).
115. *Id*. at 56, 69.
116. *Id*. at 59 n.6.
117. Am. Civ. Liberties Union of Fla., Inc., v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009).
118. *Id.* (emphasis added) (quotations omitted).

precedential value of *Pico*, evidenced by the court repeatedly qualifying that it is just "assuming" the standard applies.[119] Further evidence of *Pico*'s lack of precedential value is contained in a footnote where the majority stated, "[C]onsidering Judge Hill's ten-judge plurality opinion together with Judge Rubin's four-judge concurring opinion, a total of fourteen of the twenty-two judges who participated in the *Muir* decision explicitly recognized that the *Pico* decision has no precedential value."[120]

C. Unconstitutional Discrimination against LGBTQ and Race Discussions under the Guise of "Educational Unsuitability"

It is no secret that America has been embroiled in partisan politics and the country is facing a stark divide among party lines.[121] But, as the Supreme Court recently noted, "America's public schools are the nurseries of democracy. Our representative democracy only works if we protect the 'marketplace of ideas.'"[122] Yet, the marketplace of ideas in the nurseries of our democracy has been, and is currently, plagued by a mass movement to purge public school libraries' shelves of LGBTQ and racially sensitive content.[123] *Pico* opened the door for school boards to remove books based on impermissible motives by constraining courts to only finding a violation of the school boards' discretion if the "decisive factor" in the school board's decision was political.[124] This has allowed individuals and groups motivated by restricting materials related to race and LGBTQ content to successfully challenge such materials by sneaking in unconstitutional, politically driven bans under the guise of "educational unsuitability."[125]

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119. *Id.* at 1202, 1204, 1206–07, 1226. Judge Charles R. Wilson stated, "We are without much precedent to help us decide the extent to which the First Amendment applies to school library book removal decisions . . . . I agree with the majority that Justice Brennan's plurality decision in *Pico* is of limited precedential value[.]" *Id*. at 1233 (Wilson, J., dissenting).

120. *Id*. at 1200 n.4.

121. Simon Jackman, *America more divided than at any time since civil war,* U.S Stud. Ctr. (Mar. 15, 2022), https://www.ussc.edu.au/analysis/america-more-divided-than-at-any-time-since-civil-war [perma.cc/3DFB-UFZ2].

122. Mahanoy Area Sch. Dist. v. Levy ex rel. B.L., 141 S. Ct. 2038, 2046 (2021).

123. Friedman & Johnson, *Rising School Book Bans*, *supra* note 11.

124. Am. Civ. Liberties Union of Fla., Inc., v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1203, 1206 (11th Cir. 2009); *see also* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982).

125. *See generally* Ryan L. Schroeder, *How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 Iowa L. Rev. 363 (2021). For a brief list of these types of groups, *see also* Nat'l Coal. Against Censorship & Gay & Lesbian All. Against Defamation, *supra* note 13.

This is clear from the court's decision in *C.K.-W. by and through T.K. v. Wentzville R-IV School District*, in which the school board found the removal of a book involving racism was allowed because it was educationally unsuitable.[126] The "plaintiffs alleged that the removal of book from the district's libraries is 'part of a targeted campaign' by two private groups 'to remove particular ideas and viewpoints about race . . . from school libraries."[127] Further, plaintiffs asserted that the book was removed because of the dislike of the ideas or opinions in the book.[128] Yet, the court had to do little work to decline plaintiffs' argument because of *Pico*'s "decisive factor" language.[129] The court found that plaintiffs' evidence was only based on "'information and belief,' that the 'ordinary course and procedures for consideration of weeding' were not followed."[130] Thus, prior to analyzing whether the book in question was vulgar or educationally unsuitable, the court signaled plaintiffs' argument did not have much merit due to the lack of support that the decisive factor in banning the book was a narrowly political one.[131] Indeed, the court signaled that only an *extreme* example of a pretextual reason for the removal of a book would work in plaintiffs' favor.[132]

Further, the case of *Case v. Unified Sch. Dist. No. 223*, although favorable to the plaintiffs of the case, exhibited the vast amount of evidence needed to qualify as a "decisive factor" displaying an intent to deny access to books based on disapproval of the messages expressed within.[133] The book at issue was *Annie on My Mind*, a novel concerning a romantic relationship between teenage girls.[134] In its discussion of the board's motivation for removal, the court noted that numerous board members expressed views not having to do with educational suitability, but rather with their own personal beliefs and preferences about their ideas of orthodoxy.[135] Although the board members tried to state their reasons for removing the book was because it was educationally unsuitable, the court used *Pico* to "assess the credibility of [school officials'] justifications for

126. C.K.-W by and through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 909–10 (E.D. Mo. 2022).

127. *Id.* at 911.

128. *Id.*

129. *Id.* at 915.

130. *Id.*

131. *Id.*

132. *C.K.-W by and through T.K.*, 619 F. Supp. 3d at 916.

133. Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 875 (D. Kan. 1995).

134. *Id.* at 867.

135. *Id.* at 870–71. One board member testified that he believes that in his community, one must be heterosexual in order to meet community moral standards. Another board member "concluded that the book was well written but was objectionable because 'it was promoting a very unhealthy lifestyle.'" *Id*. at 871.

their decision."[136] The court ultimately decided that the board's removal of the book was unconstitutional because it was obviously motivated by their attempt to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion,"[137] while also finding the board's removal of the book disregarding established procedure for such removals as "important evidence of their improper motivation."[138]

As depicted from the above cases, *Pico* simply is not sufficient to guard against impermissible motivations from banning books. The precedential value is unclear, and even when there may be an impermissible motive at play, in order to overcome the pretexts of educational unsuitability or vulgarity and find the motivation is really to restrict ideas which one disagrees with, the evidence must be obvious. Based on the foregoing reasons, if the issue of public-school book bans comes before the Supreme Court again, the Court should instead modernize the test by looking to the similarities between social media sites and modern public-school libraries, affording these libraries similar protections as social media websites.

D. A Stronger and Modern Framework

As Justice Burger stated in his *Pico* dissent, "[t]he First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world."[139] One such new problem is social media websites.[140]

Section 230 of the Communications Decency Act (CDA) grants social media platforms near immunity from liability for the content posted to their sites.[141] Additionally, by virtue of the CDA, and social media companies' status as private actors, decisions to keep or remove content are strongly insulated from pressure by political advocacy groups and government officials.[142] The CDA states that "[n]o provider or user of an

136. *Id.* at 875 (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 875 (1982)).

137. *Id.* at 876 (citations omitted).

138. *Id.*

139. *Pico*, 457 U.S. at 854, 885.

140. *See generally* Valerie C. Brannon, *Free Speech and the Regulation of Social Media Content*, Cong. Rsch. Service (Mar. 27, 2019), https://www.everycrsreport.com/reports/R45650.html [https://perma.cc/553M-M49W].

141. *See* Alan Z. Rozenshtein, *The Fifth Circuit's Social Media Decision: A Dangerous Example of First Amendment Absolutism*, Lawfare (Sept. 20, 2022), https://www.lawfareblog.com/fifth-circuits-social-media-decision-dangerous-example-first-amendment-absolutism [https://perma.cc/LQB8-KND3] ("Section 230 [of the Communications Decency Act of 1996] is the landmark law that immunizes platforms from liability for almost all of the content they host[.]").

142. *See* Rebecca Kern, *Push to rein in social media sweeps the states*, Politico (July 7, 2022, 4:30 AM), https://www.politico.com/news/2022/07/01/social-media-sweeps-the-states-00043229 [https://perma.cc/C3MJ-MQRY].

interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider."[143]

In a very recent case, *NetChoice, LLC v. Attorney General, Florida*,[144] the plaintiff represented various Internet and social media platforms in an action challenging Florida's statutes regulating social media providers.[145] The State of Florida argued that social media platforms, like Facebook and Twitter, do not "engage[] in constitutionally protected expressive activity when they moderate and curate the content that they disseminate on their platforms."[146] The Eleventh Circuit held "that it is substantially likely that social-media companies—even the biggest ones—are 'private actors' whose rights the First Amendment protects," that their content-moderation decisions are protected exercises of editorial judgment, and that parts of Florida's statute unconstitutionally burden 'large platforms' ability to engage in content moderation . . . ."[147] The court highlighted: (1) a social media platform "doesn't create most of the original content on its site," most of that content is created by the site's users while a platform "might publish terms of service or community standards;" and (2) the information provided to users when they visit a site like Facebook or Twitter is curated and edited.[148] Additionally, the court found that the platforms exercised editorial judgment by removing posts that violate its term of service or community standards (e.g., hate speech, pornography, or violent content).[149] Notably, the court concluded that "a social-media platform serves as an intermediary between users who have chosen to partake of the service the platform provides and thereby participate in the community it has created" and that a platform's decision to remove content communicates a message of disapproval.[150] The Eleventh Circuit ultimately struck down the part of the statute that limited the power of social media platforms to moderate and curate content.[151]

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143. 47 U.S.C. § 230 (c)(1).

144. This is a complex and novel case with a great deal of information that is not discussed because it is not pertinent to this Section's analysis.

145. NetChoice, LLC v. Att'y Gen., Fla, 34 F.4th 1196, 1207 (11th Cir. 2022).

146. *Id.* at 1203. The Court noted that Florida "enacted a first-of-its-kind law to combat what some of its proponents perceive to be a concerted effort by 'the "big tech" oligarchs in Silicon Valley' to 'silenc[e]' 'conservative' speech in favor of a 'radical leftist' agenda." *Id*.

147. *Id.*; *see also* FLA. STAT. ANN. §§ 106.072(2), 501.2041(2)(b).

148. *NetChoice, LLC*, 34 F.4th at 1204. The Court also stated, "[w]hen platforms choose to remove users or posts, or deprioritize content in viewers' feeds or search results, or sanction breaches of their community standards, they engage in First-Amendment-protected activity." *Id.* at 1213. *But see* NetChoice, L.L.C. v. Paxton, 49 F.4th 439, 445 (5th Cir. 2022).

149. *NetChoice, LLC*, 34 F.4th at 1204.

150. *Id.* at 1204, 1217 ("Given the context, a reasonable observer witnessing a platform remove a user or item of content would infer, at a minimum, a message of disapproval.").

151. *Id.* at 1209–10.

The role of modern public school libraries is similar to that of social media platforms—they act as intermediaries that provide curated and edited content for students who *choose* to use the library, and typically provide curated and edited internet services as well.[152] As Justice Brennan pointed out, nothing in *Pico* affects the discretion a local school board has in *adding* books to their libraries.[153] Similarly, social media platforms have discretion in deciding what content they will add, such as community standards, and allow to be added to their sites.[154] Given these similarities between social media platforms and public school libraries and the need for a new book banning framework, the Supreme Court should look to *NetChoice, LLC v. Attorney General, Florida* to derive this model.[155] The model should look to the "special characteristics of the school library that make that environment *especially* appropriate for the recognition of the First Amendment right of students"[156] by: (1) extending the First Amendment's protection of editorial judgments to cover a public school library's curation and filtering judgments; (2) treating public school libraries as private actors that engage in First-Amendment protected activity through their curation and filtering of books; and (3) applying First Amendment scrutiny to any new law concerning school board book bans. This model would replace the permissive *Pico* standard with a stronger standard that would no longer allow political advocacy groups to put forth pretextual arguments under the guise of "educational unsuitability" or "vulgarity" to successfully pressure local school board members into banning books. This is not a perfect model, but it follows the idea expressed in *Pico* that school boards should play a role in determining the content of their libraries, because *Pico*'s book banning standard did not "affect[] in any way the discretion of a local school board to choose books to add to the libraries of their schools."[157] A standard such as this accounts for the technological advancements of today, where kids find more objectionable content on their phones than from reading books in the library.[158] As a result of *Pico*'s lackluster guidance and weak precedential value,

152. *See generally* Kate Lechtenberg & Jenna Spiering, *Rethinking Curation in School Libraries and School Library Education: Critical, Conceptual, Collaborative*, 26 Sch. Libraries Worldwide 83 (2020) (emphasis added).

153. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982).

154. *NetChoice, LLC*, 34 F.4th at 1204.

155. *Id.*

156. *Pico*, 457 U.S. at 868.

157. *Id.* at 871.

158. *See* Waxman, *supra* note 16; *see also* Michael B. Robb & Supreet Mann, *Teens and Pornography*, Common Sense Media (Jan. 10, 2023), https://www.commonsensemedia.org/sites/default/files/research/report/2022-teens-and-pornography-final-web.pdf [https://perma.cc/HAN4-2TSR] (finding that more than 73% of teenagers in the United States have seen porn online).

it allowed the floodgates to open wide and has invited intense pressure on school boards and librarians to remove books.[159] Book banning has become a national problem—one cause is the political divide in this country and the ideas different parties fervently want to suppress.[160]

IV. Impact

A. Impact on Students

Maoria Kirker, the lead of the Teaching and Learning Team at George Mason University Libraries, points out the students who are subject to these book removals/bans are those grades K-12.[161] Many of them may not have the luxury of turning anywhere but their school libraries, and thus, those children do not have the opportunity to explore the diversity of ideas, characters, etc., from those books that are unavailable.[162] Maoria points out that those diverse ideas and concepts are what "help children think through history, ideas, and concepts from different angles."[163] This is an essential skill for critical thinking, which serves students throughout their lifetime, and when students miss out on that opportunity, it has the potential to "create significant gaps in knowledge for young learners."[164] Many teenagers have conveyed the negative effects of book bans.[165] Students have expressed numerous different opinions about how they view book bans including, generally that: (1) it is wrong to shield kids from reality; (2) books are meant to challenge and educate; (3) book bans are not effective and there are other ways to handle sensitive subjects; (4) parents and lawmakers deciding what students should read is a slippery slope; (5) book banning limits thinking; and (6) book banning is a form of discrimination.[166]

Additionally, the banning of books does not protect students from certain ideas or ideologies, but rather it "only fosters ignorance and

159. *See supra* Part III A–C.

160. *See supra* Part III; *see also* Friedman & Johnson, *The Growing Movement to Censor Books in Schools*, *supra* note 11 (reporting that advocacy groups, like Moms for Liberty, played a role in at least twenty percent of the book bans in the 2021-22 school year).

161. *See* Maoria Kirker, *Mason expert says that book banning hurts students' access to learning*, Geo. Mason Univ. (Jan. 20, 2022), https://www.gmu.edu/news/2022-01/mason-expert-says-book-banning-hurts-students-access-learning [https://perma.cc/BK4G-THXK].

162. *Id.*

163. *Id.*

164. *Id.*

165. The Learning Network, *What Students Are Saying About Banning Books From School Libraries*, N.Y. Times (Feb. 18, 2022), https://www.nytimes.com/2022/02/18/learning/students-book-bans.html [perma.cc/X7PL-AQDV].

166. *Id.*

isolation."[167] Many book bans are attempting to wash over sensitive subjects like racism, which affects students of color and is important to understanding America's history.[168] Yet, as one student aptly observed, "[b]y banning books with important context, we risk the inception of more racial injustice within our society as a whole. No matter how horrible our history is, it is more important than ever that students are well informed to prevent repeating history."[169] Additionally, the impact of banning books and ideas concerning marginalized LGBTQ students is incredibly serious.[170] In 2022, "45% of LGBTQ youth seriously considered suicide in the past year."[171] The notion that LGBTQ students are less because they are different or do not belong has contributed to serious damage to the LGBTQ community, and the ease in which schools can ban such content representing acceptance of the LGBTQ community may increase the risk of that damage in a population.[172] It is clear that the LGBTQ community benefits from seeing themselves represented and accepted,[173] but that such continued discrimination, like book bans, will contribute to poor mental health.[174]

B. Impact on Librarians

Students are not the only ones negatively affected by book challenges and removals. The feeling of isolation can cause major distress for librarians. Dealing with these issues has been so distressing that it led

167. Emma Reilly, *Banning books in schools is a harmful, exclusionary practice*, The Elm (Feb. 11, 2022), https://blog.washcoll.edu/wordpress/theelm/2022/02/banning-books-in-schools-is-a-harmful-exclusionary-practice/ [perma.cc/R6SF-DAAP]. Reilly also stated, "by eliminating perspectives from students' literary repertoire, we are sanitizing our history and curating a dangerously heteronormative, white-dominated narrative for student consumption." *Id*.

168. *Id.*

169. The Learning Network, *supra* note 165.

170. *See generally Laws that Prohibit the "Promotion of Homosexuality": Impacts and Implications*, GLSEN (2018), https://www.glsen.org/sites/default/files/2020-04/No_Promo_Homo_2018.pdf [perma.cc/E2KZ-HAHQ].

171. *See 2022 National Survey on LGBTQ Youth Mental Health*, The Trevor Project (2022), https://www.thetrevorproject.org/survey-2022/assets/static/trevor01_2022survey_final.pdf [perma.cc/82NU-36Y9].

172. *See generally* Emily Barber & Matthew C., *Why Banning LGBTQ+ Books Hurts All Kids,* Richland Library (Mar. 16, 2022), https://www.richlandlibrary.com/blog/2022-03-09/why-banning-lgbtq-books-hurts-all-kids [perma.cc/ZBB5-FZFK]; Jody L. Herman et al., *Suicide Thoughts and Attempts Among Transgender Adults*, UCLA Sch. of L. Williams Inst. (Sept. 2019), https://williamsinstitute.law.ucla.edu/publications/suicidality-transgender-adults/ [perma.cc/2CFV-38GH]; *The Trevor Project Research Brief: Accepting Adults Reduce Suicide Attempts Among LGBTQ Youth*, The Trevor Project (June 2019), https://www.thetrevorproject.org/wp-content/uploads/2019/06/Trevor-Project-Accepting-Adult-Research-Brief_June-2019.pdf [perma.cc/ZE64-5QU7].

173. The Trevor Project, *supra* note 172 (reporting that LGBTQ youth who felt accepted by their school and community had lower rates of attempting suicide than those who do not).

174. *See id.*

Carolyn Foote, a retired Texas school librarian to "establish Freedom [sic] Fighters, a kind of support group for librarians in distress."[175] These librarians are in need of such support because of the increase from conservative parent groups calling for book bans "often by and about queer and Black people and lobbying for their removal from library shelves," which has led to unbearable stress for many librarians.[176] School librarians are also experiencing more one-on-one meetings with parents, which can be emotionally taxing.[177] Additionally, school librarians are not only dealing with school board meetings and investigations, but they also have to deal with books being silently pulled without any notice.[178] On top of all this, school librarians have been compared to pedophiles and cockroaches, and worry about ending up on the news.[179] Public school librarians also have to keep up with different bills that threaten monetary penalties and prison.[180] A possible portent of things to come is a recently enacted law in the conservative majority state of Florida, known as HB 1467, which provides that some school librarians are now being tasked with acting as arbiters on whether books violate the law, and play a factor in whether a teacher faces felony charges.[181]

C. Impact on Country – Opening the Doors to Discriminatory Legislation Due to Pico's Soft Standards

In 2022, at least seven states have proposed new book ban bills promoting different agendas, such as widening the scope of permissible book bans, specifically targeting LGBTQ content, expediting the removal processes, and imposing monetary penalties for delay

175. *See* Lauren Mechling, *'We've moved backwards': US librarians face unprecedented attacks amid rightwing book bans*, The Guardian (Sept. 20, 2022), https://www.theguardian.com/books/2022/sep/20/librarians-banned-books-attacks-library [perma.cc/TM6V-9QSC] ("Most librarians are the only librarian in the building. It puts you in the spotlight when you don't feel you can speak in public about what's happening. The group's Twitter account, which has 12,000 followers, shares links to news stories about assaults on libraries and librarians as well as resources such as advice on dealing with contentious board meetings.").

176. *Id.*

177. Hannah Natanson, *Schools nationwide are quietly removing books from their libraries*, Wash. Post (Mar. 22, 2022, 9:54 AM), https://www.washingtonpost.com/education/2022/03/22/school-librarian-book-bans-challenges/ [perma.cc/C66M-G9DC].

178. *Id*.

179. *Id*.

180. *See* James Dawson, *Idaho librarians could face jail time for lending 'harmful' books*, Boise State Pub. Radio News (Mar. 3, 2022, 4:05 PM), https://www.boisestatepublicradio.org/politics-government/2022-03-03/idaho-librarians-could-face-jail-time-for-lending-harmful-books [perma.cc/87JJ-RNNK].

181. Erum Salam, *Florida Teachers Forced to Remove or Cover Up Books to Avoid Felony Charges*, The Guardian (Jan. 24, 2023), https://www.theguardian.com/us-news/2023/jan/24/florida-manatee-county-books-certified-media-specialist [perma.cc/QC6K-3ZKF].

in removal of books.[182] This drastic expansion of book banning is not just because of politicians, but rather a major driving force behind this movement is political advocacy groups, like "Moms for Liberty, a national-level organization that now has over 200 chapters."[183] Moms for Liberty is not the only conservative parent group fighting against books because of Black and LGBTQ issues, and rightwing extremist groups, like the Proud Boys, have also adopted the cause.[184] In some instances, school boards removing books are inviting scenes that seemingly would appear to come right out of Ray Bradbury's famous dystopian novel, *Fahrenheit 451*.[185] If something does not change, then this trend of book banning and restricting students' right to information in our country[186] will continue to be ruled and subjected to the whims of whatever political group is facing anxiety and taking it out on America's nurseries of democracy and constraining the marketplace of ideas.[187] America is known to the world as "the melting pot" and the books in American public school libraries should reflect this notion.

V. Conclusion

Under the current framework of *Pico*, the test for determining whether a public school's banning of a book is permissible easily allows parents and politically driven advocacy groups to pressure school boards into justifying a book ban because the content is "educationally unsuitable" or "vulgar." If the issue of public school book bans come before the Supreme Court again, the Court should consider the similarities of modern public libraries to social media platforms and use

182. Madison Hall, *At least 7 state legislatures are proposing 'book ban' legislation, prompting concern from civil liberty advocates,* Bus. Insider (Feb. 28, 2022, 3:42 PM), https://www.businessinsider.com/state-legislatures-across-the-country-are-proposing-book-ban-bills-2022-2 [perma.cc/UCU8-HKKC].

183. Friedman & Johnson, *The Growing Movement to Censor Books in Schools*, *supra* note 11.

184. *See* Mechling, *supra* note 175. Other conservative parent groups pushing bans on books by Black and LGBTQ authors include groups such as No Left Turn in Education and Parents Defending Education. *Id*.

185. *See* Waxman, *supra* note 16.

> Two board members, Courtland representative Rabih Abuismail and Livingston representative Kirk Twigg, said they would like to see the removed books burned. "I think we should throw those books in a fire," Abuismail said, and Twigg said he wants to "see the book before we burn them so we can identify without our community that we are eradicating this bad stuff."

Id.

186. For a comprehensive list of pending legislation proposing public school library books and other educational gag orders, *see PEN America Index of Educational Gag Orders*, Pen Am. https://docs.google.com/spreadsheets/d/1Tj5WQVBmB6SQg-zP_M8uZsQQGH09TxmBY73v23zpyr0/edit#gid=1505554870 [perma.cc/V6P5-UCQ6] (last visited Mar. 28, 2023).

187. Am. Civ. Liberties Union of Fla., Inc., v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1236 (11th Cir. 2009) (emphasis added).

NetChoice, LLC v. Attorney General, Florida to construct a model that extends First Amendment protections to public school libraries which would protect a public-school library's curation and filtering decisions about what books are shelved.

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