PAGES UNDER FIRE: EXPLORING CONSTITUTIONAL CHALLENGES TO BOOK BANNING IN PUBLIC SCHOOL LIBRARIES

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[†] J.D. Candidate, Syracuse University College of Law, 2025. I am truly honored to have had the opportunity to write this Note for the *Syracuse Law Review*, and I would like to start by thanking all of my friends and colleagues for their edits. Thank you to my Associate Notes Editor, Seth Owens, for providing me with exceptional guidance throughout the note-writing process and for his invaluable contributions in shaping this piece into its final form. I also extend a special thanks to Professor Aliza Milner for her thoughtful suggestions on this topic. Finally, I would like to thank my family and friends for their unwavering support and encouragement; I dedicate this work to you with heartfelt appreciation.

ABSTRACT

Book banning in public school libraries presents a complex legal landscape, intertwining intellectual freedom, educational policy, and constitutional rights. Despite increasing challenges, the Supreme Court's guidance on this issue remains limited, leading to a patchwork of lower court decisions. This Note delves into the legal framework of book banning, focusing on pivotal Supreme Court cases and their implications for public school libraries. Central to this examination is the landmark case of *Board of Education v. Pico*, where Justice Brennan's plurality opinion emphasized school libraries as spaces for voluntary inquiry and safeguarded against political censorship. Drawing on principles from *West Virginia State Board of Education v. Barnette*, this Note explores the boundaries of school boards' authority in regulating library collections, emphasizing students' liberty of conscience and the prohibition against imposing orthodoxy. Furthermore, this Note analyzes the relevance of *Brown v. Entertainment Merchants Ass'n* and *Tinker v. Des Moines Independent Community School District* in protecting children's rights and exposure to diverse ideas. Synthesizing these precedents, this Note proposes a nuanced legal framework that balances intellectual freedom, educational objectives, and constitutional rights in addressing book banning in public school libraries.

INTRODUCTION

In the spring of 2020, as students transitioned to remote learning, novel digital teaching techniques became commonplace in homes across the United States. Despite the increasing reliance on technology for assignments and virtual class, contentious discussions at school board meetings surprisingly revolved around the teaching tools that have existed long before Zoom—books. The stereotype of public-school libraries as serene havens has been shattered as their collections become commanding political symbols nationwide. Some states and school boards have gone so far as to advocate for extreme measures. For instance, members of the Spotsylvania School Board in Virginia, reminiscent of dystopian literature, expressed a desire to burn certain

books.[1] Additionally, some states have enacted new laws that permit criminal prosecution of school and library personnel for providing sexually explicit, obscene, or "harmful" books to children. Arkansas is one such state, with new legislation enacted as of 2023 that allows school employees and public librarians to face prosecution "for disseminating obscene matter, leading to up to six years in prison and a fine of up to $10,000."[2]

Unfortunately, the incident in Spotsylvania was not a one-off event. Similar occurrences have been on the rise across the United States. The American Library Association's (ALA) Office of Intellectual Freedom, which monitors attempts to ban books across the country, "tracked 155 unique censorship incidents, and provided direct support and consultation in 120 of those cases" between June 1, 2021, and September 30, 2021.[3] According to the director of the Office of Intellectual Freedom, it is unprecedented for the ALA to face multiple challenges on a daily basis.[4] This concerning pattern extends beyond mere anecdotes. In 2021, the United States saw a surge in censorship attempts, reaching "the highest level since the [ALA] began tracking book challenges 20 years ago."[5] This a growing trend, as the ALA reported that efforts to ban books nearly doubled in 2022—up 38 percent from the previous year.[6] While certain stories garner

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1. *See* Adele Uphaus, *Spotsylvania School Board Orders Libraries to Remove 'Sexually Explicit' Books*, FREE LANCE-STAR (Nov. 9, 2021), https://fredericksburg.com/news/local/education /spotsylvania-school-board-orders-libraries-to-remove-sexually-explicit-books/article_6c54507a-6383-534d-89b9-c2deb1f6ba17.html. Comments from some board members included: "I think we should throw those books in a fire," with another representative stating he wanted to "see the books before we burn them so we can identify within our community that we are eradicating this bad stuff." *See also* Julie Carey & Derrick Ward, *Spotsylvania School Board Appoints Chair Who Backed Burning Books, Fires Superintendent*, NBC4 WASH. (Jan. 10, 2022), https://www.nbcwashing- ton.com/news/local/northern-virginia/spotsylvania-school-board-appoints-chair-who-was- in-favor-of-burning-books-fires-superintendent/2933066.

2. 2023 Ark. Acts 3; *see* Hannah Natanson, *School Librarians Face a New Penalty in the Banned-Book Wars: Prison*, WASH. POST (May 18, 2023, 6:00 AM), https://www.washingtonpost.com/education/2023/05/18/school-librarians-jailed-banned-books/.

3. *ALA Statement on Book Censorship*, AM. LIBR. ASS'N (Nov. 29, 2021), https://www.ala.org/advocacy/statement-regarding-censorship.

4. *See id.*

5. Elizabeth A. Harris & Alexandra Alter, *Book Banning Efforts Surged in 2021. These Titles Were the Most Targeted*, N.Y. TIMES (Apr. 4, 2022), https://www.nytimes.com/2022/04/04/books/banned-books-libraries.html.

6. *See* Alexandra Alter & Elizabeth A. Harris, *Attempts to Ban Books Doubled in 2022*, N.Y. TIMES (Mar. 23, 2023), https://www.nytimes.com/2023/03/23/books/book-ban-2022.html; *What You Need to Know About*

disproportionate attention, such as books with LGBTQ+ or controversial themes and books addressing race and racism,[7] challenges are mounting nationwide. These challenges to books have arisen at the state and local level in thirty-two states, indicating that no state is immune to potential public school library controversies.[8]

This begs the question: What is the legal framework governing the banning of books? Unfortunately, the Supreme Court has not provided a definitive precedent on the removal of books from public school libraries. In fact, the Supreme Court has only addressed library-related cases thrice, each resulting in complex webs of plurality opinions.[9] While *Board of Education v. Pico* serves as the guiding case for public school libraries,[10] its application by lower courts in recent decades has revealed its limitations. Despite the impending multitude of

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

7. Books such as GENDER QUEER by Maia Kobabe and THE BLUEST EYE by Toni Morrison have faced significant scrutiny and challenges due to their LGBTQ+ content or exploration of complex social issues. *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; *see also* Chris Jones, *Davis School District Bans Nobel Prize-Winning Book 'The Bluest Eye' From All Libraries,* KUTV (Mar. 15, 2023, 1:01 PM), https://kutv.com/news/crisis-in-the-classroom/davis-school-district-bans-nobel-prize-winning-book-the-bluest-eye-from-all-libraries-toni-morrison-banned-books-law-utah. Furthermore, titles LIKE STAMPED: RACISM, ANTIRACISM, AND YOU by Jason Reynolds and Ibram X. Kendi, and THE HATE U GIVE by Angie Thomas frequently come under fire for their discussions of race and systemic racism. *See* Mike Hixenbaugh, *Here Are 50 Books Texas Parents Want Banned From School Libraries*, NBC NEWS (Feb. 2, 2022), https://www.nbcnews.com/news/us-news/texas-library-books-banned-schools-rcna12986; *see* Ali Velshi & Hannah Holland, *This YA Novel Shows the Importance of the Genre*, MSNBC (July 28, 2023, 12:59 PM), https://www.msnbc.com/ali-velshi/-hate-u-give-book-ban-lists-rcna96251.

8. *See* Jonathan Friedman, *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.

9. *See* United States v. Am. Libr. Ass'n, 539 U.S. 194, 214 (2003) (holding that the Children's Internet Protection Act's requirement for public libraries to use internet filtering software to block access to obscene and harmful content did not violate the First Amendment); Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871–72 (1982) (5–4 decision) (holding that a public school board could not remove books from a school library solely because they disagreed with the content or found it objectionable); Brown v. Louisiana, 383 U.S. 131, 141–42 (1966) (holding that protestors have a First and Fourteenth Amendment right to engage in a peaceful sit-in at a public library).

10. *See Pico*, 457 U.S. at 871–72.

potential cases concerning banned books, federal courts are not without direction. Rather than piecing together a disjointed precedent from the fragments of the *Pico* plurality, courts can rely on binding precedents established in *West Virginia State Board of Education v. Barnette*,[11] *Brown v. Entertainment Merchants Ass'n*,[12] and *Tinker v. Des Moines Independent Community School District*[13] to inform decisions regarding books within public school libraries. In an insightful discussion of these cases, this Note argues that courts should objectively assess book bans, prioritizing student safety and diverse perspectives, and base decisions on objective criteria and compelling justifications rather than subjective objections to ideological content.

Part I of this Note will establish a baseline comprehension of the background of book bans in public school libraries. Beginning with an exploration of the terminology associated with banning books, Part I continues to trace the historical interconnection between book banning and the realm of free speech. It culminates in an assertion that the issue of banning books should be framed as a matter of free speech rather than parental rights, examining the potential speech implications for parents, school governments, students, authors, and librarians. Additionally, Part I clarifies that the proposed post-*Pico* framework should target high school students exclusively to ensure a focused and customized approach in tackling the intricacies of student rights within public school libraries. Next, Part II delves into the Supreme Court's treatment of book removal from public school libraries in the *Pico* case, exploring how federal circuit courts of appeals and federal district courts have applied the *Pico* plurality. Addressing these gaps, Part III argues that even in the absence of binding precedent from the Supreme Court, courts can integrate the *Pico* plurality with binding First Amendment precedents from *Barnette*, *Brown*, and *Tinker* to inform their deliberations on upcoming decisions related to banned books.

I. BACKGROUND: THE HISTORY OF BOOK BANNING IN THE UNITED STATES

Engaging in the conversation about the legality of banning books requires first defining the vocabulary distinguishing between banning and removal. This sets the stage by establishing a shared context for

11. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

12. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 799 (2011).

13. *See* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 509 (1969).

understanding the connection between books and free speech rights of students.

A. Common Vocabulary and Vernacular

This piece employs various terms to describe the action of taking books out of libraries, including "ban," "challenge," and "remove." Some sources suggest that "remove" is a politically neutral term for the process.[14] Interestingly, none of the plurality opinions in *Pico* used the term "ban"; instead, phrases such as "discretion to remove library books" were used.[15] The absence of the term "ban" in *Pico* has led to conflicting perspectives among federal judges, as seen in *ACLU of Florida, Inc. v. Miami-Dade County School Board*, where the distinction between "ban" and "remove" was crucial.[16] Despite aligning with the Supreme Court, the majority's adherence to "remove" deviated from the common usage of "ban" prevalent among librarians and the general public.[17]

While some scholars and judges advocate for the use of "removal" over "ban" when referring to schools taking books off library shelves, the ALA and Judge Charles Wilson's dissent in the *Miami-Dade* case endorse the use of the term "ban."[18] Every year since 1982, the ALA and libraries nationwide observe Banned Books Week in September.[19] The significance of Banned Books Week is underscored by the official ALA definitions of removal, banning, and challenge which clarify that "[a] challenge is an attempt to remove or restrict materials, based upon the objections of a person or group. A banning

14. *See* Ryan L. Schroeder, Note, *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, 364 n.1 (2021).

15. *Pico*, 457 U.S. at 856 (plurality opinion).

16. *See* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1219 (11th Cir. 2009).

17. *See id.* at 1220.

18. *See id.* at 1242 (Wilson, J. dissenting); AM. LIBR. ASS'N, *supra* note 3.

19. *See* Herbert Mitgang, *Groups Aim to Counter Book Bans*, N.Y. TIMES, Sept. 7, 1982, at C11; Kellie Clinton, *Exile Aisle: Challenged and Banned Books in Youth Literature*, UNIV. OF ILL. LIBR.: NON SOLUS BLOG, https://www.library.illinois.edu/rbx/2019/10/01/exile-aisle-challenged-and-banned-books-in-youth-literature (last visited Sept. 21, 2024); *About*, BANNED BOOKS WEEK, https://bannedbooksweek.org/about (last visited Sept. 21, 2024); *Banned & Challenged Books*, AM. LIBR. ASS'N: BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/books (last visited Sept. 21, 2024).

is the removal of those materials."[20] While Judge Wilson did not explicitly reference the ALA's definitions, he deemed "ban" a suitable term to characterize the school board's actions in *Miami-Dade*.[21] He clarified that his disagreement was not dependent on the specific term used, but rather on the majority's flawed definition of "ban," which would effectively prevent a school board from ever banning a book due to potential access elsewhere.[22] Adding to this logical inconsistency, Judge Wilson underscored discrepancies between the Eleventh Circuit's reluctance to use "ban" in *Miami-Dade* and its use of the term in other contexts within Florida and the Eleventh Circuit, aligning his observations with common usage among librarians and patrons.[23] Given these considerations, opting for "ban" appears entirely justified.

Possibly, the hesitance to use the term "ban" may be linked to the closely associated connotations between banning and censorship, as illustrated by the fact that Thesaurus.com identifies "censorship" as the second synonym for "ban."[24] A deep-rooted tradition of resisting censorship is embedded in American history, though it has often been more of an aspiration than a reality. For instance, President John Adams faced opposition from publishers who resisted his attempt at censorship when he implemented the Alien and Sedition Acts.[25] This sentiment against censorship persisted over a century later, as affirmed by the Supreme Court in the 1943 *Barnette* decision.[26] The majority opinion in that case emphasized that "[i]t is now a commonplace that censorship or suppression of expression of opinion is tolerated by our

20. *Banned Book FAQ*, AM. LIBR. ASS'N: BANNED & CHALLENGED BOOKS, https://www.ala.org/advocacy/bbooks/banned-books-qa (last visited Sept. 21, 2024).

21. *Miami-Dade*, 557 F.3d at 1234 (Wilson, J., dissenting).

22. *Id.* at 1250–52 (citing Searcey v. Harris, 888 F.2d 1314, 1318, 1322 (11th Cir. 1989) ("calling a school board's regulation prohibiting certain groups from presenting at career day 'banning,' even though they were not prohibited from presenting elsewhere"); FLA. STAT. ANN. § 386.206 (West 2008) ("referring to 'the smoking ban' in workplaces when people are allowed to have cigarettes and smoke in other venues")).

23. *See id.* at 1250–51.

24. *Ban*, THESAURUS.COM, https://www.thesaurus.com/browse/ban (last visited Sept. 17, 2024).

25. *See* WENDELL BIRD, CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798, at 4, 5, 6 (2020). In 1798, with the backing of the Adams Administration, Congress passed the Alien and Sedition Acts. The Alien Act gave the President unilateral power to deport non-citizens who were subjects of foreign enemies, while the Sedition Act targeted the very essence of free speech and a free press—the right to criticize the government. *Id.* at 2.

26. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."[27] The spirit of resistance against censorship endured throughout the twentieth century, withstanding the challenges of the 1950s,[28] and extending into the new millennium.[29] Notably, during oral arguments for the *Citizens United* case, Chief Justice Roberts, Justice Alito, Justice Kennedy, and Justice Souter, although unrelated to banning books, raised hypothetical scenarios about applying the proposed interpretation to censoring a book.[30] While tangential to the case at hand, these inquiries showcased the ingrained aversion to censorship among American jurists.

B. Parental Rights or Free Speech Rights?

Beyond the choice of terminology applied to describe book bans and removals, the crucial decision of framing the issue either as one of parental rights or as a matter of free speech holds significant importance. Viewing book bans through the lens of free speech emerges as the more fitting perspective because it emphasizes constitutional protections, supports academic freedom, addresses the broader implications of censorship, upholds the importance of open public discourse, and provides a historical context for understanding the impact on access to diverse ideas. While whether a judge labels the act of taking books off library shelves as "removal" or "banning" primarily influences the censorship connotations, the pivotal decision of categorizing the action within the realms of parental rights or free speech

27. *Id.* at 633.

28. *See* RICHARD MCKEON ET AL., *Preface* to THE FREEDOM TO READ: PERSPECTIVE AND PROGRAM, at v (1957). The 1950s were marked by significant challenges to free speech, including government actions like McCarthyism, where individuals were often accused of being communists and faced censorship or blacklisting. *Id.* at xi.

29. *See generally* Cohen v. California, 403 U.S. 15 (1971) (ruling in favor of a man who had been convicted for wearing a jacket with the words "Fuck the Draft" in a courthouse, holding that the government could not criminalize the display of offensive speech in public, reinforcing the broad protections of the First Amendment.); Texas v. Johnson, 491 U.S. 397 (1989) (ruling that burning the American flag is a form of protest is protected speech under the First Amendment.); Reno v. ACLU, 521 U.S. 844 (1997) (striking down provisions of the 1996 Communications Decency Act that sought to regulate indecent material on the internet, ruling that the Act's restrictions violated the First Amendment, recognizing the internet as a "vast democratic forum" that deserves robust free speech protections).

30. *See* Transcript of Oral Argument at 27–38, Citizens United v. Fed. Election Comm'n, 558 U.S. 310 (2010) (No. 08-205). For example, Justice Alito asked whether "[t]he government's position is that the First Amendment allows the banning of a book if it's published by a corporation." *Id.* at 29.

rights significantly shapes the legal analysis employed. Much like the use of "ban" or "remove" reflects the desired outcome, where an individual stands on the spectrum of parental rights versus free speech provides insight into whether they advocate for the removal or preservation of a book.

While federal courts have acknowledged certain school-related topics as parental rights issues, the banning of books does not feature on this designated list. Notably, the question of whether individuals can opt for private school education for their children was treated as a parental rights matter in *Pierce v. Society of Sisters*,[31] and a similar treatment occurred in *Meyer v. Nebraska* regarding the choice of course offerings in languages other than English.[32] However, both of these cases dealt with required actions, unlike the presence of books in a library, which does not necessitate students to read them. In instances where parents petition school boards to remove morally objectionable books from public school libraries, they often rely on parental rights justifications in their discourse.[33] While members of the public may find these justifications compelling, librarians, as indicated by the ALA's official interpretation of the Library Bill of Rights,[34] prioritize collections development through a free speech framework.[35] When confronted with banned-book cases, courts should accord greater significance to how librarians classify collection development than to parental perspectives.

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31. *See* Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

32. *See* Meyer v. Nebraska, 262 U.S. 390, 403 (1923).

33. *See* Anika Exum & Meghan Mangrum, *Williamson County Schools Committee Removes Book from Elementary Curriculum*, THE TENNESSEAN (Jan. 28, 2022, 11:32 AM), https://www.tennessean.com/story/news/local/williamson/2022/01/25/williamson-county-schools-committee-removes-book-elementary-curriculum/9217318002.

34. *See Library Bill of Rights and Freedom to Read Statement Pamphlet*, AM. LIBR. ASS'N: OFF. FOR INTELL. FREEDOM, https:// www.ala.org/aboutala/offices/oif/LBOR-FTR-statement-pamphlet/ (last visited Sept. 21, 2024).

35. *Diverse Collections: An Interpretation of the Library Bill of Rights*, AM. LIBR. ASS'N (June 24, 2019), https://www.ala.org/advocacy/intfreedom/librarybill/interpretations/diversecollections ("Best practices in collection development assert that materials should not be excluded from a collection solely because the content or its creator may be considered offensive or controversial. Refusing to select resources due to potential controversy is considered censorship, as is withdrawing resources for that reason.").

C. Focusing on Free Speech as the Correct Approach

Reframing the ostensibly parental rights issue of book-banning as a free speech matter finds a parallel in the *Brown* decision.[36] In the case, California enacted a statute aiming to limit children's access to violent video games.[37] Justice Scalia's majority opinion acknowledged that "(1) addressing a serious social problem and (2) helping concerned parents control their children . . . are [both] legitimate, but when they affect First Amendment rights they must be pursued by means that are neither seriously underinclusive nor seriously overinclusive."[38] Similarly, when parents express concerns about books, their objections might stem from a perceived "serious social problem," with school boards seeking to support parental efforts at control.

While the state may have a legitimate goal, the First Amendment sets boundaries on the extent to which the state, represented by a school board, can impose limitations. Parents advocating for book removals may prefer to align with Justice Thomas' dissent in *Brown*, which delved into the historical context of parental-child relationships in the eighteenth century, emphasizing that "[p]arents had total authority over what their children read."[39] Ultimately, in the *Brown* case, it was free speech concerns that guided the majority, rather than the parental rights central to Justice Thomas' dissent.[40] In cases involving book-banning, it is likely that First Amendment considerations will circumscribe any parental rights issues raised.

1. Who Is Speaking?

Viewing book-banning as a free speech issue prompts the question of whose free speech rights are at stake. Courts do not treat book banning as a parental rights matter, and neither librarians nor parents are seen as the speakers whose free speech rights are endangered.[41] By process of elimination, students emerge as the individuals whose free speech interests are vulnerable to violation by book bans. Justice Brennan's plurality opinion in *Pico* reinforces this perspective, emphasizing that the removal of books directly implicates the First Amendment

36. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 788 (2011).

37. *See id.* at 789.

38. *Id.* at 805.

39. *Id.* at 832 (Thomas, J., dissenting) (citing ANNE S. MACLEOD, AMERICAN CHILDHOOD 177 (1994)).

40. *Id.* at 805.

41. *See* Anne Klinefelter, *First Amendment Limits on Library Collection Management*, 102 LAW LIBR. J. 343, 352 (2010).

rights of students.[42] Brennan underscores the importance of access to books, framing it as essential for students to actively participate in a diverse society, preparing them for both the present and future exercise of their rights.[43]

Stemming from discomfort with Justice Brennan's passive rationale, some academics have broadened the notion of the First Amendment "right to read."[44] Professor Susan Nevelow Mart defines it as the "right to receive information," reflecting the idea that the value of free speech diminishes without accessible speech.[45] However, not all academics concur on this conception. Professor Marc Jonathan Blitz views reading as an alternative means for individuals to exercise liberty of conscience and self-development, emphasizing its expressive qualities.[46] While the debate reveals diverse perspectives, it underscores the interconnectedness of the concepts of the right to read and free speech.

2. Where Is the Speech Occurring?

Beyond the speaker, the location of speech is crucial for free speech analysis, with federal courts uniformly treating public school libraries as a distinct category. Although historical justifications for this distinction are not often provided by judges, librarians have considered public school libraries as unique spaces since their inception. The idea of school libraries, distinct from community libraries, was championed by Melvil Dewey in the late nineteenth century and remains a prevailing concept.[47] Described as an enduring "duality" by Professor Richard J. Peltz, public school libraries serve both curricular and extracurricular functions.[48] Furthermore, courts consistently recognize the separation of public school libraries from classrooms.[49] As

42. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 866 (1982).

43. *See id.* at 868.

44. *See* Barbara Gordon-Lickey, *The Freedom to Read*, ACLU OR., https://www.aclu-or.org/en/freedom-read (last visited Jan. 15, 2025).

45. Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175, 175 (2003).

46. *See* Marc Jonathan Blitz, *Constitutional Safeguards for Silent Experiments in Living: Libraries, the Right to Read, and a First Amendment Theory for an Unaccompanied Right to Receive Information*, 74 UMKC L. REV. 799, 802 (2006).

47. *See* Richard J. Peltz, *Pieces of PICO: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 107, 113–14 (2005).

48. *See id.* at 106.

49. *See id.* at 138 (citing Roberts v. Madigan, 702 F. Supp. 1505, 1513–14 (D. Colo. 1989)). (Colorado district court described a small selection of books inside a

communities grapple with nationwide calls to ban books,[50] legal guidance becomes essential, but unfortunately, only one Supreme Court case has addressed the issue of banning books in public school libraries: *Pico*.[51]

D. Who Is the Target Audience?

As discussions arise regarding the potential expansion of *Pico's* scope to encompass students at all educational levels, it becomes crucial to consider the unique developmental stages and educational needs of different age groups. While *Pico's* principles are applicable across educational settings, the target audience of the proposed post-*Pico* framework should be limited to high school students to ensure a focused and tailored approach to addressing the complexities of student rights within public school libraries.

High school students represent a pivotal stage in academic and personal development, characterized by increased cognitive abilities, critical thinking skills, and a burgeoning sense of individual identity.[52] Unlike younger students in elementary and middle schools, high school students are better equipped to engage in sophisticated discussions about censorship, intellectual freedom, and the role of public school libraries as bastions of diverse perspectives.[53] By targeting this demographic, legal interpretations and precedents established in *Pico* can be contextualized within the unique educational environment of high schools, where students actively shape their intellectual identities and prepare for higher education or the workforce. Moreover, limiting the target audience of the proposed post-*Pico* framework to high school students allows for a more focused analysis of the legal, ethical, and practical implications of book removals from school libraries. High school students, nearing adulthood and exercising increasing levels of autonomy, are better positioned to understand and appreciate the nuances of First Amendment jurisprudence as it applies to their

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classroom as a classroom library, distinct from the larger library that served the whole school.

50. *See* Friedman, *supra* note 8.

51. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 855 (1982).

52. *See* NAT'L ACADS. OF SCIS., ENG'G, & MED., THE PROMISE OF ADOLESCENCE: REALIZING OPPORTUNITY FOR ALL YOUTH 2 (2019).

53. *See* Neal McCluskey, *Are Public School Libraries Accomplishing Their Mission? Public School Libraries Do Not Appear to Stock a Balance of Views*, 962 CATO POLICY ANALAYSIS 1, 4-5, 7 (2023).

educational experiences.[54] Additionally, high schools often offer a broader and more diverse range of library resources compared to elementary and middle schools, making the protection of students' rights to access information even more critical at this educational level.

Ultimately, while *Pico* remains a seminal case in safeguarding students' First Amendment rights in public school libraries, any expansion of its scope should be judiciously considered. By limiting the target audience of an expanded *Pico* to high school students, policymakers, educators, and legal scholars can address the unique developmental and educational needs of this demographic while ensuring a comprehensive examination of the issues at hand. This narrowed approach promotes the preservation of student autonomy, academic freedom, and intellectual exploration within the dynamic landscape of public school libraries.

II. *PICO*

A. Background and History of Pico

A crucial starting point in the ongoing debate over intellectual freedom within the American education system is the landmark Supreme Court case *Pico*, decided in 1982.[55] The school board of the Island Trees Union Free School District in New York, under the authority of its policy on controversial books, ordered the removal of several titles deemed objectionable by some community members.[56] The list included works by renowned authors such as Kurt Vonnegut, Jr., Langston Hughes, and Richard Wright.[57] The primary rationale cited by the school board was the desire to shield students from potentially offensive content and to align the curriculum with the community's perceived values.[58] In response to this book ban, Steven Pico

54. *See* Niraj Chokshi, *First Amendment Support Climbing Among High School Students*, N.Y. TIMES (Feb. 7, 2017), https://www.nytimes.com/2017/02/07/us/high-school-students-first-amendment.html; *see also High School Students Support First Amendment Freedoms More than Adults for the First Time in a Decade, Survey Finds*, KNIGHT FOUND. (Sept. 17, 2014), https://knightfoundation.org/press/releases/high-school-students-support-first-amendment-freed/.

55. *See Pico*, 457 U.S. at 855.

56. *See id.* at 857–58.

57. *See id.* at 856 n.3 (plurality opinion) (citing Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist., 474 F. Supp. 387, 389 (E.D.N.Y. 1979)).

58. *See id.* at 857 (quoting *Pico*, 474 F. Supp. at 390). When explaining their decision to remove the books, the school board "characterized the removed books as 'anti-American, anti-Christian, anti-[Semitic], and just plain filthy,' and concluded that '[i]t is our duty, our moral obligation, to protect the children in our

and fellow students sued the school board, initially losing in district court but winning on appeal in the Second Circuit, which ordered a trial.[59]

When the case eventually reached the Supreme Court, it remained equally divisive. The central question was whether school officials had the authority to remove books they deemed inappropriate without violating students' constitutional right to free speech and intellectual freedom.[60] The Supreme Court's divided opinions, resulting in six separate viewpoints, underscored the difficulty of defining students' free speech rights in educational settings and left lower courts without clear precedent for similar cases. In order to reach the proper result in such cases, it is necessary to briefly examine each opinion of the *Pico* case in search of common themes.

B. Breakdown of the Pico Decision

1. Pico Plurality

When parties want to uphold their intellectual freedom within the American education system, especially by wanting to keep a book in a school library, the main plurality opinion of *Pico* provides the strongest foundation for their arguments. In an opinion led by Justice Brennan, the Court delineated the circumstances under which public school boards should exercise caution and refrain from removing books from libraries.[61] Importantly, Justice Brennan began by establishing that taking books out of libraries is not a curriculum issue, but rather that "the only books at issue in this case are *library* books, books that by their nature are optional rather than required reading."[62] In emphasizing that libraries and classrooms should not receive the same treatment, he noted "the unique role of the school library" and the "regime of voluntary inquiry" present in public school libraries.[63]

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schools from this moral danger as surely as from physical and medical dangers.'" *Id.* (alterations in original).

59. *See* Nicole Chavez, *He Took His School to the Supreme Court in the 1980s for Pulling 'Objectionable' Books. Here's His Message to Young People*, CNN (June 25, 2022, 4:00 AM), https://www.cnn.com/2022/06/25/us/book-bans-island-trees-union-free-school-district-v-pico/index.html; *see Pico*, 457 U.S. at 859–60 (citing to *Pico*, 474 F. Supp. at 397); *see also* Pico v. Bd. of Edu., Island Trees Union Free Sch. Dist. No. 26, 682 F.2d 404, 407 (2d Cir. 1980).

60. *See Pico*, 457 U.S. at 855–56.

61. *See id.* at 861.

62. *Id.* at 861–62.

63. *Id.* at 869.

After acknowledging the connection between public schools and their libraries, Justice Brennan observed that school boards can exert authority over public school libraries, provided they do so within the confines of the First Amendment.[64] While Justice Brennan could have then relied upon the hallmark case *Tinker v. Des Moines Independent Community School District*, wherein the Court recognized the principle that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,"[65] he instead chose to identify *West Barnette* as instructive.[66] This case highlighted students' liberty of conscience, emphasizing that schools cannot suppress diverse viewpoints in the name of unity or patriotism.[67] Justice Brennan expressed concerns that school boards might restrict library collections to politically acceptable books, focusing on motivations behind book removal rather than mandating access.[68] This differentiation is significant as not every Justice perceived the selection of collections as separate from the process of removal. Justice Brennan again referenced *Barnette* to encapsulate how the plurality "hold[s] that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[69]

Other parts of the plurality opinion highlighted Justice Brennan's concerns about political censorship based on the choices of which books to permit in school libraries. Justice Brennan recognized the "significant discretion" vested in school boards concerning public school library collections, yet he proceeded to identify the boundaries of that discretion:

> If a Democratic school board, motivated by party affiliation, ordered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school

64. *See id.* at 864 (quoting Brief for Petitioners at 10, Bd. of Educ. v. Pico, 457 U.S. 853 (1982) (No. 80-2043)).

65. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

66. *See Pico*, 457 U.S. at 865 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 640–42 (1943)) ("[T]he action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.").

67. *See id.*

68. *See id.* at 872.

69. *Id.* (quoting *Barnette*, 319 U.S. at 642).

> board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of *ideas*.[70]

Justice Brennan had a legitimate basis for making this explicit. When justifying his choice to endorse the removal of books at issue in *Pico*, one school board member explained that he "[felt] that it [was his] duty to apply [his] conservative principles to the decision making process in which [he was] involved as a board member and [he had] done so . . . ."[71] Filtering collections to make sure that they included solely books that aligned with specific political views clashed with the Constitution.

While Justice Blackmun concurred in part with Justice Brennan and concurred in the judgment, he wrote "separately because [he had] a somewhat different perspective on the nature of the First Amendment right involved."[72] Similar to Justice Brennan, Justice Blackmun did not advocate for the inclusion of all books in a school library, but he opposed the removal of books by school boards based on political disagreement. He referenced *Barnette* to note that

> the State may not suppress exposure to ideas – for the sole purpose of suppressing exposure to those ideas – absent sufficiently compelling reasons. Because the school board must perform all its functions "within the limits of the Bill of Rights," this principle necessarily applies in at least a limited way to public education.[73]

Here, Justice Blackmun pinpointed *Barnette* as a common thread linking his opinion with that of Justice Brennan. Ultimately, public schools ought to equip students to constitute "an informed citizenry,"[74] and the removal of books undermines efforts to "teach[] children to respect the diversity of ideas that is fundamental to the American system."[75] From there, readers reach the third perspective in the *Pico* saga, a concise opinion by Justice White concurring in the judgment, where he suggests remanding the case to a lower court for resolution

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70. *Id.* at 870–71.

71. *See Pico*, 457 U.S. at 872 n.24 (quoting Joint Appendix at 21, Bd. of Educ. v. Pico, 457 U.S. 852 (1982) (No. 80-2043)).

72. *Id.* at 876 (Blackmun, J., concurring in part and concurring in the judgment).

73. *Id.* at 877.

74. *Id.* at 876.

75. *Id.* at 880.

of factual issues and provides limited guidance on the First Amendment's implications for school board discretion.[76]

2. Pico Dissent

When school boards seek to remove books from their public-school libraries, they frequently cite the rationale found in the three separate dissenting opinions of *Pico*.[77] Chief Justice Burger's main dissent, joined by Justices Powell, Rehnquist, and O'Connor, focuses on access to books and libraries without differentiating between curriculum and library spaces. Chief Justice Burger views *Pico* as a case solely about book access rather than free speech, emphasizing students' freedom to read and discuss the book, with the only restriction being physical access in the school library. [78] He invokes a Madisonian notion of free speech, highlighting how the Founders did "not establish a *right* to have particular books retained on the school library shelves if the school board decides that they are inappropriate . . . to the school's mission."[79] In alluding to the mission of a school, Chief Justice Burger appeared to amalgamate libraries and curriculum, representing a fundamental departure from the plurality and nearly every subsequent lower court case.

Apart from joining Chief Justice Burger's dissent, Justice Powell authored a separate dissent in *Pico*, focusing on his interpretation of the books in question. He criticizes the plurality's opinion for its vagueness and lack of clear guidance to lower courts, presenting specific passages to clarify the dispute and alleviate concerns about politically motivated bans.[80] In the final opinion of *Pico*, Justice Rehnquist, along with Chief Justice Burger and Justice Powell, delves into objections to Justice Brennan's plurality opinion, expressing dissatisfaction with its hypothetical nature and lack of clarity.[81] Instead of drawing a distinction between libraries and curriculum, Justice Rehnquist categorized various types of libraries separately, considering how "[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are

76. *Pico*, 457 U.S. at 883 (White, J., concurring in judgment).

77. *See* Douglas Soule, *'That's Authoritarianism': Florida Argues School Libraries Are for Government Messaging*, TALLAHASSEE DEMOCRAT (Dec. 4, 2023, 5:17 AM), https://www.tallahassee.com/story/news/politics/2023/12/04/florida-says-school-libraries-have-right-to-remove-lgbtq-books/71742277007/.

78. *See Pico*, 475 U.S. at 886 (Burger, C.J., dissenting).

79. *Id.* at 888.

80. *See id.* at 895 (Powell, J., dissenting); *see also id.* at app. 897–903.

81. *See id.* at 904 (Rehnquist, J., dissenting).

tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas."[82] This suggests that libraries and curriculum ought to be grouped together within the same category. Additionally, Justice Rehnquist offers a different perspective on First Amendment rights and the timing for addressing concerns, believing that not every educational denial of access to information necessarily promotes orthodoxy.[83] While he acknowledged Justice Brennan's concerns about political orthodoxy in school libraries, he believed they were not relevant to the present case. Referencing the hypothetical scenarios from Justice Brennan's opinion, Justice Rehnquist agreed that extreme examples would be unconstitutional but suggested saving such discussions for another day, confident that such situations would not arise.[84] As evidenced by subsequent cases, it appears that the days of encountering extreme examples are gradually approaching.

C. Banned Books and Boundless Rights: Pico's Ripple Effect

In the decades following the *Pico* decision, various Circuit Courts of Appeals have reached different conclusions while grappling with the convoluted array of opinions emanating from the Supreme Court in *Pico*. Before these lower courts addressed post-Pico banned-book cases, the Supreme Court clarified public schools' authority over curriculum in *Hazelwood School District v. Kuhlmeier*.[85] *Hazelwood* specifically addressed editorial control in a high school newspaper as part of the journalism curriculum, offering clarity on curriculum-related issues rather than navigating ambiguous territory. There, the Supreme Court held that

> [e]ducators are entitled to exercise greater control over this second form of student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school.[86]

As this quote demonstrates, public school libraries are dual curricular and extracurricular spaces that fall beyond *Hazelwood's* orbit.

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82. *Id.* at 915.

83. *See Pico*, 475 U.S. at 917 ("[The plurality] mixes First Amendment apples and oranges . . . [because the] right to receive information differs from the right to be free from an officially prescribed orthodoxy.").

84. *See id.* at 907–08.

85. *See* Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988).

86. *Id.* at 271.

Following *Pico* and *Hazelwood*, when courts encounter situations involving the removal of books from public school libraries by school boards, *Pico* typically receives greater consideration than *Hazelwood*. Lower courts do not categorize book removals as curricular decisions akin to *Hazelwood*, nor do they frame removals as issues of expression falling under the purview of *Tinker*. Instead, federal courts consistently attempt to construct a test from the *Pico* plurality, revealing the decision's shortcomings.[87]

In general, one of the most blatant drawbacks of *Pico* arises from the challenges it poses from an evidentiary perspective, particularly concerning the motivations behind a school board's decision to ban a book. This poses difficulties for parties in demonstrating the specific rationale behind such decisions, hindering appellate courts' ability to assess their constitutionality. An example of this predicament surfaced in a Fifth Circuit decision involving the removal of "Voodoo & Hoodoo" from a public school library.[88] Although the district court initially granted summary judgment in favor of the school board, the appellate court remanded the case, stating that it could not "conclude as a matter of law that a genuine issue of material fact does not exist as to whether the motivating factor behind the School Board's decision to remove *Voodoo & Hoodoo* was one that violated the students' First Amendment right freely to access ideas and receive information."[89] This highlights the broader challenge of assembling evidence on school board members' motivations for book removals, with courts adopting varying approaches beyond *Pico's* limits.

Confronted with the evidentiary gaps within the *Pico* plurality, the Eleventh Circuit Court of Appeals crafted its own test for assessing factual inaccuracies, supplementing *Pico's* evaluation of motivation.

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87. *See* Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003) (quoting *Pico*, 457 U.S. at 857) ("The Court is persuaded that Dakota Counts has alleged sufficient injury to give her standing to pursue her claims in this case. The right to read a book is an aspect of the right to receive information and ideas, an 'inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.'"); Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189 (5th Cir. 1995) ("As reflected by the record in the instant case, the students attending the St. Tammany Parish public schools are not required to read the books contained in the libraries; neither are the students' selections of library materials supervised by faculty members—thus, the School Board's decision to remove *Voodoo & Hoodoo* concerns a non-curricular matter. As such, the School Board's decision to remove the Book must withstand greater scrutiny within the context of the First Amendment than would a decision involving a curricular matter." (footnote omitted)).

88. *Campbell*, 64 F.3d at 190.

89. *Id.* at 191.

American Civil Liberties Union of Florida, Inc. v. Miami-Dade County Board centered on the removal of a children's book about Cuba, contested by some parents for its purportedly inaccurate depiction of life in Cuba.[90] One specific line, "People in Cuba eat, work, and go to school like you do," sparked considerable objection, as parents and school board members contended it misleadingly omitted the challenges of life in Cuba.[91] The majority opinion justified the book's removal based on inaccuracies, [92] asserting that "[l]ife in Cuba is not like life in the United States."[93] While using factual inaccuracies as a rationale may initially seem reasonable for removing a book, such inaccuracies can easily serve as a pretext for politically motivated book bans.

The Eleventh Circuit noted the lack of binding precedent in its judgment, highlighting the ambiguity of the *Pico* standard. While indicating the Miami-Dade School Board did not act unconstitutionally under *Pico*, the court acknowledged minor inaccuracies could prompt removal.[94] Judge Wilson's dissent cautioned against maintaining a single viewpoint on Cuba, emphasizing the book's audience and arguing against minor discrepancies justifying removal.[95] This raises concerns about applying the factual inaccuracy test to genres beyond nonfiction. To avoid jeopardizing children's access to books due to uncertain tests and standards, courts can draw from *Pico's* plurality, the *Pico* dissent, and other free speech cases to guide decisions in situations where book bans appear to be driven by partisan agendas. Although *Pico* lacks a majority opinion, referencing cases like *Barnette*, *Brown*, and *Tinker* can help courts uphold students' rights in public school libraries.

90. *See* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1183–84 (11th Cir. 2009).

91. *Id.* at 1206 (quoting ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1283 (S.D. Fla. 2006)).

92. *See id.* at 1209.

93. *Id.* at 1214.

94. *See id.* at 1202.

95. *Miami-Dade*, 557 F.3d at 1234 (Wilson, J., dissenting) ("Having read the book and independently examined the entire record, I agree with the district court that the School Board's claim that *Vamos a Cuba* is grossly inaccurate is simply a pretense for viewpoint suppression, rather than the genuine reason for its removal.").

III. PROPOSING A POST-*PICO* FRAMEWORK IN PUBLIC SCHOOLS

A. Reading Pico in Conjunction with Other First Amendment Precedent

While lower courts are unable to construct a composite precedent from bits of agreement found among the various opinions from *Pico*, they can turn to other First Amendment cases involving the speech of students for guidance. Specifically, *Barnette* and *Brown* offer the most pertinent guidance as a starting point. Although neither case perfectly mirrors the circumstances of removing a book from public school libraries, both have majority opinions that offer valuable precedential direction for lower courts.[96]

1. Beginning with Barnette and Brown

When seeking guidance from other First Amendment cases for analyzing situations where public school libraries remove books from their collections, *Barnette* serves as a valuable starting point. Justice Brennan, Blackmun, and Rehnquist all cite *Barnette* in their *Pico* opinions to argue that public schools should refrain from "prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[97] *Barnette* centered on the constitutionality of a West Virginia law requiring students to salute the American flag while reciting the Pledge of Allegiance, and students who failed to comply faced expulsion.[98] The legal battle commenced when Jehovah's Witness students were expelled for refusing to salute the flag.[99] Despite differences between *Barnette* and *Pico*—with *Barnette* involving a mandatory requirement and disciplinary action, while *Pico* focused on optional reading materials—similarities exist in how the Court framed *Barnette* as presenting the question of "where the rights of one end and those of another begin."[100]

Three significant themes from *Barnette* resonate throughout the *Pico* opinions that mention the case: (1) "[free] public education, if faithful to the ideal of secular instruction and political neutrality, will

96. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 625 (1943); Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 786 (2011).

97. *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 872 (1982) (quoting *Barnette*, 319 U.S. at 642).

98. *See Barnette*, 319 U.S. at 627–29.

99. *See id.* at 629, 630.

100. *Id.* at 630.

not be partisan or enemy of any class, creed, party, or faction;"[101] (2) "Boards of Education . . . have . . . important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights;"[102] and (3) "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."[103] Given the multiple references to *Barnette* in *Pico*, these shared principles offer guidance to lower courts on applying free speech principles to public school libraries.

Despite the insights offered by *Barnette*, it is important to acknowledge the significant distinctions between its circumstances and those surrounding book removal cases. First, *Barnette* underscored the mandatory nature of the expression in question.[104] Additionally, the notion of "orthodoxy" appears less defined in the setting of a public school library compared to the requirement for students to salute the American flag during the Pledge of Allegiance. When a school board removes an entire selection of books related to the Civil Rights Movement or books authored by LGBTQ+ writers, it implies an endorsement of a particular narrative regarding race or sexuality. However, removing just one book would complicate this comparison. Nevertheless, the numerous references to *Barnette* throughout *Pico* highlight the importance of considering *Barnette* in any assessment of banned books. Beyond *Barnette*, another case directly addressed children's autonomy: *Brown*.

Though *Brown* did not pertain to students or educational institutions, it did involve the First Amendment rights of children, providing some insight into how courts may consider the First Amendment within public school libraries.[105] Much like the conflict between parental rights and student speech rights evidence in book removal cases, *Brown* dealt with diverse perspectives regarding whose rights were at stake. The case focused on a California statute that restricted the sale of violent video games to minors, with none of the Supreme Court opinions solely addressing the rights of the parties involved: California's Attorney General and a video game industry organization.[106] Justice Scalia's majority opinion specifically criticized how the statute "abridge[d] the First Amendment rights of young people whose

101. *Pico*, 457 U.S. at 877 (Blackmun, J., concurring) (citing *Barnett,* 319 U.S. at 637).

102. *Id.* at 864 (citing *Barnette*, 319 U.S. at 637).

103. *Id.* at 872 (*Barnette*, 319 U.S. at 642.)

104. *See Barnette*, 319 U.S. at 637, 638.

105. *See* Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 788–89 (2011).

106. *See id.* at 789.

parents (and aunts and uncles) think violent video games are a harmless pastime."[107] By framing the issue in this manner, Justice Scalia broadened the case's scope to encompass the rights of children themselves. Book-banning cases can draw similar conclusions concerning children's rights.

Given that Justice Scalia's interpretation of free speech prevailed in *Brown*, as it rightfully should in public school libraries, courts should carefully consider his remarks regarding uncomfortable ideas. A significant parallel exists between public school libraries and the *Brown* opinion in the majority's discussion of shielding children from uncomfortable ideas. While acknowledging that "[n]o doubt a State possesses legitimate power to protect children from harm . . . that does not include a free-floating power to restrict the ideas to which children may be exposed."[108] Since restricting the ideas children encounter is a common justification for book removals from public school libraries, this aspect of *Brown* holds particular importance in shaping the relevant First Amendment analysis in book-banning cases. Courts should avoid endorsing book removals grounded in arbitrary restrictions on the ideas found in children's public school library collections.

2. Turning to Tinker

When read in conjunction with the *Pico*, *Barnette*, and *Brown*, *Tinker* provides significant additional guidance for courts faced with the question of whether a school board's efforts to ban a book from a school library violates the students' First Amendment rights. In *Tinker*, the Supreme Court held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[109] While *Tinker* specifically addressed the issue of symbolic speech, its underlying principles have been extended to protect various forms of student expression. *Tinker* established a three-pronged test, often referred to as the "*Tinker* test," outlining the criteria for determining when school officials can restrict student speech or expression.

According to the first prong of the *Tinker* test, school authorities may only restrict student speech or expression if they can reasonably forecast that it will cause a substantial disruption to the educational environment.[110] This prong requires a showing of a genuine and material interference with school operations, such as significant

107. *Id.* at 805.
108. *Id.* at 794 (citing Ginsberg v. New York, 390 U.S. 629, 640–41 (1968)).
109. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
110. *See id.* at 509 (citing Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

disruptions to classroom instruction, threats to student safety, or significant unrest among students or faculty.[111] The second prong of the test stipulates that school officials may restrict student expression if they reasonably believe that it will invade the rights of others.[112] This includes situations where the speech or expression infringes on the rights of other students to be free from harassment, discrimination, or intimidation, or where it disrupts the rights of others to participate fully in educational activities. Finally, the third prong of the *Tinker* test requires that any restriction on student speech or expression be based on specific and objective evidence, rather than mere speculation or subjective viewpoints.[113] This prong emphasizes the importance of having clear and compelling reasons for limiting student expression, supported by factual evidence demonstrating that potential harm or disruption that would result from allowing the speech or expression to occur.[114]

B. Free, but Appropriate Expression

Implementing more strict protection measures for books in public school libraries does not guarantee that every book will always remain in the collection. Justice Blackmun's concurring opinion in *Pico* emphasized the necessity of "sufficiently compelling reasons" for the removal of books from schools.[115] Similarly, Justice Scalia's majority opinion in *Brown* recognized that "[n]o doubt a State possesses legitimate power to protect children from harm."[116] These protections may justify the removal of books containing explicit instructions for committing acts of violence. For instance, objections may arise regarding children's access to "The Anarchist Cookbook" and its guidance on constructing explosives.[117] If a copy of "The Anarchist Cookbook" were to somehow pass through the screening process of a public school library and be placed on the shelves of a high school, concerns about reducing the risk of violence could warrant its removal.

111. *See id.*

112. *See id.* at 513.

113. *See id.* at 509.

114. *See Tinker*, 393 U.S. at 509.

115. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 877 (1982).

116. Brown v. Ent. Merchs. Ass'n, 564 U.S. 786, 794 (2011) (citing Ginsberg v. New York, 390 U.S. 629, 640–41 (1968)).

117. For a discussion about banning THE ANARCHIST COOKBOOK, see Tony Thompson, *Ban My Bombers' Guide, Says Author*, THE GUARDIAN (June 11, 2000, 6:31 PM), https://www.theguardian.com/uk/2000/jun/11/booksnews.uksecurity.

However, it is essential to distinguish between books that genuinely pose a threat to student safety and those that merely present ideas or perspectives that some parents may find objectionable. In most instances where parents advocate for book bans, the objections do not approach such a level of danger but rather stem from disagreements with certain ideas or content. In these cases, the protection of students' rights to access diverse perspectives and engage in intellectual exploration must be carefully balanced with parental concerns and community values. Therefore, while strict protection measures are necessary to ensure student safety, the removal of books from public school libraries should be based on objective criteria and sufficiently compelling reasons rather than subjective objections to ideological content.

Federal courts should read the *Pico* plurality in conjunction with binding First Amendment precedents set by *Barnette*, *Brown*, and *Tinker* when adjudicating cases involving book banning in high school libraries. Given that high school students demonstrate greater intellectual maturity, courts should adopt a perspective that prioritizes free expression, as established in *Tinker*. Conversely, this approach should not extend to lower school libraries due to the higher curricular content found in their collections. In deciding such cases, courts should utilize the principles from *Pico* combined with the ideals from *Barnette*, a rationale supported by controlling precedent in *Tinker* and *Brown*. This approach effectively balances the considerations of preserving students' freedoms of speech and expression while also protecting them from objectively harmful information. Critics may argue that this approach overlooks the unique educational needs of younger students in lower school libraries, potentially stifling their access to appropriate materials. However, differentiation between high school and lower school libraries acknowledges the varying levels of intellectual maturity and educational needs of students at different stages of development. Additionally, critics may raise concerns about the potential for subjective interpretation of the factors test and prongs from various cases, leading to unpredictable outcomes and potential infringement on students' rights across different jurisdictions. Nevertheless, such concerns are unfounded since the factors test and prongs drawn from *Pico*, *Barnette*, *Brown*, and *Tinker* provide a structured framework for courts to evaluate book banning cases, enhancing predictability and consistency in judicial decisions. By anchoring their decisions in established legal precedents, courts can mitigate the risk of subjective interpretation and ensure that outcomes ultimately serve to enhance the rights of students.

CONCLUSION

As book bans increasingly sweep across the United States, the discussion around this issue persists within a legal framework, with terms like "ban," "remove," and "challenge" deemed appropriate based on definitions by the ALA, common usage, and Judge Charles Wilson's *Miami-Dade* dissent. Framing the issue as one involving First Amendment rights rather than parental rights is crucial, with courts urged to differentiate between public school libraries and classrooms in book-ban cases. It is essential to distinguish between acquiring books for libraries and removing them, and courts should primarily follow the *Pico* plurality while drawing from other free speech precedents. Students should not have to rely on public opinion to access books once available in their school libraries. By following the principles laid out in *Pico*, federal judges can uphold *Barnette's* ideals and prioritize children's rights, as demonstrated in *Brown* and *Tinker*, avoiding inconsistencies and uncertainty in public schools nationwide. As Judge Wilson's dissent in *Miami-Dade* emphasized, "[i]f the school is one of the most important laboratories for application of free speech principles, then its library is perhaps the most important."[118] How courts interpret the First Amendment in current banned book disputes will influence students' understanding and future use of their First Amendment rights.

118. ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1236 (1943) (Wilson, J., dissenting) (citing to *Pico*, 457 U.S. at 868).