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Liberty and Equality Under the First Amendment

SCRUTINIZING BOOK BANS THROUGH AN EQUAL PROTECTION FRAMEWORK

“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.”¹

INTRODUCTION

In May of 2022, Vicki Baggett, a language arts teacher, submitted a “Request for the Reconsideration of Educational Media,” objecting to the use of the book *The Perks of Being a Wallflower* by Stephen Chbosky as “optional study material” at Northview High School in Escambia County, Florida.² Baggett later admitted that she put forward her request because the book was a common target of the “nationwide book-removal movement.”³ In fact, she had never heard of this book prior to her request for its removal.⁴ This request marked the beginning of a book banning spree that would sweep Escambia County and capture national attention.

In the ensuing months, Baggett targeted over one hundred books for removal.⁵ The challenged books ranged from picture books to adult novels and included works of fiction and nonfiction.⁶ A significant number of these books contained themes of racism and/or LGBTQIA+ identity.⁷ Although the

¹ *Lamont v. Postmaster Gen.*, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

² Complaint at 14–15, *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist.*, No. 23-10385 (N.D. Fla. May 17, 2023). This Note contemplates and cites to the original complaint. When the case is heard by the district court, reference will be given to the amended complaint. Where distinctions are pertinent, this Note cites to the amended complaint.

³ *Id.* at 15.

⁴ *Id.*

⁵ *Id.* at 17.

⁶ *Id.*

⁷ *Id.* at 18.

school district's policy required that these titles be evaluated prior to removal, the established review procedure was temporarily amended, and many challenged books were automatically "subject to restricted access."⁸ As of July 2023, 218 books were challenged, by Baggett and others, and a substantial number of books remained restricted from student use.⁹

In the nationwide conversation around book banning, various terms are used. A school book ban refers to "any action taken against a book based on its content . . . 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."¹⁰ The terms "ban" and "removal" have become synonymous with the restriction of student access to specific books previously available in school libraries.¹¹ A "challenge" is an attempt to restrict student access to a book.¹² This terminology signifies a revocation of library offerings previously deemed suitable for students.¹³

Book banning is an exercise of content-based censorship that has its roots in the United States dating back to the colonial era.¹⁴ Censorship in public schools is restricted by the First Amendment of the Constitution, as well as various Supreme Court rulings that have expanded upon its meaning.¹⁵ The specific issue of book banning in public school libraries was taken up by the Supreme Court in the landmark case *Board of Education v. Pico*.¹⁶ However, as a plurality opinion, *Pico* is nonbinding precedent that has failed to effectively set a concrete rule for what constitutes a permissible exercise of school board discretion when a library book is removed from circulation.¹⁷

Escambia County is one of many school districts around the United States that have instituted book bans in recent years.

⁸ *Id.* at 19–21.

⁹ Amended Complaint at 23, 31, *PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Dist.*, No. 23-10385 (N.D. Fla. July 24, 2023).

¹⁰ 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> [<https://perma.cc/4KKV-DEJ5>].

¹¹ *Id.*

¹² *About Banned & Challenged Books*, *AM. LIBR. ASS'N*, <https://www.ala.org/advocacy/bbooks/aboutbannedbooks> [<https://perma.cc/4FZ7-UY7Q>].

¹³ Friedman, *supra* note 10.

¹⁴ Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, *NAT. GEO.* (Apr. 24, 2023) <https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states> [<https://perma.cc/7BLD-Y6T2>].

¹⁵ *Id.* See, e.g., *Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969); *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

¹⁶ *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

¹⁷ *Id.* at 853.

From July of 2022 to June of 2023, PEN America, a free speech advocacy group, documented 3,362 instances of book banning around the United States, resulting in the restriction and removal of 1,557 distinct titles.¹⁸ As of 2023, 153 school districts across thirty-three states were documented as having banned books from classrooms and libraries.¹⁹ Florida led the charge, with over 1,400 books banned across thirty-three school districts.²⁰ Other states with the highest number of book bans during this time period included Texas, Missouri, Utah, and Pennsylvania.²¹

While book challenges are often thought to come from concerned parents, many recent bans have come about as a result of political pressure exerted by elected officials.²² In states such as Texas, Wisconsin, and South Carolina, lawmakers have sent letters and book lists to school districts inquiring whether certain titles are presently available to students and flagging them for removal.²³ Some states, including Missouri and Utah, have ultimately passed legislation prohibiting the provision of certain materials to students, sometimes under threat of criminal liability.²⁴ Vague statutory language concerning what constitutes prohibited material for student use has generated fear among school employees of inadvertently violating state law.²⁵ Such legislation, referred to by PEN America as

¹⁸ Kasey Meehan et al., *Banned in the USA: The Mounting Pressure to Censor*, PEN AM., <https://pen.org/report/book-bans-pressure-to-censor/> [<https://perma.cc/6XKC-T6GC>]. This marks a 33% increase in the number of book bans from the 2021-2022 school year. *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.*

²² *Id.*

²³ Friedman, *supra* note 10; *see, e.g.*, Letter from Henry McMaster, Governor, S.C., to Molly Spearman, Superintendent, Educ., S.C. Dep't of Educ. (Nov. 10, 2021), <https://governor.sc.gov/sites/governor/files/Documents/Letters/Gov.%20McMaster%20to%20Spearman%20Inappropriate%20Materials%20in%20Schools.pdf> [<https://perma.cc/ARR5-ACQX>].

²⁴ Meehan et al., *supra* note 18. In 2022, Missouri criminalized the provision of “sexually explicit material” to students. Eesha Pendharkar, *Nearly 300 Books Removed From Schools Under Missouri’s ‘Sexually Explicit Materials’ Law*, EDUC. WEEK (Nov. 18, 2022), <https://www.edweek.org/teaching-learning/nearly-300-books-removed-from-schools-under-missouris-sexually-explicit-materials-law/2022/11> [<https://perma.cc/8JG8-Z8CR>]. Such material includes books that depict or describe sexual intercourse or genitalia. *Id.* As a result of the law’s enactment, approximately 300 books have been banned from public school libraries around Missouri. *Id.* The titles removed include works about famous artists like Leonardo da Vinci and Michaelangelo,

graphic novels like *Maus* by Art Spiegelman, and even a copy of Reader’s Digest. *Id.*

²⁵ *See* Meehan et al., *supra* note 18.

“educational intimidation,” drives book bans and has a chilling effect on certain areas of teaching and learning.²⁶

Other bans have been the result of efforts by far-reaching conservative interest groups.²⁷ At least fifty groups have been identified as being involved with book banning efforts across the country.²⁸ These groups operate on a national scale and exert tremendous influence over school district decisions.²⁹ In addition to book banning efforts, these groups seek to censor discussions around race and sexuality, and in some cases, promote Christian nationalist ideologies.³⁰

Many of the targeted books contain similar themes. According to PEN America, 41 percent of the targeted books from 2021 to 2022 contained LGBTQIA+ themes, protagonists, or major secondary characters and 40 percent contained “protagonists or other significant secondary characters of color.”³¹ The movement to ban books that focus on diverse perspectives reflects an ever-growing backlash against societal efforts to bring previously disenfranchised voices to the forefront of conversation.³² In addition to efforts to restrict access to reading material, state legislators have instituted educational gag orders to prevent the teaching of subjects like race, gender, and sexuality in public schools.³³ A well-known example of this is Florida’s “Parental Rights in Education” law—more popularly known as the “Don’t Say Gay” law—which prohibits class instruction on sexual orientation or gender identity from kindergarten through the third grade.³⁴

Beyond the troubling surge of attempts at censorship around the country, PEN America determined that a majority of

²⁶ Jonathan Friedman et al., *Educational Intimidation*, PEN AM. (Aug. 23, 2023), <https://pen.org/report/educational-intimidation/> [<https://pen.org/report/educational-intimidation/>]. These bills “pressure educators to be more timid in the content they teach, pressure librarians to be more restrictive in the books they make available to students, and pressure students to limit their self-expression.” *Id.*

²⁷ Friedman, *supra* note 10.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² 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/> [<https://perma.cc/U23S-R96E>].

³³ Jeremy C. Young & Jonathan Friedman, *America’s Censored Classrooms*, PEN AM. (Aug. 17, 2022), <https://pen.org/report/americas-censored-classrooms/> [<https://perma.cc/F32K-VH7G>].

³⁴ Jaclyn Diaz, *Florida’s Governor Signs Controversial Law Opponent Dubbed ‘Don’t Say Gay’*, NAT’L PUB. RADIO (Mar. 28, 2022, 2:33 PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis> [<https://perma.cc/LCM3-597F>].

the book bans were a result of procedural “departures from best practice guidelines outlined by the National Coalition Against Censorship (NCAC) and the American Library Association (ALA).”³⁵ These guidelines function to ensure proper compliance with applicable legal doctrine.³⁶ Best practices include the filing of formal challenges in writing and the appointment of review committees, typically made up “of librarians, teachers, administrators, and community members.”³⁷ Further, it is generally recommended that the challenged books remain in circulation during the review process and not be removed until a final decision is rendered.³⁸ While the NCAC and the ALA lack a means of legal enforceability, their recommendations have proved influential to library policies around the United States and align with First Amendment jurisprudence.³⁹

According to the PEN America report, only a small number of book bans complied with best practices, while a majority were the result of “irregular and ad hoc’ removal processes.”⁴⁰ Under the First Amendment, school administrations are vested with significant discretion “in managing school-related affairs,” specifically what books are made available to students, as well as curricular materials.⁴¹ However, such discretion does not relieve school administrations of the responsibility to “engage in rigorous review processes that reflect both First Amendment safeguards and best practices.”⁴² Failure to adhere to established protocol or drastic revision to existing school removal policies serves as evidence of pedagogical bad faith and is suggestive of noncompliance with First Amendment jurisprudence concerning content-based censorship.⁴³

³⁵ Friedman & Johnson, *supra* note 32. The National Coalition Against Censorship is an alliance of over fifty nonprofit organizations advocating for the protection of First Amendment principles. *About Us*, NAT’L COAL. AGAINST CENSORSHIP, <https://ncac.org/about-us> [<https://perma.cc/VVN3-KM5S>]. The American Library Association is a nonprofit organization working to promote and improve library services in furtherance of learning and open access to information. *ALA Legal Framework: Questions & Answers*, AM. LIBR. ASS’N, <https://www.ala.org/aboutala/governance/legalguidelines/legalframework/alalegalframework> [<https://perma.cc/P9UV-SSLB>].

³⁶ Friedman & Johnson, *supra* note 32.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Enforcement of the Code of Ethics Q&A*, AM. LIBR. ASS’N, <https://www.ala.org/tools/ethics/enforcementqa> [<https://perma.cc/J4CV-Q4ES>]; see Friedman & Johnson, *supra* note 32.

⁴⁰ Friedman & Johnson, *supra* note 32.

⁴¹ *Id.*

⁴² *Id.*

⁴³ See Friedman, *supra* note 10.

Although student speech is generally protected by the First Amendment, the constitutional rights of students are not coextensive with those of ordinary citizens outside of the school setting.⁴⁴ Consequently, student speech may be restricted in limited circumstances, such as where certain expressive activity is thought to cause a material or substantial disruption.⁴⁵ The Supreme Court has recognized the right to receive information as a logical extension of the constitutional guarantee of free speech.⁴⁶ The character and function of the school library as a marketplace of ideas, where students can voluntarily explore diverse areas of interest, thus necessitates rigorous First Amendment protection.⁴⁷

In May of 2023, PEN America, Penguin Random House, authors, and parents brought suit against the Escambia County School District (the District) in Florida.⁴⁸ The lawsuit was brought in response to the District's removal and restriction of several books previously available to students in public school libraries.⁴⁹ A majority of the works that were subject to the book ban discuss themes of race and LGBTQIA+ identity.⁵⁰ These books include classics such as *The Bluest Eye* by Toni Morrison, *The Kite Runner* by Khaled Hosseini, and *Slaughterhouse-Five* by Kurt Vonnegut.⁵¹ The complaint alleged that the ban "disproportionately targeted books by or about people of color and/or LGBTQ people and have prescribed an orthodoxy of opinion that violates the First and Fourteenth Amendments."⁵² By mandating the censorship of diverse voices, the District sought to restrict the promulgation of ideas which are inconsistent with conservative ideology. The objection to the books' presence in school libraries was "ideological . . . not pedagogical," and thus at odds with First Amendment jurisprudence.⁵³ The PEN America lawsuit was notable for the involvement of major organizations in the literary world and came at a time when the

⁴⁴ *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 680, 682 (1986).

⁴⁵ *See Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969).

⁴⁶ *See Stanley v. Georgia*, 394 U.S. 557, 564 (1969) ("This right to receive information and ideas, regardless of their social worth . . . is fundamental to our free society.").

⁴⁷ Shane Morris, *The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right*, 13 DREXEL L. REV. 787, 801 (2021).

⁴⁸ Complaint, *supra* note 2, at 1.

⁴⁹ *Id.*

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 8.

⁵² *Id.* at 2.

⁵³ *Id.* at 3.

censoring of diverse ideas by state entities had become increasingly brazen.⁵⁴

The PEN America lawsuit is unique for its inclusion of an equal protection claim, which highlights the pattern of discrimination that is present in a majority of the book challenges and bans of today. The plaintiffs claimed that by singling out non-white and LGBTQIA+ authors, as well as books containing themes of racism, discrimination, and racial and/or LGBTQIA+ identity, the District's actions constituted an unconstitutional exercise of discretion under the Fourteenth Amendment.⁵⁵ The claims worked together to emphasize the concept of equality as an implicit principle of First Amendment protection.

The Supreme Court has previously drawn from equal protection analysis when considering the constitutionality of the government's restriction of free speech.⁵⁶ While the First Amendment emphasizes liberty rather than equality, its insistence that the government not abridge freedom of speech suggests that all speech should be considered equal.⁵⁷ This idea can be applied to content-based censorship, specifically in the public school arena. When a school board removes or restricts access to a book, the board must make a showing that their action was not motivated by discriminatory intent.⁵⁸

Under a traditional equal protection analysis, more stringent levels of scrutiny are applied in proportion to the burden imposed by state actors on certain classes of people.⁵⁹

⁵⁴ PEN America, a free speech advocacy group, was joined in the suit by Penguin Random House, one of the largest book publishers in the world. Emily St. Martin, *Why the World's Largest Publisher Found a Book-Ban Lawsuit in Florida 'Irresistible'*, L.A. TIMES (May 18, 2023, 1:34 PM), <https://www.latimes.com/entertainment-arts/books/story/2023-05-18/pen-america-and-penguin-random-house-suing-florida-school-district-book-bans> [<https://perma.cc/2QWC-MF6A>].

⁵⁵ Complaint, *supra* note 2, at 4.

⁵⁶ Kenneth L. Karst, *Equality as a Central Principle in the First Amendment*, 43 U. CHI. L. REV. 20, 21 (1975). *See also* Police Dep't of Chi. v. Mosley, 408 U.S. 92, 92 (1972) (holding that a city ordinance that prohibited all but peaceful labor picketing was in violation of the equal protection clause because it made an "impermissible distinction between peaceful labor picketing and other peaceful picketing").

⁵⁷ Karst, *supra* note 56, at 23 (quoting Harry Kalven Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967)).

⁵⁸ Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982).

⁵⁹ *See* R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 227 (2002). Courts will apply different standards of review depending on the nature of the group impacted by the challenged government action. *Id.* at 228. The three main standards of review are strict scrutiny, intermediate scrutiny, and rational basis review. *Id.* Government action implicating suspect classes may be upheld under strict scrutiny if the action is proven to be narrowly tailored to achieve a compelling government

Tiered scrutiny is similarly employed in the context of state restriction of free expression.⁶⁰ Government regulation of expressive activity is generally disfavored under the First Amendment and is consequently subject to varying levels of scrutiny by the courts.⁶¹ Content-based regulations, or those which attempt to restrict free expression based on “its message, its ideas, its subject matter, or its content,” are presumptively unconstitutional and ordinarily subject to strict scrutiny.⁶² Strict scrutiny is likewise employed where a regulation is content-neutral on its face, but the purpose or justification for the regulation is content-based.⁶³ Under this level of analysis, the government must demonstrate that the regulation was enacted in furtherance of a compelling state interest and is narrowly tailored such that no other speech is burdened.⁶⁴

Given the broad discretion granted to school boards when prescribing educational offerings suitable for student use, content-based restrictions in public schools are afforded greater lenience by the courts.⁶⁵ Although school boards are expected to implement restrictions while adhering to established First Amendment principles, under the *Pico* standard, a school may justify its removal decision by merely demonstrating that the book flagged for removal lacks “educational suitability” or is “pervasively vulgar.”⁶⁶ The relaxed nature of this standard, in contrast to the far more demanding strict scrutiny standard, has inadvertently created a loophole by which school boards can justify content-based restrictions through weak and subjective rationale.

In place of the *Pico* standard, courts should scrutinize library book bans through an equal protection framework. Tiered scrutiny akin to that of a traditional equal protection analysis should apply in instances where books containing certain ideas are intentionally singled out for restriction. Classifications that implicate a suspect class, particularly those based on race, ethnicity, and national origin, are assessed under

interest. *Id.* at 228 n.18. Intermediate scrutiny, applied where quasi-suspect classes are implicated, requires that a challenged government action be substantially related to an important government purpose. *Id.* at 228 n.17. The lowest level of review, rational basis review, requires only a rational relation to a legitimate government purpose and applies to all groups not deemed a suspect or quasi-suspect class. *Id.* at 228 n.16.

⁶⁰ VICTORIA L. KILLION, CONG. RSCH. SERV., IF12308, FREE SPEECH: WHEN AND WHY CONTENT-BASED LAWS ARE PRESUMPTIVELY UNCONSTITUTIONAL (2023).

⁶¹ *Id.*

⁶² *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972).

⁶³ *Reed v. Town of Gilbert*, 576 U.S. 155, 164 (2015).

⁶⁴ *Id.*

⁶⁵ *Bd. of Educ. v. Pico*, 457 U.S. 853, 863–64 (1982).

⁶⁶ *Id.* at 871.

strict scrutiny; in those instances, challenged government actions must be proven necessary to achieve a compelling government interest in order to be upheld as constitutional.⁶⁷ While there is no legal consensus as to whether sexual orientation constitutes a suspect class, the Court has previously applied a heightened level of rational basis review when considering government action that has a discriminatory effect on members of the LGBTQIA+ community.⁶⁸ This so-called “rational basis with bite” applies where governmental classifications arise out of a “desire to harm a politically unpopular group.”⁶⁹ This level of scrutiny is less deferential than the standard rational basis review, which merely requires that a classification bear a rational relation to a legitimate government interest.⁷⁰ These more advanced levels of scrutiny are a far cry from the broad deference afforded to school board discretion and are thus far more protective of vulnerable classes.

Part I of this Note provides a history of book bans in the United States through to the modern era. Part II analyzes the current state of First Amendment jurisprudence, specifically *Board of Education v. Pico* and how its holding has allowed modern book banning efforts to proliferate. Part III focuses on the PEN America lawsuit, the arguments for how the Florida book ban violates the First Amendment and the Fourteenth Amendment’s Equal Protection Clause, and how this suit represents a potential stopping point for the conservative movement to restrict the spread of diverse ideas. Finally, Part IV argues that the Supreme Court should reexamine the holding in *Pico* to better address First Amendment concerns with regard to book bans in public school libraries. More specifically, the Court should utilize the tiered scrutiny framework of equal protection analysis to provide more clarity when determining

⁶⁷ Jeremy B. Smith, *The Flaws of Rational Basis with Bite: Why the Supreme Court Should Acknowledge Its Application of Heightened Scrutiny to Classifications Based on Sexual Orientation*, 73 *FORDHAM L. REV.* 2769, 2772–73 (2005); Raphael Holoszyc-Pimentel, *Reconciling Rational-Basis Review: When Does Rational-Basis Bite?*, 90 *N.Y.U. L. REV.* 2070, 2072 (2015).

⁶⁸ Smith, *supra* note 67, at 2774. A “more searching form of rational basis review” was applied by Justice O’Connor in her concurring opinion in *Lawrence v. Texas*. *Id.* at 2784. *Lawrence*, which considered the constitutionality of a statute that criminalized same-sex sexual conduct, struck down the law under substantive due process rather than equal protection doctrine. *Lawrence v. Texas*, 539 U.S. 558, 578–79 (2003). Justice O’Connor, in contrast to the majority, found that the statute’s discriminatory effect on gay individuals implicated equal protection and that the presence of animus warranted a heightened level of scrutiny. *Id.* at 581.

⁶⁹ *Lawrence*, 539 U.S. at 580 (quoting *Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)).

⁷⁰ Smith, *supra* note 67, at 2773.

whether a book may be removed beyond a mere consideration of the “educational suitability” of the material.

I. BOOK BANNING IN THE UNITED STATES

In recent years, campaigns by a vocal minority of ideologically-driven interest groups and individuals have led to the removal of thousands of unique book titles from public school libraries across the United States.⁷¹ Beyond library book bans, these campaigns to restrict educational opportunities have resulted in educational gag orders, educational intimidation bills, and further challenges to curricula, art, school plays, and more.⁷² In what has been dubbed the “Ed Scare,” student exposure to certain educational topics—especially those dealing with race, gender, LGBTQIA+ identity, and even some areas of American history—has been constricted.⁷³ This censoring of diverse ideas and perspectives has a damaging effect on students who are deprived of their constitutional right to read and learn about the world around them.⁷⁴

A. *Book Banning Throughout US History to Present Day*

Though book bans have become more prolific in recent years, they are hardly a novel concept in the United States. Throughout history, book bans have consistently emerged from attempts by sociopolitical groups to further their own interests and quash the dissemination of opposing ideas. In the mid-nineteenth century, prior to the outbreak of the Civil War, abolitionist materials were banned and even burned in pro-slavery states.⁷⁵ Harriet Beecher Stowe’s *Uncle Tom’s Cabin* is considered by many to be the first book in the United States to face a ban on a national level.⁷⁶ The Confederate government banned the book for its anti-slavery rhetoric and pro-abolition message.⁷⁷ In the 1950s, during the Civil Rights Movement, the White Citizens Council of Montgomery, a pro-segregation group, successfully advocated for the removal of *The Rabbit’s Wedding*

⁷¹ Meehan et al., *supra* note 18.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Blakemore, *supra* note 14.

⁷⁶ Amy Brady, *The History (and Present) of Banning Books in America*, LITHUB (Sept. 22, 2016), <https://lithub.com/the-history-and-present-of-banning-books-in-america> [<https://perma.cc/P37L-FLTF>].

⁷⁷ *Id.*

by Garth Williams from public school libraries.⁷⁸ The story depicted a black rabbit marrying a white rabbit, raising concerns that the book promoted interracial marriage.⁷⁹

In the public school arena, instances of book bans have consistently flared during periods of social and political upheaval such as the McCarthy era or the Reagan presidency.⁸⁰ Both time periods were marked by efforts to censor materials that were antithetical to the views of powerful political figures.⁸¹ Still, these efforts encountered opposition from free speech advocacy groups. During the McCarthy-Era Red Scare of the 1940s and 1950s, Senator George McCarthy compiled a list of books that he considered to promote communist ideology and ordered them to be “confiscated and destroyed.”⁸² In 1954, in response to increasing censorship efforts, the ALA issued the Freedom to Read Statement,⁸³ a document created by professors, directors, librarians, publishers, and businessmen in defense of the general public’s freedom to choose what to read.⁸⁴ The statement continues to serve as a rallying cry to members of the literary community to challenge attempts at censorship.⁸⁵

Immediately following President Ronald Reagan’s election in 1980, challenges to library books purportedly increased “fivefold.”⁸⁶ Many of the challenges came from members of conservative groups such as the Moral Majority and Phyllis Schlafly’s Eagle Forum, who were emboldened by

⁷⁸ Carolina Ciucci, *The Controversy of the Rabbits’ Wedding by Garth Williams*, BOOK RIOT (Nov. 29, 2022), <https://bookriot.com/the-rabbits-wedding-by-garth-williams/> [https://perma.cc/6LRS-UBNE].

⁷⁹ *Id.*

⁸⁰ Friedman, *supra* note 10.

⁸¹ Jonna Perrillo, *Today’s Book Bans Might Be More Dangerous Than Those from the Past*, WASH. POST (Sept. 12, 2022, 6:00 AM), <https://www.washingtonpost.com/made-by-history/2022/09/12/todays-book-bans-might-be-more-dangerous-than-those-past/> [https://perma.cc/93FK-LK4L]; James R. Bennett, *Censorship by the Reagan Administration*, 17 INDEX ON CENSORSHIP 28, 29 (Aug. 1988).

⁸² Dan Sheehan & Lisa Tolin, *Manuscripts Don’t Burn: A Timeline of Literary Censorship, Destruction, and Liberation*, PEN AM. (July 13, 2023), <https://pen.org/censorship-history-book-bans/> [https://perma.cc/7NSL-K4L2].

⁸³ See *The Freedom to Read Statement*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/intfreedom/freedomreadstatement> [https://perma.cc/E6UV-RJXL].

⁸⁴ Sheehan & Tolin, *supra* note 82; *Library Bill of Rights and Freedom to Read Statement Pamphlet*, AM. LIBR. ASS’N, <https://www.ala.org/aboutala/offices/oif/LBOR-FTR-statement-pamphlet> [https://perma.cc/8GU8-DCFH].

⁸⁵ *Library Bill of Rights and Freedom to Read Statement Pamphlet*, *supra* note 84.

⁸⁶ *Calls for Banning of Library Books Rise Sharply Since Reagan Victory*, N.Y. TIMES (Dec. 10, 1980), https://timesmachine.nytimes.com/timesmachine/1980/12/11/111826413.pdf?pdf_redirect=true&ip=0 [https://perma.cc/3265-AWJX].

Reagan's victory.⁸⁷ Once again, these censorship efforts were met with resistance. In 1982,⁸⁸ Banned Books Week, an annual event bringing attention to books that have been singled out for removal or restriction, was launched in response to the uptick in challenges to books in libraries and schools.⁸⁹ Banned Books Week has since provided the literary community the opportunity to come together in support of not only the freedom to read, but also for unrestricted access to information and ideas.⁹⁰

In the present day, campaigns to ban books in public schools have expanded drastically and are fueled by deepening political divides. Following the outbreak of the COVID-19 pandemic, fights against mask mandates, social distancing, and vaccinations have further polarized already diverging sociopolitical views in the realm of public education.⁹¹ This polarization has spilled over into conversations about the inclusion of so-called "divisive" content in school curricula.⁹² Government officials have proposed educational gag orders to restrict discussions of race and racism in response to sensationalized reports surrounding the teaching of "Critical Race Theory" in classrooms.⁹³ More recently, LGBTQIA+ content has become an even greater target for censorship in schools, advocated for under the guise of protecting children from

⁸⁷ *Id.* See also Charles R. Babcock, *Book Banning Spreads*, WASH. POST (May 10, 1982), <https://www.washingtonpost.com/archive/politics/1982/05/10/book-banning-spreads/8f892694-9de3-4faa-8d20-f168dd0ff7dc/> [https://perma.cc/D252-P537]. According to Robert Doyle of the ALA, in the wake of Reagan's election "[p]eople felt there was a mandate for change, on the local level, as well as the national, people who felt institutions didn't represent them . . . after the power shift, they no longer felt unrepresented." *Id.*

⁸⁸ *Board of Education v. Pico* was decided the same year. See *Bd. of Educ. v. Pico*, 457 U.S. 853, 853 (1982).

⁸⁹ *About*, BANNED BOOKS WEEK, <https://bannedbooksweek.org/about/> [https://perma.cc/VA2L-8JJ7]; *Calls for Banning of Library Books Rise Sharply Since Reagan Victory*, *supra* note 86 (highlighting the increase in the number of book bans during the Reagan presidency).

⁹⁰ *About*, *supra* note 89.

⁹¹ See Friedman, *supra* note 10.

⁹² *Id.*

⁹³ *Id.* Coined by Professor Kimberlé Williams Crenshaw, Critical Race Theory, or CRT, refers to the "practice of interrogating the role of race and racism in society" and involves a critique of how social constructions of race have ultimately led to systemic racial inequality in America. Janel George, *A Lesson on Critical Race Theory*, AM. BAR ASS'N (Jan. 11, 2021), https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/civil-rights-reimagining-policing/a-lesson-on-critical-race-theory/ [https://perma.cc/2LDZ-2BG8]. The teaching of CRT in K-12 education has drawn criticism, often from conservative groups, who claim that the theory fosters intolerance and advocates for discrimination against white people. Stephen Sawchuk, *What is Critical Race Theory, and Why is it Under Attack?*, EDUC. WEEK (May 18, 2021), <https://www.edweek.org/leadership/what-is-critical-race-theory-and-why-is-it-under-attack/2021/05> [https://perma.cc/FK85-SZX9].

exposure to sexual content.⁹⁴ Efforts to censor certain topics of discussion in classrooms have made their way to school libraries, as optional reading material containing themes of race, racism, and LGBTQIA+ identity are flagged for removal or restricted access.⁹⁵

Organized efforts by prolific interest groups, such as Moms for Liberty,⁹⁶ constitute a driving force for book banning at local and national levels.⁹⁷ These groups formed recently and have expanded quickly.⁹⁸ As part of a coordinated campaign, the groups compile lists of books that should be targeted for removal.⁹⁹ According to the PEN America complaint, Vicki Baggett herself lifted language from a website tangentially affiliated with Moms for Liberty, Book Looks,¹⁰⁰ when she submitted her reasoning behind the challenges in Escambia County.¹⁰¹ The listed books often contain conversations on race or LGBTQIA+ themes.¹⁰² These groups have made explicit calls to exclude discussions of racism and discrimination in classrooms as well as books that contain related messaging.¹⁰³ Books containing LGBTQIA+ themes are frequently framed as inappropriate and even pornographic, furthering the damaging stereotype of LGBTQIA+ content as innately sexual.¹⁰⁴

⁹⁴ Friedman, *supra* note 10.

⁹⁵ *Id.*

⁹⁶ David Gilbert, *A Far Right Moms Group Is Targeting Students. These Women Are Fighting Back*, VICE (May 22, 2023, 7:00 AM), <https://www.vice.com/en/article/n7ezek/moms-for-liberty-book-banning-lgbtq> [<https://perma.cc/V9MX-5UVC>]. Moms for Liberty was founded in Florida in 2020. *Id.* It has since grown rapidly, boasting 280 chapters and over 115,000 members. *Id.* The group has endeavored, often successfully, to further a pro-Christian agenda in public schools around the country. *Id.* They have played a significant role in numerous school book bans and are even described as having helped the “Don’t Say Gay” bill be signed into law in Florida. *Id.*

⁹⁷ Friedman, *supra* note 10. Other prominent groups include Citizens Defending Freedom and Parents’ Rights in Education. *Id.* These two groups, along with Moms for Liberty, operate in thirty-two of the thirty-three states that banned books during the 2022-2023 school year. Meehan et al., *supra* note 18.

⁹⁸ Friedman, *supra* note 10.

⁹⁹ Meehan et al., *supra* note 18.

¹⁰⁰ Book Looks uses a rating system to evaluate the “appropriateness” of a book for children or young adults. *Book Rating System*, BOOK LOOKS, <https://booklooks.org/ratings-system> [<https://perma.cc/EE5H-HREP>]. According to the PEN America complaint, “Book Looks disclaims affiliation with Moms for Liberty,” despite the website’s founder being a member. Complaint, *supra* note 2, at 17.

¹⁰¹ Complaint, *supra* note 2, at 16–17.

¹⁰² Friedman, *supra* note 10.

¹⁰³ *Id.*

¹⁰⁴ *Id.*; see also Kendra Albert & Afsaneh Rigot, *Apple and Google Still Have an LGBTQ Problem*, WIRED (Aug. 16, 2021, 1:00 AM), <https://www.wired.com/story/apple-google-lgbtq-apps/> [<https://perma.cc/UZL2-LPC9>] (discussing how Silicon Valley’s regulation of sexually explicit content on its various platforms disproportionately targets queer content). The tendency for queer content to be singled out for regulation highlights a double standard for what is considered sexual. *Id.* For example, in the online video

These interest groups utilize extreme tactics to further their agenda, such as “swarming school board meetings” and drawing attention to their cause through the use of provocative language about “grooming” and “pornography.”¹⁰⁵ In some documented cases, the complaining parties do not even have children that attend public school.¹⁰⁶ Although perceived as unorthodox by many, their tactics have proved effective. During the 2021-2022 school year, interest groups were involved in at least half of the book bans instituted around the country.¹⁰⁷

This drive for censorship in public school education is destructive to student growth and development as it threatens the free exchange of ideas and information. Restrictions on classroom and extracurricular instruction have been pushed by a powerful vocal minority made up of interest groups and individual actors, as well as newly introduced state legislation. Thousands of books have been banned from public school libraries as a result of these campaigns, which reflects a worrying trend toward the repression of diverse voices at the expense of education. Amidst the proliferation of book bans, a tension arises between the discretion granted to school boards when making decisions concerning student instruction and the students’ own constitutionally-protected educational liberty.

B. The Damaging Effects of Book Banning

Book banning has been condemned as “deeply undemocratic.”¹⁰⁸ By enabling challengers to place restrictions on large numbers of students based on their own closely-held beliefs, school boards are prescribing a homogenized worldview.¹⁰⁹ This is often done under the guise of protecting students from mature content.¹¹⁰ Restricting access to diverse perspectives and rewriting factual historical information can

context, “[a] kiss between two lovers may count as PG if between a man and a woman, but if two men are kissing, the same act can be viewed as not safe for work.” *Id.*

¹⁰⁵ Friedman, *supra* note 10.

¹⁰⁶ *Id.*; see Katie LaGrone, *After Historic Year of Book Challengers, FL’s Prolific Book Challengers Explain Why They’re Doing It*, ABC ACTION NEWS (June 3, 2022, 6:53 PM), <https://www.abcactionnews.com/news/local-news/i-team-investigates/after-historic-year-of-book-challengers-fls-prolific-book-challengers-explain-why-theyre-doing-it> [<https://perma.cc/MCT4-CN3T>].

¹⁰⁷ Friedman, *supra* note 10.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ Katy Waldman, *What Are We Protecting Children from by Banning Books?*, NEW YORKER (Mar. 10, 2023), <https://www.newyorker.com/books/page-turner/what-are-we-protecting-children-from-by-banning-books> [<https://perma.cc/U2ZH-M3MS>].

have a detrimental effect on education.¹¹¹ Moreover, it can distort children’s understanding of their place in the world.¹¹² It is important for students from a young age to engage with new ideas and experiences in order to grow and understand the world from various points of view.¹¹³ It is equally important for students of different cultural backgrounds to see themselves reflected in literature.¹¹⁴ By removing books that speak to many students’ individual experiences—especially those from marginalized backgrounds—these bans can evoke feelings of isolation and exclusion.¹¹⁵

Book bans can also have a “chilling effect” on teachers, librarians, parents and even writers.¹¹⁶ As the censoring of diverse voices becomes normalized through book bans, it is unclear what content is acceptable for classrooms and libraries.¹¹⁷ Parents who wish for their children to have a more well-rounded, secular education may fear drawing the ire of other community members.¹¹⁸ Some writers are hesitant to share and publish stories that may become targets for challenge.¹¹⁹ Although largely advocated for by conservative groups, polls reveal that Americans on both ends of the political spectrum stand in opposition to book bans.¹²⁰ In actuality, these bans placate only a small segment of the population while large numbers of students suffer the repercussions.¹²¹ Beyond the resultant harm to student education and development,

¹¹¹ See, e.g., Brenda Alvarez, *Florida’s New History Standard: ‘A Blow to Our Students and Nation’*, NAT’L EDUC. ASS’N (Aug. 3, 2023), <https://www.nea.org/nea-today/all-news-articles/floridas-new-history-standard-blow-our-students-and-nation> [<https://perma.cc/38D9-ZGM7>]. In 2023, the Florida State Board of Education promulgated a new history standard for public schools, requiring middle school students to be taught that enslaved persons were able to derive benefit from their enslavement. *Id.* This is a brazen example of a more insidious problem affecting public schools throughout the country, namely a failure to adequately address the harsh realities of racism and white supremacy embedded within American history and society. See also Ana Rosado et al., *Erasing the Black Freedom Struggle: How State Standards Fail to Teach the Truth About Reconstruction*, ZINN EDUC. PROJECT (2022), <https://www.teachreconstructionreport.org/> [<https://perma.cc/DFJ2-MHB9>] (“Only one state, Massachusetts, mentions and directly links white supremacy to the rise of the KKK, the passage of Black Codes and Jim Crow laws, and the end of Reconstruction.”).

¹¹² Waldman, *supra* note 110.

¹¹³ For Waldman, “[w]hen childhood is racialized, cisgendered, and de-queered, insisting on ‘age-appropriate material’ becomes a way to instill doctrine and foreclose options for some readers, and to evict other readers from childhood entirely.” *Id.*

¹¹⁴ Friedman, *supra* note 10.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ See *id.* (discussing how authors have not been spared from the harmful impacts of the book ban movement).

¹²⁰ *Id.*

¹²¹ See *id.*

regulating access to specific content on the basis of ideological disagreement contravenes First Amendment principles, namely the idea that students themselves possess a constitutionally-protected right to free speech and expression.¹²²

II. THE FIRST AMENDMENT IN PUBLIC SCHOOLS

Since its ratification, the First Amendment, and incidentally our understanding of free speech, has undergone significant change. With the advent of the digital age, conceptions about what constitutes speech and what expressive activity warrants constitutional protection are continuously evolving.¹²³ As long-standing precedents continue to be overturned by the current Supreme Court, First Amendment jurisprudence presumably stands on equally unsteady ground.¹²⁴ Moreover, as new lawsuits challenging the constitutionality of public school book bans enter the courts, questions about the effectiveness of the current legal standard arise and a distinct opportunity for change presents itself.

A. *Academic Freedom and Free Speech for Students*

In recent years, academic freedom has become particularly deserving of renewed constitutional protection amidst rampant “social polarization and hyper-partisanship.”¹²⁵ The freedom for students to pursue unique areas of study, and for educators to teach such areas, is guaranteed by the First Amendment.¹²⁶ In the context of public schools, courts have consistently grappled with the tension between the constitutionally-protected rights of students and the broad discretion granted to school districts when deciding matters of pedagogical concern.¹²⁷ As schools likewise possess academic freedom to choose what material is taught to its students, First

¹²² See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 503 (1969); *Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

¹²³ Evelyn Douek & Genevieve Lakier, *Rereading the First Amendment*, KNIGHT FIRST AMEND. INST. COLUM. UNIV. (May 18, 2022), <https://knightcolumbia.org/blog/rereading-the-first-amendment-1> [<https://perma.cc/2NVD-XMKS>].

¹²⁴ *Id.*

¹²⁵ Michael S. Roth, *Academic Freedom Is More Important Now than Ever*, TIME (Apr. 23, 2024, 12:06 PM), <https://time.com/6969851/academic-freedom-is-more-important-than-ever-now/> [<https://perma.cc/Z9NF-SXQN>].

¹²⁶ See *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) (“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.”).

¹²⁷ *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

Amendment case law in public schools is largely focused on students' free speech rights.

In *Board of Education v. Barnette*, the Court considered the extent to which students may exercise their constitutional right of free speech in the school setting, holding that a school may not compel its students to salute the American flag in the classroom under threat of expulsion.¹²⁸ In a majority opinion, Justice Jackson explained that “[school boards] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”¹²⁹ For Justice Jackson, educating students as future citizens of the world demanded rigorous protection of individual liberty “if we are not to strangle the free mind at its source.”¹³⁰ Thus, *Barnette* clarified a student’s right to free expression in the classroom.

Years later, in *Tinker v. Des Moines*, the Court reiterated the First Amendment protections afforded to students, holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹³¹ *Tinker* considered the constitutionality of a school’s decision to suspend students who wore black armbands on their sleeves in protest of the Vietnam War.¹³² The Court held that the school’s action was an unconstitutional denial of the students’ freedom of expression under the First Amendment.¹³³ Schools may not restrict student speech merely to avoid discomfort arising from the expression of unpopular opinion.¹³⁴ Instead, schools must demonstrate that the speech targeted for restriction “would substantially interfere with the work of the school or impinge upon the rights of other students.”¹³⁵

Barnette and *Tinker* laid the foundation for the concept that students are entitled to First Amendment constitutional protection in public schools. However, these seemingly clear declarations in favor of free speech and expression have encountered resistance due to the high degree of discretion granted to schools when making decisions regarding students’

¹²⁸ Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

¹²⁹ *Id.* at 637.

¹³⁰ *Id.*

¹³¹ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

¹³² *Id.* at 504–05.

¹³³ *Id.* at 514.

¹³⁴ *Id.* at 509.

¹³⁵ *Id.*

educational wellbeing.¹³⁶ Schools are responsible for balancing their First Amendment obligations while “maintaining the integrity of the educational program, meeting state education requirements, respecting the judgments of professional staff, and addressing deeply held beliefs in students and members of the community.”¹³⁷

B. Board of Education v. Pico

The landmark case *Board of Education v. Pico* is singularly instructive when considering the constitutionality of a public school book ban.¹³⁸ However, the plurality holding in *Pico* is nonbinding and has set a vague standard for courts to follow, thereby failing to stop unconstitutional book banning efforts in their tracks.¹³⁹ In essence, the *Pico* plurality held that a school board may not restrict access to library books with the singular intention of silencing diverse ideas or to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁴⁰ However, an accusation that a school board’s removal decision was unlawful may be refuted by a showing that the targeted book was educationally unsuitable or “pervasively vulgar.”¹⁴¹ By setting “educational suitability” as a standard with no further guidance, the plurality has allowed school boards to justify the removal of books that may be subjectively considered to contain objectionable content. Consequently, *Pico* serves as “a roadblock for a school board to go around, rather than a fully effective shield of students’ rights to receive artistic expression.”¹⁴²

The facts of *Board of Education v. Pico* mirror the facts of many book banning cases of the present day.¹⁴³ Members of the Island Trees Board of Education attended a conference hosted by Parents of New York United, a conservative activist group, where they obtained lists of books that were deemed inappropriate for student use.¹⁴⁴ At the time, nine of the listed

¹³⁶ NCAC Staff, *The First Amendment in Schools*, NAT’L COAL. AGAINST CENSORSHIP (Aug. 9, 2021), <https://ncac.org/resource/first-amendment-in-schools> [<https://perma.cc/KU4C-DPQT>].

¹³⁷ *Id.*

¹³⁸ Bd. of Educ. v. Pico, 457 U.S. 853 (1982).

¹³⁹ See Morris, *supra* note 47, at 818–19.

¹⁴⁰ *Pico*, 457 U.S. at 872 (quoting Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

¹⁴¹ *Id.* at 871.

¹⁴² Morris, *supra* note 47, at 818.

¹⁴³ See *Pico*, 457 U.S. at 856–57.

¹⁴⁴ *Id.* at 856.

books were available in the Island Trees High School library.¹⁴⁵ One listed book was available in the junior high school library, while another was included in the curriculum of an upper-level literature course.¹⁴⁶ The Board ordered the books to be removed from the libraries' shelves, characterizing them as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."¹⁴⁷ This order was given against the objections of the Superintendent and in direct opposition to the District's established procedure for the removal of books from school libraries and curricula.¹⁴⁸

Following the removal, the Board appointed a committee of staff and parents to read the books and evaluate their "educational suitability."¹⁴⁹ The committee recommended that two of the books remain off of library shelves and five of the books be reinstated for student use.¹⁵⁰ The committee failed to take any position on one book and could not agree on two others.¹⁵¹ Finally, it recommended that one book be allowed in school libraries but only made available with parental approval.¹⁵² The Board largely rejected the committee's recommendations.¹⁵³ One book was returned to the library shelf and another was made available for use with parental approval.¹⁵⁴ The Board upheld the removal of the remaining nine books.¹⁵⁵

In response, a group of Island Trees students initiated a claim alleging that the Board had violated their First Amendment rights.¹⁵⁶ More specifically, the student-plaintiffs argued that the Board had instituted the removal because the books' contents "offended their social, political and moral tastes and not because the books . . . were lacking in educational

¹⁴⁵ *Id.* The nine listed titles found in the high school library were *Go Ask Alice* by Anonymous, *A Hero Ain't Nothin' But a Sandwich* by Alice Childress, *Soul on Ice* by Eldridge Cleaver, *Best Short Stories of Negro Writers* (Langston Hughes ed.), *Laughing Boy* by Oliver LaFarge, *The Naked Ape* by Desmond Morris, *Down These Mean Streets* by Piri Thomas, *Slaughterhouse-Five* by Kurt Vonnegut, and *Black Boy* by Richard Wright. *Id.* at 856 n.3.

¹⁴⁶ *Id.* at 856 n.3. The listed title found in the Junior High School library was *A Reader for Writers* (Jerome Archer ed.). *Id.* *The Fixer* by Bernard Malamud, another listed title, was used as part of the curriculum for a twelfth-grade literature class. *Id.*

¹⁴⁷ *Id.* at 857 (alteration in original).

¹⁴⁸ *Id.* at 857 n.4.

¹⁴⁹ *Id.* at 857.

¹⁵⁰ *Id.* at 858.

¹⁵¹ *Id.*

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 859.

value.”¹⁵⁷ The district court granted summary judgment in favor of the Board, citing the broad discretion granted to school boards in the creation of academic policy.¹⁵⁸ The Second Circuit reversed and remanded the case, concluding that summary judgment was improper because the students had established a prima facie case for a First Amendment violation and the Board had, in turn, failed to provide sufficient justification for its interference with students’ constitutional rights.¹⁵⁹ On appeal, the Supreme Court affirmed the judgment of the Second Circuit and the case was remanded to determine the credibility of the Board’s reasoning with regard to its book removal decision.¹⁶⁰ The issue proved divisive for the Court, with six justices writing their own individual opinions.¹⁶¹ Justice Brennan wrote the main plurality opinion and was joined by Justice Marshall and Justice Stevens and partially by Justice Blackmun.¹⁶²

1. The *Pico* Plurality

In the main plurality opinion, Justice Brennan concluded that a school board’s decision to remove books from libraries may violate the First Amendment rights of students.¹⁶³ Justice Brennan did not address the removal of required reading material as such action was considered to be well within the school board’s discretion to set curricula.¹⁶⁴ The plurality chose instead to focus solely on library books.¹⁶⁵ As optional reading material, the restriction of access to library books was thought to warrant a higher level of scrutiny as it implicated students’ free choice to educate themselves.¹⁶⁶

The plurality reiterated the holding of the district court, recognizing the broad discretion granted to public school boards when deciding matters of student instruction.¹⁶⁷ However, that

¹⁵⁷ *Id.* at 858–59.

¹⁵⁸ *Bd. of Educ. v. Pico*, 474 F. Supp. 387, 397–98 (E.D.N.Y. 1979) (“[A] court simply is not competent to decide what books are to be in a school’s library. The proper agency is the school board, and it would be illogical and unrealistic to deprive a board of its most relevant criterion, content, for making that decision.”). Courts will generally defer to the expertise of local school boards in making decisions regarding student instruction, unless “basic constitutional values” are “sharply implicate[d].” *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

¹⁵⁹ *Pico v. Bd. of Educ.*, 638 F.2d 404, 418–19 (2d Cir. 1980).

¹⁶⁰ *Pico*, 457 U.S. at 875.

¹⁶¹ *Id.* at 853.

¹⁶² *Id.* at 854.

¹⁶³ *Id.* at 866.

¹⁶⁴ *Id.* at 862.

¹⁶⁵ *Id.*

¹⁶⁶ *Id.* at 869.

¹⁶⁷ *Id.* at 859–63.

discretion may be limited in such instances where “basic constitutional values’ are ‘directly and sharply implicate[d].”¹⁶⁸ The plurality acknowledged that the removal of books from school libraries may, in some circumstances, “directly and sharply” implicate the First Amendment rights of students as they do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”¹⁶⁹

Justice Brennan identified the First Amendment right at issue in *Pico* as the right to receive ideas.¹⁷⁰ A school’s library serves as a hub of information where students are free to explore new ideas and interests outside the bounds of the classroom.¹⁷¹ While a school board is endowed with substantial discretion to select which books are made available to students, the Court held that such “discretion may not be exercised in a narrowly partisan or political manner.”¹⁷² Accordingly, the plurality’s test for a lawful exercise of discretion involved an analysis of the school board’s intent when denying students access to certain books.¹⁷³ If a school board’s decision to remove certain books from library shelves was predicated on an ideological disagreement with their contents, then the school board has acted in violation of the First Amendment.¹⁷⁴ However, a removal decision will nonetheless be considered permissible if the school board can prove that its action was based entirely on the “educational suitability” of the material.¹⁷⁵ Justice Brennan pointed to the school board’s failure to follow established book removal procedure and the rejection of committee recommendations as potential evidence of bad faith, and thus concluded a new trial was warranted.¹⁷⁶

2. Justice Blackmun’s Concurrence

Although Justice Blackmun concurred with a significant portion of the plurality opinion in *Pico*, he disagreed with Justice Brennan’s assertion of the First Amendment right implicated as

¹⁶⁸ *Id.* at 866 (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹⁶⁹ *Id.* at 865–66 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969)).

¹⁷⁰ *Id.* at 867–68.

¹⁷¹ *Id.* at 869 (citing *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703, 715 (D. Mass. 1978)).

¹⁷² *Id.* at 870.

¹⁷³ *Id.* at 871.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*; *Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan.*, 895 F. Supp. 1463, 1469 (D. Kan. 1995).

¹⁷⁶ *Pico*, 457 U.S. at 874–75.

the “right to receive” ideas.¹⁷⁷ Justice Blackmun focused instead on the impropriety of removal decisions based on a discriminatory disapproval of specific ideas.¹⁷⁸ In a footnote, he explained, “while the plurality focuses on the failure to provide information, I find crucial the State’s decision to single out an idea for disapproval and then deny access to it.”¹⁷⁹ While Justice Blackmun recognized the need for substantial school board discretion in pedagogical matters, he stressed the importance of preserving diverse thought.¹⁸⁰ Such preservation is necessary for students to develop their own ideas about the world.¹⁸¹ Justice Blackmun’s concern with idea discrimination by the state signaled a recognition of the First Amendment’s implied equality requirement and the consequent need for equal representation of viewpoints in the school library forum.

C. *The Aftermath of Pico*

In the years following *Pico*, there have been various challenges to the constitutionality of book bans in public school libraries. Although nonbinding precedent, the plurality holding has proved influential over the years, with many courts following Justice Brennan’s reasoning.¹⁸² As recently as 2023, courts have referenced the plurality holding in *Pico* in their rulings as to the potential illegality of state laws restricting student access to reading material in public schools.¹⁸³ The *Pico* plurality, which used educational suitability as a standard for the acceptability of school library offerings, has proven to be ineffective in deterring book banning efforts around the country.¹⁸⁴ Instead, *Pico* has allowed some school districts to sidestep the rigorous judicial scrutiny typically applied in

¹⁷⁷ *Id.* at 853, 878 (Blackmun, J., concurring).

¹⁷⁸ *Id.* at 879 (Blackmun, J., concurring).

¹⁷⁹ *Id.* at 879 n.2 (Blackmun, J., concurring).

¹⁸⁰ *Id.* at 879 (Blackmun, J., concurring) (citing *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

¹⁸¹ *Id.* at 877 (Blackmun, J., concurring) (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967); *Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

¹⁸² *Pico*, 457 U.S. at 854–55.

¹⁸³ *See Fayetteville Pub. Libr. v. Crawford Cnty., Ark.*, 684 F. Supp. 3d 879, 909 (W.D. Ark. 2023) (granting a preliminary injunction to plaintiffs challenging an Arkansas law which imposed criminal liability on librarians, booksellers, and others for making certain reading material deemed “obscene” available to minors); *Book People, Inc. v. Wong*, 692 F. Supp. 3d 660, 687 (W.D. Tex. 2023) (granting a preliminary injunction to plaintiffs challenging the constitutionality of a Texas law restricting access to books deemed “sexually explicit” in public school libraries), *aff’d in part, vacated in part*, 91 F.4th 318 (5th Cir. 2024).

¹⁸⁴ *Pico*, 457 U.S. at 871.

instances of content-based restriction and justify ideologically-motivated book removals upon a mere showing that a book lacks educational value.¹⁸⁵ As a result, the reach of First Amendment protection in public school libraries remains uncertain.

In *Case v. Unified School District*,¹⁸⁶ the District Court of Kansas adopted the plurality holding in *Pico* when it considered the constitutionality of a school district's removal of the book *Annie on My Mind* by Nancy Garden from school libraries.¹⁸⁷ The novel, which depicted a romantic relationship between two young women, generated controversy in the Kansas school district.¹⁸⁸ Drawing from the holding in *Pico*, the court determined that the school board's motivations behind the book's removal, which were likely grounded in homophobia, were unconstitutional.¹⁸⁹

A few years after *Case* was decided, the District Court of the Western District of Arkansas in *Counts v. Cedarville School District*,¹⁹⁰ referenced *Pico* in its consideration of whether a student's First Amendment rights were impeded by the school board's restriction of access to J.K. Rowling's Harry Potter series.¹⁹¹ Members of the school board condemned the books series as promoting witchcraft.¹⁹² One member testified that he would not have objected to the book had it "promoted Christianity."¹⁹³ The court, citing *Pico*, found that the school board's action to restrict student access to the series, based on a dislike of the ideas expressed within, constituted an unlawful exercise of discretion.¹⁹⁴

In *ACLU v. Miami-Dade County School Board*,¹⁹⁵ the Eleventh Circuit grappled with whether to apply the holding in *Pico*.¹⁹⁶ *Miami-Dade* centered around the school board's removal of children's series of travel books, including *Vamos a Cuba*,

¹⁸⁵ See, e.g., *L. H. v. Indep. Sch. Dist.*, No. 4:22-CV-00801-RK, 2023 WL 2192234, at *1 (W.D. Mo. Feb. 23, 2023); *C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 909 (E.D. Mo. 2022), *appeal dismissed*, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023).

¹⁸⁶ *Case v. Unified Sch. Dist. No. 233, Johnson Cnty., Kan.*, 895 F. Supp. 1463 (D. Kan. 1995).

¹⁸⁷ *Id.* at 1467–69.

¹⁸⁸ *Id.* at 1466.

¹⁸⁹ *Id.* at 1469.

¹⁹⁰ *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996 (W.D. Ark. 2003).

¹⁹¹ *Id.* at 998, 1004.

¹⁹² *Id.* at 1002.

¹⁹³ *Id.* at 1004.

¹⁹⁴ *Id.* at 1004–05.

¹⁹⁵ *Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009).

¹⁹⁶ *Id.* at 1200.

from school libraries.¹⁹⁷ The dispute arose from a parent's complaint as to the factual inaccuracy of the way Cuba was depicted within the book.¹⁹⁸ Although the designated review committee voted to retain the book, the parent appealed the decision to the school board.¹⁹⁹ A school board meeting was held where the parent and other community members "spoke about their views" regarding the book and the rationale behind its removal.²⁰⁰ Following the meeting, the Board voted to remove *Vamos a Cuba* from the school district libraries.²⁰¹ While the court referenced the "educational suitability" standard set forth by *Pico*, the court emphasized that the case lacked precedential value.²⁰² *Miami-Dade* highlighted a debilitating weakness in *Pico*: its lack of binding power on courts nationwide.

Amidst the modern proliferation of public school library book removals, the weakness of *Pico* has become even more apparent. In *C.K.-W. v. Wentzville R-IV School District*, a student sought a preliminary injunction to compel the reinstatement of eight books that had been removed from her school's library.²⁰³ The student relied primarily on the *Pico* plurality in her action.²⁰⁴ The District Court for the Eastern District of Missouri emphasized that *Pico* was a "sharply divided" opinion and nonbinding precedent.²⁰⁵ The court nevertheless pointed to the language in the *Pico* plurality holding that a school may permissibly remove a book based upon the book's "educational suitability" or if the book is "pervasively vulgar."²⁰⁶ In its analysis of the books at issue, the court concluded that each one contained inappropriate content and that the removal decision was thus a lawful exercise of the district's discretion.²⁰⁷ The court denied the preliminary injunction, finding that the student did not have a probable chance of prevailing on her First Amendment claim.²⁰⁸ One of the books, *All Boys Aren't Blue*, was authored by George M. Johnson,

¹⁹⁷ *Id.* at 1182–83.

¹⁹⁸ *Id.* at 1182. The parent, a former political prisoner, claimed that the book depicted life in Cuba in a manner not reflective of reality. *Id.* at 1183–84.

¹⁹⁹ *Id.* at 1185.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 1199–1200.

²⁰³ *C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 909 (E.D. Mo. 2022), *appeal dismissed*, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023).

²⁰⁴ *Id.*

²⁰⁵ *Id.* at 913.

²⁰⁶ *Id.* at 915.

²⁰⁷ *Id.* at 917.

²⁰⁸ *Id.* at 913.

a plaintiff in the PEN America lawsuit.²⁰⁹ Johnson’s memoir-manifesto details his own coming of age as a queer Black man.²¹⁰ Another book, *Fun Home: A Family Tragicomic Paperback* by Alison Bechdel, contains themes of gender, sexuality and LGBTQIA+ identity.²¹¹ A third book, *Heavy: An American Memoir* by Kiese Laymon, is a memoir about growing up Black in America.²¹² These themes of race, gender, sexuality, and LGBTQIA+ identity are common among books targeted for removal around the country.²¹³ The *Wentzville* court placed particular emphasis on the graphic sexual content of the books in its educational suitability analysis, while minimizing the fact that all eight of the books at issue featured the perspectives of non-white or LGBTQIA+ individuals.²¹⁴ *Wentzville* highlights a fundamental gap in *Pico*, namely that a court may find the removal of library books constitutional upon a mere showing of vulgarity despite evidence suggesting a discriminatory motivation.²¹⁵ These cases demonstrate how the vagueness of the *Pico* holding has led to inconsistent rulings and failed to deter book banning efforts, even where such efforts signify overt idea discrimination.

III. THE PEN AMERICA LAWSUIT

In May of 2023, PEN America, Penguin Random House, authors, and parents filed suit against the Escambia County School District in the United States District Court for the Northern District of Florida.²¹⁶ In their complaint, the plaintiffs alleged that the school district had violated free speech and equal protection by restricting student access to school library books “based on ideological objections to their contents or disagreement with their messages or themes.”²¹⁷ PEN America

²⁰⁹ *Id.* at 910; Complaint, *supra* note 2, at 6.

²¹⁰ Complaint, *supra* note 2, at 6. *All Boys Aren’t Blue* was among the United States’ most frequently banned books during the 2021-2022 school year. Friedman, *supra* note 10.

²¹¹ *Wentzville*, 619 F. Supp. 3d at 916; Grace Lacarte, Alison Bechdel, “*Fun Home: A Family Tragicomic*,” CARNEGIE MELLON UNIV.: BANNED BOOKS PROJECT (Sept. 17, 2019), <https://bannedbooks.library.cmu.edu/alison-bechdel-fun-home-a-family-tragicomic/> [https://perma.cc/D339-5MR7].

²¹² *Wentzville*, 619 F. Supp. 3d at 916–17; Martha Ann Toll, ‘*Heavy*’ Brilliantly Renders the Struggle to Become Fully Realized, NAT’L PUB. RADIO (Oct. 17, 2018, 7:01 AM), <https://www.npr.org/2018/10/17/657824190/heavy-brilliantly-renders-the-struggle-to-become-fully-realized> [https://perma.cc/CC4J-QBEK].

²¹³ Meehan et al., *supra* note 18.

²¹⁴ See *Wentzville*, 619 F. Supp. 3d at 913–20.

²¹⁵ See *id.* at 915–16.

²¹⁶ Complaint, *supra* note 2, at 1.

²¹⁷ *Id.* at 54.

is an advocacy group whose mission is to bring together members of the literary community to protect the freedom of creative expression in the United States and around the world.²¹⁸ Penguin Random House is an international publishing conglomerate home to over three hundred imprints, making it one of the largest book publishers in the world.²¹⁹ Other plaintiffs included authors whose books have been removed from library shelves or faced some level of restriction.²²⁰ The remaining plaintiffs were parents of students who wanted their children to have access to books that present “different viewpoints and experiences.”²²¹ Other parents acted on behalf of their children who wanted to check out the library books that have been removed or restricted.²²²

The lawsuit challenged the constitutionality of the District’s removal and restriction of library books that feature themes of race, racism, or LGBTQIA+ identity.²²³ More specifically, the plaintiffs argued that the District acted in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. These assertions were supported by the District’s failure to follow established removal procedure, as well as its siding with challengers who have put forward openly discriminatory reasoning as bases for their complaints.²²⁴

When Vicki Baggett first challenged *The Perks of Being a Wallflower*, a review committee opted to retain the book as optional study material.²²⁵ Baggett appealed the committee’s decision, arguing that the book was “pornographic.”²²⁶ As noted previously, she cited Book Looks, a website that provides reports on books that contain material that is considered by the site’s operators to be “ideologically objectionable.”²²⁷

²¹⁸ *About Us*, PEN AM., <https://pen.org/about-us/> [https://perma.cc/HS27-FBXR]. The name “PEN America” originated as an acronym: Poets, Essayists, Novelists. *Id.* Since the organization’s creation, membership has expanded to include people who do not necessarily fit into these three categories. *Id.* Thus, in present day, “PEN” is no longer considered an acronym. *Id.*

²¹⁹ St. Martin, *supra* note 54; *Our Story*, PENGUIN RANDOM HOUSE, <https://www.penguinrandomhouse.com/about-us/our-story/> [https://perma.cc/ZA2M-7YN6].

²²⁰ Complaint, *supra* note 2, at 4.

²²¹ Complaint, *supra* note 2, at 9–10.

²²² *Id.*

²²³ *Id.* at 2, 13.

²²⁴ *Id.*

²²⁵ *Id.* at 15.

²²⁶ *Id.* at 15–16.

²²⁷ *Id.* at 17.

Baggett then moved from curricular material to library books.²²⁸ Her challenges lifted language directly from the Book Looks website and other challenges submitted in other districts around the country.²²⁹ PEN America argued that Baggett's challenges were "nakedly ideological" or undoubtedly driven by a personal political agenda.²³⁰ For example, Baggett's challenge to *Race and Policing in Modern America* by Duchess Harris included an objection on the basis that the book "[p]ush[es] the idea that all police are bad + non-blacks are racist."²³¹ She also claimed that the goal of the book was "[t]o race-bait."²³² Baggett's other challenges contained similar reductive language that reveal her own intentions behind seeking the books' removal.²³³

At the time Baggett's challenges were put forward, the District had an existing policy by which a panel would review the flagged book:²³⁴ the book was to remain on library shelves throughout the review process until a decision was made.²³⁵ However, the District made a drastic change to the established procedure, resulting in the automatic removal of challenged books from library shelves.²³⁶ Although the District later amended the policy again, many books remained restricted.²³⁷ PEN America's lawsuit argued that the District's actions constituted an unconstitutional violation of the First Amendment.²³⁸ The District removed and restricted access to certain books on ideological, rather than pedagogical grounds.²³⁹ By targeting books that contain themes of race, gender, and sexuality, the District was aiming to enforce its own ideas to the detriment of others.

The facts in the PEN America lawsuit bear a stark resemblance to the facts of *Pico*. Both cases involved a failure by

²²⁸ *Id.*

²²⁹ *Id.* at 18.

²³⁰ *Id.* at 19.

²³¹ *Id.* (alteration in original).

²³² *Id.* (alteration in original).

²³³ *Id.* at 18. When challenging the graphic novel *Drama* by Raina Telgemeier, Baggett objected to the book on the sole basis of its representation of a gay character. *Id.* When submitting this challenge, she attached a list of quotes from the book that referenced the character's gay identity as presumable evidence of the book's inappropriate nature. *Id.* Baggett also objected to the book *When Wilma Rudolph Played Basketball* by Mark Weakland, a picture book detailing the life of Olympic athlete Wilma Rudolph and her experience coming of age in the segregated South. *Id.* Baggett claimed that the book "opines prejudice based on race." *Id.* This language was lifted from an identical challenge submitted in a Texas school district. *Id.*

²³⁴ *Id.* at 19–20.

²³⁵ *Id.*

²³⁶ *Id.* at 20–21.

²³⁷ *Id.* at 21.

²³⁸ *Id.* at 40.

²³⁹ *Id.*

the school board to follow established procedure in the removal of books deemed objectionable by conservative interest groups.²⁴⁰ Likewise, many of the books targeted for removal in *Pico* were authored or edited by people of color.²⁴¹ The plaintiffs in the PEN America lawsuit relied on *Pico* in their claim that the District violated the First Amendment.²⁴² When the PEN America case is ultimately heard, the district court is almost certain to apply the test put forward by the plurality, where “educational suitability” serves as the standard by which courts determine whether a book’s removal was constitutional.²⁴³

The PEN America lawsuit is unique in comparison to other book ban complaints that have been put forward due to the inclusion of an equal protection claim.²⁴⁴ This claim highlights the discriminatory intent behind most of the book bans of today. Escambia County, as well as other state actors, have contributed to the silencing of diverse voices around the country by allowing for the removal of books dealing with race, racism, sexuality, and gender. In order to amplify disenfranchised voices and foster equality, the judiciary should reexamine the existing *Pico* standard and acknowledge the discriminatory implications of contemporary book banning efforts. This can be achieved by drawing from equal protection jurisprudence.

IV. A PROPOSAL FOR THE APPLICATION OF AN EQUAL PROTECTION FRAMEWORK IN THE CONTEXT OF BOOK BANS

By guaranteeing freedom of speech for all, the First Amendment, in theory, allows all voices an equal opportunity to be heard. While the First Amendment refers explicitly to liberty, equality, too, has been recognized as an implicit principle.²⁴⁵ The First Amendment’s equality principle requires that courts assume “all speakers and all points of view are entitled to a

²⁴⁰ See *Bd. of Educ. v. Pico*, 457 U.S. 853, 856–57 (1982).

²⁴¹ See *id.* at 856 n.3.

²⁴² Complaint, *supra* note 2, at 2–3.

²⁴³ As of January 2024, the PEN America lawsuit survived Escambia County’s motion to dismiss. *In Win for Free Expression, Judge Rules Lawsuit Challenging Escambia County, Fl Book Bans Can Move Forward*, PEN AM. (Jan. 10, 2024), <https://pen.org/press-release/in-win-for-free-expression-judge-rules-lawsuit-challenging-escambia-county-fl-book-bans-can-move-forward/> [https://perma.cc/33UL-88DT]. United States District Judge Kent Wetherell ruled that the plaintiffs have standing to bring their First Amendment claims, but denied the equal protection claim. *Id.*

²⁴⁴ See Complaint, *supra* note 2, at 4.

²⁴⁵ Karst, *supra* note 56, at 21.

hearing.”²⁴⁶ Any deviation from this assumption may be permissible “only upon a showing of substantial necessity.”²⁴⁷ This line of thinking suggests that some First Amendment claims may be viewed through the lens of an equal protection analysis. In the context of public school book bans, a focus on maintaining equal representation of diverse ideas can help protect vulnerable targets of discrimination.

A. *Equality Under the First Amendment*

The Supreme Court has previously recognized the close relationship that exists between the Equal Protection Clause and the First Amendment.²⁴⁸ In *Police Department of Chicago v. Mosley*, Justice Marshall declared, that “under the Equal Protection Clause” and the First Amendment there exists an “equality of status in the field of ideas,’ and government must afford all points of view an equal opportunity to be heard.”²⁴⁹ While *Mosley* focused on the exclusion of peaceful picketers from a public forum, the idea that the First and Fourteenth Amendments demand all points of view be heard can also be applied when considering the constitutionality of content-based regulation, specifically in the context of public schools.²⁵⁰ Content-based regulation, a governmental restriction on the transmission and reception of ideas, raises concerns of unequal treatment by the State. Inequality naturally arises when certain ideas are suppressed in exchange for the amplification of others.²⁵¹ Such action may have the effect of driving certain ideas out of the conversation altogether.²⁵² When individuals, particularly children and young adults, are intentionally prevented from accessing diverse perspectives, government actors seek to prescribe a uniformity of thought not reflective of reality. Such government control runs directly contrary to First Amendment principles.

In the case of book bans, the pattern of targeting books that contain themes of race, racism, and LGBTQIA+ experiences demonstrates how content-based regulation promotes inequality. In his concurring opinion in *Pico*, Justice Blackmun argued that the focus of book ban jurisprudence should not be

²⁴⁶ *Id.* at 28.

²⁴⁷ *Id.*

²⁴⁸ *See* *Police Dep’t of Chi. v. Mosley*, 408 U.S. 92 (1972).

²⁴⁹ *Id.* at 96.

²⁵⁰ *Id.*

²⁵¹ *See* Genevieve Lakier, *Imagining an Antisubordinating First Amendment*, 118 COLUM. L. REV. 2117, 2123–24 (2019).

²⁵² *Id.*

the failure to provide information, as Justice Brennan insisted, but the discriminatory disapproval of specific ideas.²⁵³ The disparate impact the bans of today have on marginalized voices serves as evidence of discriminatory intent on the part of government actors. While an intent requirement exists under *Pico*, a school board need only show that the book flagged for removal was educationally unsuitable or “pervasively vulgar” for the removal to be deemed permissible.²⁵⁴ This standard allows school boards to sidestep accusations of unconstitutional censorship by showing that the books in question contain content that is unsuitable for children.²⁵⁵

Drawing from Justice Blackmun’s concurrence, which emphasizes idea discrimination, rather than relying on the main plurality holding in *Pico*, courts should analyze the constitutionality of book bans through the framework of equal protection. In this manner, a plaintiff can show that a school board is not acting in pedagogical good faith where a removal or restriction decision has the effect of eliminating certain ideas or points of view. When those points of view come from particularly vulnerable or suspect classes, such as persons of color, courts should apply even greater scrutiny to decide whether the book ban was instituted in a narrowly tailored manner, in furtherance of a compelling government interest.

Using an equal protection framework when considering First Amendment claims “places an affirmative burden on those who would justify a restriction on expression to demonstrate that it is necessary to achieve a compelling state interest.”²⁵⁶ By using this framework, courts can be more protective of free speech than existing First Amendment doctrine.²⁵⁷ The *Pico* standard, as it currently stands, allows public school boards to impose content-based regulations through a mere showing that a given title lacks “educational suitability” while avoiding the hurdle of strict scrutiny.²⁵⁸ Educational suitability as a standard is vague and undeniably subjective. Libraries are traditionally regarded as “forums for information and ideas” and contain a wide breadth of material, some of which will undoubtedly lack

²⁵³ Bd. of Educ. v. Pico, 457 U.S. 853, 879 (1982) (Blackmun, J., concurring).

²⁵⁴ C.K.-W. by & through T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 915–16 (E.D. Mo. 2022) (quoting *Pico*, 457 U.S. at 871), *appeal dismissed*, No. 22-2885, 2023 WL 2180065 (8th Cir. Jan. 17, 2023).

²⁵⁵ *See id.*

²⁵⁶ Karst, *supra* note 56, at 67.

²⁵⁷ *Id.*

²⁵⁸ *Pico*, 457 U.S. at 871.

educational merit.²⁵⁹ If each volume in a school library is evaluated in terms of its educational suitability, there would be little more than textbooks and instruction manuals remaining. Thus, courts should apply greater levels of scrutiny to groups whose voices are being continuously diminished, and in turn, state actors will have to provide a more compelling justification for their regulation of content.

B. *The PEN America Lawsuit as a Case Study*

By viewing First Amendment claims dealing with content-based regulation through an equal protection lens, the Supreme Court could clarify a standard beyond what is detailed in the *Pico* plurality. As book bans proliferate around the country, it is an ideal time for the Court to reexamine its approach to the constitutionality of book bans in public school libraries.

Using the PEN America lawsuit as a case study, a court may apply tiered scrutiny depending on what classes are implicated by a district's removal of library books. As the claim alleges and emphasizes, the District specifically targeted books containing themes of race and LGBTQIA+ identity.²⁶⁰ Under an equal protection analysis, race is a suspect class which triggers strict scrutiny.²⁶¹ Where a clear pattern emerges that books are being removed because they contain themes of race or racism, strict scrutiny should be applied to determine whether their removal is narrowly tailored to achieve a compelling pedagogical interest.²⁶² While the Court has failed to adequately address whether sexual orientation is a suspect class, various state courts have applied "rational basis with bite" to certain classes when a challenged government action is shown to be motivated by animus.²⁶³ This heightened scrutiny should be applied to

²⁵⁹ *Library Bill of Rights*, AM. LIBR. ASS'N, <https://www.ala.org/advocacy/intfreedom/librarybill> [<https://perma.cc/NLZ3-D836>].

²⁶⁰ Complaint, *supra* note 2, at 2.

²⁶¹ Smith, *supra* note 67, at 2772–73.

²⁶² *Id.*

²⁶³ *Id.* at 2785. See *United States v. Windsor*, 570 U.S. 744, 775 (2013) (finding that a federal statute, which excluded same-sex couples from definitions of "spouse" and "marriage" under other federal statutes, was unconstitutional because "no legitimate purpose [overcame] the purpose and effect [of the statute] to disparage and to injure . . ."); *Romer v. Evans*, 517 U.S. 620, 634 (1996) (striking down a state constitutional amendment that prohibited government action taken to prevent discrimination on the basis of sexual orientation as "the disadvantage imposed [was] born of animosity toward the class of persons affected"). Although the Court in *Windsor* did not clearly articulate which level of scrutiny it applied when considering the constitutionality of a federal statute, it drew from other "rational basis with bite" cases such as *Romer* in its reasoning. Holoszyc-Pimentel, *supra* note 67, at 2116.

removal decisions where books are targeted based on the presence of LGBTQIA+ themes, particularly when they arise out of a clear intent to remove such voices from the conversation. Under such circumstances, a court would consider whether removal is rationally related to legitimate pedagogical interest while giving less deference to school boards than traditional rational basis review. The application of heightened scrutiny would provide greater protection to content that has been targeted for removal for ideological, rather than pedagogical reasons. As a result, this analysis closes the gap created by *Pico* by limiting the potential for the abuse of discretion that inevitably flows from the use of subjective concepts such as vulgarity and “educational suitability” as standards for acceptability.

CONCLUSION

For many young students, school libraries provide the first opportunity to explore reading as an enjoyable, leisurely, and formative activity. Certain books that may be considered unsuitable by some could contain a story that resonates with students on a level that curricular material will not. In many of the book bans today, school boards are targeting books containing themes of race, gender, and sexuality. Schools are thus restricting access to reading material that they deem inappropriate despite the fact that many students have unlimited access to words and images of sexual content and violence on their mobile phones. Studies show that more than 50 percent of children between the ages of ten and twelve “have been exposed to inappropriate online content,” which may include anything from “vulgar language to violent and sexually explicit” images or videos.²⁶⁴

The holding in *Pico* fails to provide adequate guidance for courts to determine the constitutionality of public school book bans. In *Pico*, the Supreme Court held that a school book ban may be permissible if the “decision was based solely [on] . . . ‘educational suitability.’”²⁶⁵ However, where there is a disparate impact on a specific group, courts should apply a more stringent level of scrutiny beyond a mere consideration of whether the restricted material was educationally suitable.

²⁶⁴ Stacy Sare Cohen, *The Ultimate Internet Safety Guide for Kids*, FORBES (Mar. 9, 2024, 11:24 AM), <https://www.forbes.com/home-improvement/internet/child-internet-safety-guide/> [<https://perma.cc/L27V-HTRV>].

²⁶⁵ Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).

The PEN America lawsuit is symbolic of the pushback against attempts at censorship in schools around the country. The lawsuit's inclusion of an equal protection claim highlights the relationship between equality and First Amendment liberty.²⁶⁶ A disproportionate number of the challenged books were authored by non-white and/or LGBTQIA+ writers, or contained themes of race, racism or LGBTQIA+ identity, suggesting discriminatory intent on the part of the District.²⁶⁷ This has become a familiar pattern among book bans of the modern era. As the number of book challenges and bans grow every day, it is crucial for the Supreme Court to clarify a new standard to approach the issue of content-based regulation in schools. More specifically, First Amendment claims dealing with book bans in public schools should be viewed through an equal protection lens. By placing a burden on school boards to prove that their decisions to remove a certain book was in furtherance of a legitimate state interest, the courts can create an even stronger barrier to censorship efforts. Furthermore, using an equal protection framework provides greater safeguards for already marginalized voices who are often the targets of book banning campaigns. By uplifting voices rather than allowing for their repression, courts can promote equality because after all, “unless we protect it for all, we will have it for none.”²⁶⁸

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²⁶⁶ Complaint, *supra* note 2, at 4.

²⁶⁷ *Id.*

²⁶⁸ Karst, *supra* note 56, at 23 (quoting Harry Kalven Jr., *Upon Rereading Mr. Justice Black on the First Amendment*, 14 UCLA L. REV. 428, 432 (1967)).

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