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BATTLEFIELDS FOR BANNED BOOKS: THE FIRST AMENDMENT AND PUBLIC SCHOOL LIBRARIES

*Jensen Rehn**

When students started remote learning in the spring of 2020, new developments in digital teaching techniques entered homes and apartments across the United States. Even as children increasingly rely on technology for turning in assignments and attending virtual classes, some of the most contentious conversations at school board meetings in the past two years have related to teaching tools that have existed for centuries—books. Stereotypes of public school libraries as bastions of peaceful silence and calm order have shattered as public school library collections become powerful political symbols in communities across the country. Beyond calls to remove or reconsider books, members of some school boards have called for more drastic measures. Members of the Spotsylvania School Board in Virginia said “they would like to see the removed books burned.”¹ Comments from some board members look like dialogue more appropriate for a dystopian novel than a school board meeting: “‘I think we should throw those books in a fire,’ [one representative] said, and [another representative] said he want[ed] to ‘see the books before we burn them so we can identify within our community that we are eradicating this bad stuff.’”² These comments earned political points. After his book burning diatribe,

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1 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 [<https://perma.cc/J5DV-B4TK>].

2 *Id.*

one representative got promoted to Chairman of the Spotsylvania School Board.³

Unfortunately, the spectacle in Spotsylvania was not an isolated incident. Similar situations have occurred with increasing frequency throughout the United States. The Office of Intellectual Freedom of the American Library Association (ALA) studies efforts to ban books and “[f]rom June 1, 2021, to September 30, 2021, [the ALA] . . . tracked 155 unique censorship incidents, and provided direct support and consultation in 120 of those cases.”⁴ Anecdotally, the director of the Office of Intellectual Freedom could not “recall a time when [the ALA] had multiple challenges coming in on a daily basis.”⁵ This troubling trend exists beyond anecdotes. In December of 2021, the ALA released statements noting how “[t]here were more censorship attempts reported to ALA in the last three months [of 2021] than in all of 2020.”⁶ Banning attempts in 2022 will likely surpass the 2021 numbers, as Unite Against Book Bans tracked “1,651 unique titles targeted between January 1–August 31, 2022.”⁷ Although certain stories receive disproportionate amounts of attention, challenges are increasing across the country. Challenges to books have happened on state and local levels in thirty-two states⁸ which are spread throughout the

3 Julie Carey & Derrick Ward, *Spotsylvania School Board Appoints Chair Who Backed Burning Books, Fires Superintendent*, NBC4 WASH. (Jan. 10, 2022), <https://www.nbcwashington.com/news/local/northern-virginia/spotsylvania-school-board-appoints-chair-who-was-in-favor-of-burning-books-fires-superintendent/2933066/> [<https://perma.cc/CFC9-RT8V>].

4 *ALA Statement on Book Censorship*, AM. LIBR. ASS’N (Nov. 29, 2021), <https://www.ala.org/advocacy/statement-regarding-censorship/> [<https://perma.cc/22N8-58VX>].

5 *Id.*

6 Am. Libr. Ass’n (@ALALibrary), TWITTER (Dec. 30, 2021, 2:40 PM), <https://twitter.com/ALALibrary/status/1476639231133077509/> [<https://perma.cc/GW2D-JNAJ>].

7 UNITE AGAINST BOOK BANS, <https://uniteagainstbookbans.org/> [<https://perma.cc/U9WE-F8VE>].

8 Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), <https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/> [<https://perma.cc/4NY2-MJEX>].

country and include Iowa,⁹ Florida,¹⁰ Oklahoma,¹¹ Texas,¹² and Wisconsin.¹³ No state seems safe from potential public school library controversies.

As attempts to ban books increase throughout the United States, people on various sides of the debate use legal words and phrases to support their arguments. Academics and attorneys should recognize “ban,” “remove,” and “challenge” as synonymous terms that refer to what happens when parents ask school boards to take books off public school library shelves. Using all these terms reflects common use of the words and aligns with definitions from the ALA. After establishing a common vocabulary, courts should consider banned-book cases through a First Amendment free speech framework rather than a parental rights framework. Public school libraries exist as entities distinct from public libraries or public school classrooms. Therefore, book-ban cases require different analysis than required school curriculum cases. Removing books differs from affirmatively requiring libraries to obtain books. Once school districts identify books as educationally appropriate for public school libraries, subsequent challenges need a legitimate basis.

To determine where to draw the legitimacy line, federal courts should primarily rely upon the plurality opinion in *Board of Education v. Pico*,¹⁴ which addressed removing books from a public school library. Since *Pico* has holes, lower courts should draw upon other First Amendment precedents, too. For example, *West Virginia State Board of Education v. Barnette*¹⁵ will help lower courts ensure that public school libraries do not create a single orthodox national narrative. Similarly, *Brown v. Entertainment Merchants Ass’n*¹⁶ provides precedent for not infringing upon the First Amendment rights of children whose parents approve

9 *Bill to Ban Some Books in Iowa Schools Advances*, KCRG (Feb. 17, 2022, 9:17 AM), <https://www.kcrg.com/2022/02/17/bill-ban-some-books-iowa-schools-advances/> [<https://perma.cc/2DU4-EJEV>].

10 *Superintendent’s Decision: ‘All Boys Aren’t Blue’ Banned for Now, Other Books Return to Library Shelves*, FLAGLERLIVE (Dec. 7, 2021), <https://flaglerlive.com/170745/books-returned-withheld/> [<https://perma.cc/X3RF-X8P3>] [hereinafter *Superintendent’s Decision*].

11 *Standridge Files Bills to Address Indoctrination in Oklahoma Schools*, OKLA. SENATE (Dec. 16, 2021, 4:30 PM), <https://oksenate.gov/press-releases/standridge-files-bills-address-indoctrination-oklahoma-schools/> [<https://perma.cc/RG34-9EG7>].

12 Danika Ellis, *All 850 Books Texas Lawmaker Matt Krause Wants to Ban: An Analysis*, BOOK RIOT (Nov. 5, 2021), <https://bookriot.com/texas-book-ban-list/> [<https://perma.cc/8M2S-Y83N>].

13 Isiah Holmes, *Uneasy Start to the School Year in Politically Charged Waukesha*, WIS. EXAM’R (Sept. 8, 2022, 6:14 AM), <https://wisconsinexaminer.com/brief/uneasy-start-to-the-school-year-in-politically-charged-waukesha/> [<https://perma.cc/P2KZ-UHVP>].

14 457 U.S. 853 (1982).

15 319 U.S. 624 (1943).

16 564 U.S. 786 (2011).

of them engaging with controversial forms of media. Expanding beyond *Pico* would create more stability for students and librarians in public schools across the country.

Throughout the United States, conversations about removing books from school libraries have prompted political action from parents who hold a variety of viewpoints. Within the past year, many pushes to ban books have come from advocacy groups rather than individual parents.¹⁷ Requests to remove books often begin when someone expresses concerns about specific passages or themes contained in books.¹⁸ For example, a Tennessee chapter of “Moms for Liberty” composed a list of books it found objectionable and presented that list to both the local school board and the Tennessee Department of Education.¹⁹ Parent groups have also assembled to oppose book bans. Advocacy against banning books occurs on both a national and local level, too. One group called the “Book Ban Busters” put together an interactive map with color-coded pins identifying locations with permanent bans, temporary bans, requested bans, and busted bans.²⁰ Not all protests to book bans come from national organizations. Grassroots groups of parents also assemble when books get banned. Texas was a hot spot for book bans throughout 2021.²¹ Not all Texan parents supported these efforts. Round Rock Black Parents Association advocates in several spheres,²² and the group has been a driving force behind petitions to keep books in Texas public school libraries and on reading lists.²³ With the potential for people to take issue with books for a variety of reasons, libraries could eventually end up with sparse shelves. To demonstrate this potential abyss, one editorial noted: “You don’t like Upton Sinclair’s ‘The Jungle,’ the 115-year-old novel about the

17 See Friedman & Johnson, *supra* note 8.

18 See Anika Exum & Meghan Mangrum, *Williamson County Schools Committee Removes Book from Elementary Curriculum*, 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/> [https://perma.cc/2GKH-A6W9].

19 See *id.*

20 *Book Ban Busters*, RED WINE & BLUE, <https://www.redwine.blue/bbb/> [https://perma.cc/ZR86-9HLR].

21 See Ellis, *supra* note 12.

22 See ROUND ROCK BLACK PARENTS ASS’N, <https://www.roundrockblackparents.org/home/> [https://perma.cc/8GZZ-3K4F].

23 See Tat Bellamy-Walker, *Meet the Moms of Color from Texas Fighting Book Bans at Their Kids’ Schools*, NBC NEWS (Feb. 2, 2022, 7:26 AM), <https://www.nbcnews.com/news/nbcblk/meet-moms-color-texas-fighting-book-bans-kids-schools-rcna13701/> [https://perma.cc/ZS5M-DM34]; Mari Salazar, *Round Rock ISD Parents Fight to Keep Book About Racism on Reading List*, KVUE (Feb. 2, 2021, 7:43 PM), <https://www.kvue.com/article/news/education/schools/round-rock-isd-racism-book-reading-list/269-bce13f05-f7c-436c-880e-44c1c4dbf37a/> [https://perma.cc/5D9R-PMVZ].

horrors of the Chicago meat-packing industry? Well, I don't like 'The Fountainhead,' Ayn Rand's paean to rugged, stubborn individualism."²⁴ Before long, book bans to gain political points could devolve into ceaseless feedback loops of challenges.

Embedded in each conversation about banning books are arguments that use legal terminology. A brief conversation about banned books with a librarian will likely lead to a discussion of the "Library Bill of Rights" published by the ALA.²⁵ No one is bound by the ALA's Bill of Rights, which lacks a method of enforcement.²⁶ Thus, the question remains: what is the legal landscape of banning books? Unfortunately, the Supreme Court has not provided a clear precedent about banning books from public school libraries. In fact, the Supreme Court has only taken cases about libraries on three occasions, each of which has resulted in its own complex web of plurality opinions.²⁷ For public school libraries, *Board of Education v. Pico* is the guiding case.²⁸ Yet, as the past few decades have demonstrated, *Pico* falls short when lower courts attempt to apply it. In the face of the myriad of potential cases that could soon arise about banned books, federal courts are not completely lost. Rather than cobble together a Franken-precedent from pieces of the *Pico* plurality, courts can draw upon binding precedents from *West Virginia State Board of Education v. Barnette*²⁹ and *Brown v. Entertainment Merchants Ass'n*³⁰ to guide decisions about books in public school libraries.

First, Part I of this Note will establish a baseline understanding of the background of book bans in public school libraries. Part I begins with the vocabulary of banning books, continues to the history of how banning books connects to free speech, and concludes with why banning books should be viewed as a question of free speech rather than parental rights. Potential speech implications for parents, school governments, authors, students, and librarians each receive attention. Then, Part II examines how the Supreme Court addressed the removal of books from a public school library in *Pico* and how federal circuit

24 Editorial, *Book Banning Is a Trend That Should Be Left in the Old Year*, OBSERVER-REP. (Feb. 8, 2022), https://observer-reporter.com/opinion/editorials/editorial-book-banning-is-a-trend-that-should-be-left-in-the-old-year/article_b6d165bc-68bd-11ec-bb3c-2378e8f2f495.html [https://perma.cc/B3B3-LESB].

25 *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/2NDW-7SFV].

26 *See id.*

27 *See United States v. Am. Libr. Ass'n*, 539 U.S. 194 (2003); *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982); *Brown v. Louisiana*, 383 U.S. 131 (1966).

28 *Pico*, 457 U.S. 853.

29 319 U.S. 624 (1943).

30 564 U.S. 786 (2011).

courts of appeals and federal district courts have applied the *Pico* plurality. In light of these shortcomings, Part III argues that even without binding precedent from the Supreme Court, courts can combine the *Pico* plurality with binding First Amendment precedents from *Barnette* and *Brown* to guide how they think about upcoming decisions regarding banned books.

I. BOOK BANNING BACKGROUND

Entering the conversation about the legality of banning books requires first establishing a vocabulary for banning versus removal, providing a common context for the relationship between books and free speech, and narrowing the focus from parental rights to something more akin to student speech.

A. Common Vocabulary

Throughout this piece, a variety of terms will appear to describe the removal of books from libraries, including “ban,” “remove,” and “challenge.” Establishing which of these terms will appear matters in the book-banning context. Some articles have suggested that “remove” provides a more politically neutral word for the process.³¹ Academic authors are not the only ones who have noted the importance of precision when choosing to use either “ban” or “remove.” None of the plurality opinions in *Pico* used the word “ban.” Instead, phrases such as “discretion to remove library books” appear.³² Federal judges have taken conflicting stances about the significance of “ban” not appearing in *Pico*. When the Court of Appeals for the Eleventh Circuit decided *ACLU of Florida v. Miami-Dade County School Board*—which determined whether a children’s book about Cuba remained in a public elementary-school library’s collection—“ban” versus “remove” provided one key schism between the judges.³³ According to the majority, “[t]he Board did not ban any book” because in taking the book off school library shelves, the Board “did not prohibit anyone else from owning, possessing, or reading the book.”³⁴ To justify its rigid adherence to “remove” rather than “ban,” the majority relied on an analysis of the Supreme Court’s *Pico* opinions. The *Miami-Dade* majority noted that each of the 107 times that the Board’s actions came up in *Pico*,

31 See, e.g., 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).

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

33 557 F.3d 1177 (11th Cir. 2009).

34 *Id.* at 1218.

“the Supreme Court called the board’s action what it was—removing the books.”³⁵ Nonetheless, in conforming its writing to align with the Supreme Court, the Eleventh Circuit majority lost touch with the common use of “ban” both among librarians and everyday people.

Although some academics and judges prefer using the term “removal” rather than “ban” when schools take books from library shelves, statements from the ALA and Judge Charles Wilson’s *Miami-Dade* dissent support using the term “ban” instead. Every year since 1982, the ALA and libraries throughout the United States have celebrated Banned Books Week in September.³⁶ Perhaps even more compelling than the celebrations of Banned Books Week are the official ALA definitions of banning, removal, and challenge which explain that “[a] challenge is an attempt to remove or restrict materials, based upon the objections of a person or group. A banning is the removal of those materials.”³⁷ PEN America, a nonprofit focused on “celebrat[ing] creative expression and defend[ing] the liberties that make it possible”³⁸ tracks book bans and uses the following definition for school book bans:

any action taken against a book based on its content and as a result of parent or community challenges, administrative decisions, or in response to direct or threatened action by lawmakers or other governmental officials, that leads to a previously accessible book being either completely removed from availability to students, or where access to a book is restricted or diminished.³⁹

Although Judge Wilson did not cite the ALA or PEN America’s definitions, he identified “ban” as an appropriate term to describe the school board’s actions in *Miami-Dade*.⁴⁰ He also noted that his dissent did not depend on the term the court used.⁴¹ Rather, Judge Wilson highlighted how the majority’s definition of “ban” would prevent a school board from ever banning a book, because school boards cannot

35 *Id.* at 1220.

36 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. ILL. LIBR.: NON SOLUS BLOG, <https://www.library.illinois.edu/rbx/2019/10/01/exile-aisle-challenged-and-banned-books-in-youth-literature/> [https://perma.cc/5DM2-UEXU]; *About*, BANNED BOOKS WEEK, <https://bannedbooksweek.org/about/> [https://perma.cc/99UW-NV7B]; *Banned & Challenged Books*, AM. LIBR. ASS’N, <https://www.ala.org/advocacy/bbooks/> [https://perma.cc/42KU-C5XJ].

37 *Banned Book FAQ*, AM. LIBR. ASS’N: BANNED & CHALLENGED BOOKS, <https://www.ala.org/advocacy/bbooks/banned-books-qa/> [https://perma.cc/4K4U-QA4C].

38 *About Us*, PEN AM., <https://pen.org/about-us/> [https://perma.cc/BF3Z-AFU2].

39 Friedman & Johnson, *supra* note 8.

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

41 *Id.* at 1250.

prevent students from theoretically finding books elsewhere.⁴² In addition to this logical gap, Judge Wilson emphasized inconsistencies between the circuit's aversion to using "ban" in *Miami-Dade* and the use of "ban" elsewhere. One string of citations included a list of other situations in which Florida and the Eleventh Circuit used "ban" in ways that comport with more common usage.⁴³ Judge Wilson's observations align with how librarians and library patrons use the word "ban." With all of this in mind, using "ban" seems like an entirely appropriate choice.

Perhaps part of the reluctance to use the word "ban" stems from close connotations between banning something and censorship. For example, Thesaurus.com lists "censorship" as the second synonym for "ban."⁴⁴ A strong streak of resistance to censorship runs through American history, even if often more aspirational than achieved. When President John Adams issued the Alien and Sedition Acts, publishers resisted his attempt at censorship.⁴⁵ Over a century later, the Supreme Court confirmed that sentiment against censorship remained strong in the United States with the *West Virginia State Board of Education v. Barnette* decision in 1943.⁴⁶ There, the majority opinion noted that "[i]t is now a commonplace that censorship or suppression of expression of opinion is tolerated by our Constitution only when the expression presents a clear and present danger of action of a kind the State is empowered to prevent and punish."⁴⁷ Throughout the twentieth century, resistance to censorship survived the challenges of the 1950s⁴⁸ and persisted into the new millennium. During oral arguments for the *Citizens United* case, which related to campaign financing and on demand videos rather than banning books, Chief Justice Roberts, Justice Alito, Justice Kennedy, and Justice Souter all posed hypotheticals to the government's attorney about applying his proposed

42 *Id.* at 1251–52 (mentioning "*Searcy 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)" and "FLA. STAT. ANN. § 386.206 (2008) (referring to 'the smoking ban' in workplaces when people are allowed to have cigarettes and smoke in other venues)").

43 *Id.* at 1250–51.

44 *Ban*, THESAURUS.COM, <https://www.thesaurus.com/browse/ban/> [https://perma.cc/JKR8-666E].

45 *See generally* WENDELL BIRD, CRIMINAL DISSENT: PROSECUTIONS UNDER THE ALIEN AND SEDITION ACTS OF 1798, at 4–6 (2020).

46 319 U.S. 624 (1943).

47 *Id.* at 633.

48 For a discussion of preliminary studies of the "freedom to read" sponsored by the National Book Committee in the 1950s, see RICHARD MCKEON, ROBERT K. MERTON & WALTER GELLHORN, THE FREEDOM TO READ: PERSPECTIVE AND PROGRAM, at v (1957).

interpretation to censoring a book.⁴⁹ Although tangential in that case, this line of questions demonstrated the almost automatic bristling against censorship among American jurists.

B. *Parental Rights or Free Speech Rights?*

Beyond the terminology that people use to describe book bans and removals, the decision to refer to the issue as one of parental rights versus free speech matters immensely. Thinking about book bans as a free speech issue is the more appropriate approach. Whereas whether a judge refers to the action of taking books off library shelves as “removal” or “banning” only impacts the censorship connotations of the action, the decision of whether to think of the action as implicating parental rights or free speech impacts the legal analysis applied. Similar to how using “ban” or “remove” reflects the ultimate outcome an individual wants to occur, where a person falls on the parental rights versus free speech spectrum hints at whether they want a book removed or to remain.

Federal courts have recognized some topics related to schools as parental rights issues, but banning books does not appear on this list. Whether people can send their children to private schools received treatment as a parental rights issue in *Pierce v. Society of Sisters*.⁵⁰ Similarly, the option to choose course offerings in languages other than English received parental rights treatment in *Meyer v. Nebraska*.⁵¹ Both of those cases dealt with required actions. Unlike requiring a student to go to a certain school or take certain courses, having books in a library does not involve requiring students to read those books. When parents ask school boards to remove books that they find morally offensive from public school libraries, they often rely on parental rights justifications in their rhetoric.⁵² Perhaps members of the public find the parental rights justification compelling. Librarians do not. As the emphasis on free expression throughout the ALA’s official interpretation of the Library Bill of Rights indicates, librarians consider collections development through a free speech framework.⁵³ Courts should

49 See Transcript of Oral Argument at 27–38, *Citizens United v. FEC*, 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 28.

50 268 U.S. 510, 518 (1925).

51 262 U.S. 390, 400 (1923).

52 See Exum & Mangrum, *supra* note 18.

53 *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/> [<https://perma.cc/NA6U-9B4F>] (“Best practices in collection development assert that materials should not be excluded from a collection solely because the content

give greater weight to how librarians classify collection development than parental perspectives when banned-book cases arise.

In an academic article written by a law librarian for other law librarians, Professor Anne Klinefelter assured her audience that librarians should not worry about infringing on the free speech rights of library patrons because most of the ethical obligations of librarians comport with encouraging expression.⁵⁴ While conversations among librarians should not determine how courts consider cases concerning public school libraries, they do provide a helpful reference point for possible perspectives.

C. *Focusing on Free Speech*

Shifting the purportedly parental rights issue of book-banning to a free speech issue can draw an imperfect parallel from the *Brown v. Entertainment Merchants Ass'n* decision.⁵⁵ There, California passed a statute attempting to restrict children's access to violent video games.⁵⁶ Justice Scalia's majority opinion noted 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."⁵⁷ Similarly, when parents take issue with books, their objections might relate to "a serious social problem," and a school board might want to assist parental efforts to control children. Although the state may have a legitimate goal, the First Amendment provides boundaries for how far the state, through a school board, may go with its limitations. Parents who advocate for book removals would likely rather draw upon the observations of Justice Thomas in his *Brown* dissent, which focused on the history of parental-child relationships in the eighteenth century and noted that then "[p]arents had total authority over what their children read."⁵⁸ Ultimately, in *Brown*, free speech issues guided the majority rather than the parental rights at the heart of Justice Thomas's dissent. With book-

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.").

54 See Anne Klinefelter, *First Amendment Limits on Library Collection Management*, 102 LAW LIBR. J. 343, 346 (2010) ("[L]ibrarians . . . have as their professional goals many of the commonly attributed goals of the First Amendment—truth that emerges from the 'marketplace of ideas,' individual expression and development, and democracy." (footnotes omitted)).

55 564 U.S. 786 (2011).

56 *Id.* at 789.

57 *Id.* at 805.

58 *Id.* at 832 (Thomas, J., dissenting).

banning cases, First Amendment concerns will likely cabin any parental rights issues that get raised.

1. Who is Speaking?

After deciding to view book-banning as a free speech issue, one must next determine whose free speech rights get implicated. Courts do not frame book banning as a parental rights issue, and parents are not the speakers whose free speech rights are at risk. Further, no court has considered collection development through adding or removing books as putting the free speech rights of librarians at risk.⁵⁹ Through the process of elimination, this leaves the students themselves as the individuals whose free speech interests are at risk of violation by book bans. A more direct route to the same result comes from Justice Brennan's plurality opinion in *Pico*, which notes how the plurality believed "that the First Amendment rights of students may be directly and sharply implicated by the removal of books from the shelves of a school library."⁶⁰ Other Justices noted how their divergent views from this understanding of First Amendment implications of book removals partially led them to either not fully join Justice Brennan's opinion,⁶¹ or dissent entirely.⁶² Partially, Justice Brennan framed reading as a vehicle for acquiring ideas that would impact how students exercised subsequent speech.⁶³ Building upon this premise of accessing books as essential to free speech, Justice Brennan highlighted how "access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."⁶⁴ Ensuring present access to books prepares students to exercise their rights in the present and future.

Stemming from discomfort with the passive, preparatory nature of Justice Brennan's justification, some academic authors have attempted to expand upon the idea of the First Amendment "right to read." Professor Susan Nevelow Mart, a law librarian and professor, referred to this as "the right to receive information."⁶⁵ Her analysis captures an attitude toward library collections based upon the idea that the value of free speech diminishes when people cannot access that speech.⁶⁶ Not all academics agree that this conception of speech

59 See Klinefelter, *supra* note 54, at 352.

60 Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982) (opinion of Brennan, J.).

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

62 *Id.* at 919 (Rehnquist, J., dissenting).

63 See *id.* at 866–68 (opinion of Brennan, J.).

64 *Id.* at 868.

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

66 *Id.*

ensures a right to read. Professor Marc Jonathan Blitz has suggested characterizing reading as “not merely a complement to expression; it is also an *alternative way* for individuals to exercise liberty of conscience and self-development.”⁶⁷ To a certain extent, this characterization seems to describe conduct more than speech. Professor Blitz emphasizes the expressive qualities of reading and how “public libraries may be more important in advancing the individual liberty interests at the core of the First Amendment than in furthering the democratic deliberation it makes possible.”⁶⁸ Although not all academics can agree on a single, coherent connection between the right to read and free speech, the debates demonstrate how intertwined the concepts have become.

2. Where is the Speech Occurring?

Beyond who is speaking, where speech occurs also matters for free speech analysis. Federal courts seem to uniformly treat public school libraries as their own category of space. Judges do not typically offer historical justifications for this distinction, but librarians have thought about public school libraries as unique spaces since the concept’s inception. When the Founders drafted the Constitution, public school libraries did not exist. Although Benjamin Franklin suggested adding libraries to public schools in the 1740s, most public schools lacked libraries into the late nineteenth century.⁶⁹ Melvil Dewey—creator of the Dewey Decimal System—spoke about adding school libraries at a National Education Association conference in 1896.⁷⁰ From the outset, Dewey advocated for school libraries “distinct from the community library” and “a component in the education system distinct from the classroom.”⁷¹ Rather than a passing proposition, Dewey’s ideas about public school libraries have become the controlling conceptions. Professor Richard J. Peltz describes this as the enduring “duality” of public school libraries, as spaces that serve both curricular and extracurricular functions.⁷² Courts consistently consider public school libraries as separate from classrooms, too. One district court in Colorado described a small selection of books inside a classroom as a classroom

67 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).

68 *Id.* at 818.

69 See Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 103, 112–13.

70 *Id.* at 113.

71 *Id.* at 114.

72 See *id.* at 106.

library, distinct from the larger library that served the whole school.⁷³ Distinguishing the two underscores the differences between classrooms and libraries. As advocacy groups call for banning books on a national scale,⁷⁴ communities throughout the United States will need guidance about the legal implications of banning books. Unfortunately, only one Supreme Court case has addressed public school libraries: *Board of Education v. Pico*.

II. *PICO*

A. *Pico History and Procedural Posture*

If a case involves removing a book from a public school library, *Board of Education v. Pico* provides a crucial starting point.⁷⁵ People often frame *Pico* as a protection of student speech, but a more apt description characterizes the case as “essentially a roadblock for a school board to go around, rather than a fully effective shield of students’ rights to receive artistic expression.”⁷⁶ To understand *Pico*’s relevance relative to present book-banning situations, a person must first have a solid understanding of the factual circumstances which gave rise to the case. The controversy centered around nine books in a public school library in Island Trees Union Free School District in New York.⁷⁷ Members of the school board “gave an ‘unofficial direction’ that the listed books [including *Slaughterhouse Five* by Kurt Vonnegut, Jr. and *Black Boy* by Richard Wright] be removed from the library shelves.”⁷⁸ When explaining their decision to remove these books, the school board “characterized the removed books as ‘anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy,’ and concluded that ‘[i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers.”⁷⁹ Theoretically, the decision did not need to flow directly from the school board. The board appointed a committee to evaluate the books, and the committee believed the books could remain in the library.⁸⁰ Without any explanation, the Board ignored the committee’s

73 See *id.* at 138 (citing *Roberts v. Madigan*, 702 F. Supp. 1505, 1513–14 (D. Colo. 1989)).

74 Friedman & Johnson, *supra* note 8.

75 457 U.S. 853 (1982).

76 Shane Morris, Note, *The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right*, 13 DREXEL L. REV. 787, 818 (2021).

77 See *Pico*, 457 U.S. at 897 app. (Powell, J., dissenting).

78 *Id.* at 857, 856 n.3 (plurality opinion) (quoting *Pico v. Bd. of Educ.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

79 *Id.* at 857 (alterations in original) (quoting *Pico*, 474 F. Supp. at 390).

80 See *id.* at 857–58.

recommendations and proceeded with the removal.⁸¹ In response, a few students, including Steven Pico, filed a lawsuit questioning the First Amendment implications of the Board's decision.⁸²

Bringing this complex set of circumstances to court only complicated the situation further. Initially, the district court granted summary judgment in favor of the school board.⁸³ When the case arrived at the appellate court, the Court of Appeals for the Second Circuit reversed and remanded the case for trial, with each judge writing a separate opinion.⁸⁴ When the case finally reached the Supreme Court, it remained equally divisive. Almost every Justice wrote individually, with six opinions resulting from the case. Justice Brennan wrote the main plurality opinion.⁸⁵ Justice Blackmun wrote an opinion concurring in part and concurring in the judgment.⁸⁶ Justice White wrote an opinion concurring in the judgment.⁸⁷ Chief Justice Burger wrote a dissenting opinion.⁸⁸ Justice Powell wrote a separate dissenting opinion.⁸⁹ Finally, Justice Rehnquist wrote a dissenting opinion.⁹⁰ From this muddled mess, lower courts attempt to draw guidance for book removal cases. Without a binding precedent, lower courts try to discern what the right answer could end up being. Distilling an answer requires going through each opinion in search of common threads.

B. *Pico Plurality*

When parties want to keep a book in a library's collection, the main plurality opinion of *Pico* provides the strongest foundation for their arguments. There, Justice Brennan—joined by Justice Marshall, Justice Stevens, and partially by Justice Blackmun—outlined the contours of when and why public school boards should err against removing books from libraries. First, Justice Brennan established that the plurality did not classify taking books out of libraries as a curriculum issue.⁹¹ Rather, “the only books at issue in this case are *library* books,

81 *Id.* at 858.

82 Nicole Chavez, *He Took His School to the Supreme Court in the 1980s for Pulling ‘Objectable’ 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> [<https://perma.cc/HSS5-ZG8Z>].

83 *Pico*, 457 U.S. at 859 (plurality opinion) (citing *Pico*, 474 F. Supp. 387).

84 *Id.* at 860 (citing *Pico v. Bd. of Educ.*, 638 F.2d 404 (2d Cir. 1980)).

85 *Id.* at 855.

86 *Id.* at 875 (Blackmun, J., concurring in part and concurring in the judgment).

87 *Id.* at 883 (White, J., concurring in the judgment).

88 *Id.* at 885 (Burger, C.J., dissenting).

89 *Id.* at 893 (Powell, J., dissenting).

90 *Id.* at 907 (Rehnquist, J., dissenting).

91 *Id.* at 861–62 (plurality opinion).

books that by their nature are optional rather than required reading.”⁹² In emphasizing that libraries should not receive the same treatment as classrooms, Justice Brennan set libraries apart. He noted “the unique role of the school library” and the “regime of voluntary inquiry” that prevails in public school libraries.⁹³ By establishing that school libraries do not fall within the category of curriculum, Justice Brennan left space for a new understanding of school libraries.

Justice Brennan situated public school libraries as somewhere between public school classrooms and public libraries. The plurality cited *Brown v. Louisiana*—a case about public libraries—for the characterization of libraries as “place[s] dedicated to quiet, to knowledge, and to beauty.”⁹⁴ After recognizing the connection between public schools and their libraries, Justice Brennan noted that school boards have control over public school libraries, so long as they exercise that control within the bounds of the First Amendment.⁹⁵ Rather than turning to *Tinker v. Des Moines Independent Community School District*⁹⁶ (a hallmark case for circumstances involving student free speech), Justice Brennan identified *West Virginia Board of Education v. Barnette* (another, older case involving student free speech) as “instructive” for how “the Court held that students’ liberty of conscience could not be infringed in the name of ‘national unity’ or ‘patriotism.’”⁹⁷ Justice Brennan’s opinion seems to center around fear that school boards will use public school libraries as repositories that only hold books deemed politically palatable and orthodox. Rather than requiring libraries to affirmatively provide access to books, Justice Brennan focused on motivations for removing books from collections. This distinction matters because not every Justice conceived of collection selection as distinct from removal. Justice Brennan referenced *Barnette* again to summarize 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

92 *Id.* at 862.

93 *Id.* at 869 (opinion of Brennan, J.).

94 *Id.* at 868 (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966) (opinion of Fortas, J.)).

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

96 393 U.S. 503 (1969).

97 *Pico*, 457 U.S. at 865 (opinion of Brennan, J.) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 640–41 (1943)); *see Barnette*, 319 U.S. at 642 (“[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.”).

opinion.”⁹⁸ When the plurality approached the facts in *Pico*, they used *Barnette* for guideposts.

Other portions of the plurality opinion emphasized Justice Brennan’s fears of political suppression through the decisions of what books to allow in school libraries. Justice Brennan recognized the “significant discretion” that school boards have over public school library collections, but he went on to identify limits to 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 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*.⁹⁹

Justice Brennan had a legitimate basis for making this explicit. When describing his decision to support removing the 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.”¹⁰⁰ Pruning collections to ensure that they contained only books that aligned with particular political views grated against the Constitution.

Although 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.”¹⁰¹ Before getting to differences, one should note what Justice Blackmun agreed with the main plurality about—that removing books did not relate to curriculum.¹⁰² Similar to Justice Brennan, Justice Blackmun did not want to assert that schools must include all books in a school library, but he did not want school boards to remove books that they disagreed with politically. 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

98 *Pico*, 457 U.S. at 872 (plurality opinion) (quoting *Barnette*, 319 U.S. at 642).

99 *Id.* at 870–71.

100 *Id.* at 872 n.24 (quoting Joint Appendix at 21, *Bd. of Educ. v. Pico*, 457 U.S. 852 (1982) (No. 80-2043)); see also Chavez, *supra* note 82 (In an anniversary interview with Steven Pico, he stated that “[w]hat happened in my school district was political.”).

101 *Pico*, 475 U.S. at 876 (Blackmun, J., concurring in part and concurring in the judgment).

102 *Id.* at 878 n.1 (“[L]ibrary books on a shelf intrude not at all on the daily operation of a school.”).

perform all its functions ‘within the limits of the Bill of Rights’¹⁰³ Here, Justice Blackmun identified *Barnette* as a connecting thread between his opinion and Justice Brennan’s. Ultimately, public schools should prepare students to form “an informed citizenry”¹⁰⁴ and removing books undermines attempts to “teach[] children to respect the diversity of ideas that is fundamental to the American system.”¹⁰⁵ Between Justice Brennan and Justice Blackmun, *Barnette* provided the strongest connecting thread.

From there, readers arrive at the third opinion in the *Pico* saga, a brief one written by Justice White concurring in the judgment. Justice White believed that the case should go back to a lower court to resolve factual issues.¹⁰⁶ He noted that he would stop there and did not see why “[t]he plurality seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board.”¹⁰⁷ In declining to go further than the facts of the case required, Justice White’s opinion does not provide much guidance for lower court judges trying to determine how the First Amendment relates to their own situations.

C. *Pico Dissent*

When school boards want to remove books from their public school libraries, they often refer to the reasoning relied on in *Pico*’s three separate dissenting opinions. Chief Justice Burger wrote the main dissenting opinion in *Pico*, which Justice Powell, Justice Rehnquist, and Justice O’Connor joined. Primarily, the dissent differs from the plurality in its perception of access to books and libraries as spaces. Throughout his dissent, Chief Justice Burger never distinguished between a library and curriculum. Rather, the opinion emphasized how students can freely read the books and talk about the books—the only limitation comes from the fact that students cannot access the books in the school library.¹⁰⁸ Chief Justice Burger saw *Pico* as a case about accessing books rather than speech. Further, Chief Justice Burger harkened back to a Madisonian conception of free speech and 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.”¹⁰⁹ By

103 *Id.* at 877 (quoting *Barnette*, 319 U.S. at 637).

104 *Id.* at 876.

105 *Id.* at 880.

106 *Id.* at 883 (White, J., concurring in the judgment).

107 *Id.*

108 *See id.* at 886 (Burger, C.J., dissenting).

109 *Id.* at 888.

referencing the mission of a school, Chief Justice Burger seemed to lump libraries and curriculum together, fundamentally differing from the plurality and almost every subsequent lower court case.

In addition to signing onto Chief Justice Burger's dissent, Justice Powell wrote a separate dissent in *Pico* based on his understanding of the books at issue. The substance of Justice Powell's dissent centers around the lack of guidance in the plurality's opinion for lower courts.¹¹⁰ Overall, Justice Powell saw the plurality as too vague to provide meaningful guidance. Then, Justice Powell attached a long appendix containing the passages that prompted Island Trees School District to remove each book at issue.¹¹¹ Providing these excerpts made the conflict more concrete and countered fears about the bans being primarily political in nature.

In the final opinion of *Pico*, Justice Rehnquist wrote a dissent—joined by Chief Justice Burger and Justice Powell—that outlined disagreements with Justice Brennan's plurality opinion but identified potential circumstances that would alleviate his disagreement. Similar to Justice Powell, Justice Rehnquist disliked the hypothetical nature¹¹² and vagueness¹¹³ of Justice Brennan's opinion. Justice Rehnquist recognized “suppression of ideas” as a “catch[y] phrase” but noted that lower courts would struggle to apply such a standard.¹¹⁴ Rather than distinguish libraries from curriculum, Justice Rehnquist split types of libraries into different categories, considering how “[u]nlike university or public libraries, elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas.”¹¹⁵ This suggests that libraries and curriculum should get lumped together in the same category.

Beyond a fundamentally different understanding of libraries, Justice Rehnquist held a different view of what First Amendment rights were at issue in *Pico* and when the appropriate time to discuss First Amendment concerns would arise. According to Justice Rehnquist, 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. Not every educational denial of access to information casts a pall of orthodoxy over the classroom.”¹¹⁶ Overall, Justice Rehnquist did not completely discount the concerns

110 *Id.* at 895 (Powell, J., dissenting).

111 *Id.* at 897–903 app.

112 *Id.* at 904 (Rehnquist, J., dissenting).

113 *Id.* at 919.

114 See *id.* at 916, 919.

115 *Id.* at 915.

116 *Id.* at 917.

Justice Brennan has about spreading the pall of political orthodoxy over school libraries. Rather, Justice Rehnquist believed those concerns do not relate to what this case must address. Referencing the hypothetical from Justice Brennan's opinion about a "Democratic school board, motivated by party affiliation, order[ing] the removal of all books written by or in favor of Republicans . . . [or] an all-white school board, motivated by racial animus, decid[ing] to remove all books authored by blacks or advocating racial equality and integration,"¹¹⁷ Justice Rehnquist noted how he would "cheerfully concede all of this" being unconstitutional.¹¹⁸ The validity of those concerns did not require applying them when they are irrelevant. Justice Rehnquist noted that he "would save for another day—feeling quite confident that that day will not arrive—the extreme examples posed in Justice Brennan's opinion."¹¹⁹ As subsequent cases demonstrate, perhaps the days of extreme examples are steadily creeping toward the present.

D. *Post-Pico*

In the decades since the Supreme Court decided *Pico*, various Circuit Courts of Appeals reached different destinations in attempts to apply the muddled mess of opinions from the Supreme Court in *Pico*. Before many courts decided banned-book cases post-*Pico*, the Supreme Court clarified public schools' power over curriculum in *Hazelwood School District v. Kuhlmeier*.¹²⁰ *Hazelwood* "concern[ed] the extent to which educators may exercise editorial control over the contents of a high school newspaper produced as part of the school's journalism curriculum."¹²¹ Rather than a gray area beyond curriculum concerns, *Hazelwood* squarely addressed questions of curriculum. 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.¹²²

As this quote demonstrates, *Hazelwood* dealt directly with curriculum. Here, Dewey's duality of public school libraries, reiterated by

117 *Id.* at 870–71 (plurality opinion).

118 *Id.* at 907 (Rehnquist, J., dissenting).

119 *Id.* at 908.

120 484 U.S. 260, 262 (1988).

121 *Id.*

122 *Id.* at 271.

Professor Peltz, matters immensely.¹²³ As dual curricular and extracurricular spaces, public school libraries fall beyond *Hazelwood's* orbit.

After *Pico* and *Hazelwood*, when courts encounter situations where school boards have removed books from public school libraries, *Pico* generally receives more deference than *Hazelwood*. Lower courts do not treat book removals as curricular decisions in the vein of *Hazelwood*, nor do they treat removals as matters of expression that would involve *Tinker*.¹²⁴ Instead, federal courts almost always try to cobble together some test from the *Pico* plurality. In trying to apply the *Pico* plurality, circuit courts have demonstrated the shortcomings of the decision.

Overall, one of the most blatant shortcomings of *Pico* has come from the difficulties it creates from an evidentiary perspective. Using Justice Brennan's plurality opinion from *Pico* as a guide, lower courts must consider the motivation behind a school board's decision to ban a book. Parties struggle to show the motivation behind a school board's decision to remove a book from a library's collection. With insufficient records to show evidence of a particular motive, an appellate court cannot determine the constitutionality of a school board's decision under *Pico*. A Fifth Circuit decision regarding the removal of *Voodoo & Hoodoo* from a public school library demonstrated this dilemma.¹²⁵ Although a district court initially granted summary judgment in favor of the school board, the appellate court remanded the case to develop the record as the court 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."¹²⁶ Likely, other parties have struggled to assemble adequate evidence about the factors motivating school board members. Although the Fifth Circuit stayed

123 See Peltz, *supra* note 69, at 158.

124 See *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 999 (W.D. Ark. 2003) ("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.'" (quoting *Pico*, 457 U.S. at 853 (plurality opinion))); *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)).

125 *Campbell*, 64 F.3d at 189.

126 *Id.* at 191.

tightly within the bounds of *Pico*, other courts have gone further and supplemented *Pico* with their own tests.

When faced with the evidentiary deficiencies of the *Pico* plurality, the Court of Appeals for the Eleventh Circuit developed its own factual inaccuracy test to supplement *Pico*'s motivation evaluation. *ACLU of Florida v. Miami-Dade County School Board* revolved around a children's book about Cuba, which some parents wanted removed for its allegedly inaccurate portrayal of life in Cuba.¹²⁷ One line in particular caused most of the outcry against the book: "People in Cuba eat, work, and go to school like you do."¹²⁸ Parents and school board members believed that this fraudulently omitted difficulties of life in Cuba. Five of the six members who voted for removing the book justified their decision because of inaccuracies in the book¹²⁹ with the ultimate reason boiling down to how "[l]ife in Cuba is not like life in the United States."¹³⁰ While factual inaccuracies might initially make sense as a justification to take a book out of circulation, factual inaccuracies easily serve as a pretext for political motivations to ban books.

Before evaluating the motivation of the Miami-Dade School Board's decision to remove *Vamos a Cuba*, the Eleventh Circuit noted that it lacked a binding precedent for its decision. First, the court observed that "*Pico* is a non-decision so far as precedent is concerned. It establishes no standard."¹³¹ Shortly thereafter, the court noted that "[u]nder the *Pico* standard we are applying, the Board did not act based on an unconstitutional motive."¹³² Unfortunately, concerns about "factual inaccuracy" opened the door for minor inaccuracies to prompt removal.¹³³ The majority opinion seems unclear about whether it applied a standard from *Pico*. In contrast, Judge Wilson's dissenting opinion in *Miami-Dade* more closely aligns with the *Pico* plurality. As Judge Wilson identified, the Miami-Dade School Board

127 557 F.3d 1177, 1183–84 (11th Cir. 2009).

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

129 *Id.* at 1209.

130 *Id.* at 1214.

131 *Id.* at 1200.

132 *Id.* at 1207.

133 *Id.* at 1234, 1236 (Wilson, J., dissenting) ("Although school boards are vested with wide discretion to decide what books occupy its library shelves, I do not believe that the First Amendment permits a school board to ban a book for the purpose of suppressing the viewpoints expressed in the book, when the educational content of the book is otherwise innocuous. *Vamos a Cuba*, which is simply a part of an apolitical, superficial geography series, is only 26-sentences in length. I attach, in its entirety, the text as an Appendix. 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.").

“impos[ed] . . . what shall be the orthodox view of Cuba—the First Amendment does not permit that one perspective to officially dominate the discourse.”¹³⁴ Here, Judge Wilson focused on how *Vamos a Cuba* was meant for kindergarteners. By looking at expert testimony from educators, specific features of the book, such as the discussion of cars in Cuba, is not an omission so much as an age-appropriate way to describe vehicles there.¹³⁵ Minor discrepancies, relative to the text as a whole, were used to remove the entire book. Judge Wilson’s dissent cautioned that “[t]he sanctioned banning of a simple book like this would be logically supported by a finding that age-appropriate, politically neutral texts are rendered ‘inaccurate’ by their omission of information that would express a particular political viewpoint.”¹³⁶ Right now, it appears that the factual inaccuracy test only applies to nonfiction books. What would happen to a memoir getting challenged in Florida? Would the test applied in the Eleventh Circuit allow a book to be banned there that could not constitutionally get removed in other circuit courts? Throughout the next few months as book banning continues, students and parents will likely find out.

Rather than risk children losing access to books under uncertain and unstable tests, courts can use portions of *Pico*’s plurality, the *Pico* dissent, and other free speech cases to determine what the right decision should be in situations where book banning appears to stem from partisan policies. Although *Pico* lacks a majority opinion, drawing upon *West Virginia Board of Education v. Barnette* and *Brown v. Entertainment Merchants Ass’n* could help ensure that courts recognize the rights of students in public school libraries.

III. PROPOSING A POST-*PICO* FRAMEWORK

A. *Post-Pico Procedure and Precedent*

As book bans increase across the United States, some challenges may soon end up in court. Unfortunately, *Board of Education v. Pico*’s pluralities do not provide adequate guidance. Instead of constructing something out of this amorphous mess of opinions, courts can draw upon other First Amendment precedents involving students and children from *West Virginia Board of Education v. Barnette* and *Brown v. Entertainment Merchants Ass’n* to appropriately respond to attempts to remove books from public school libraries.¹³⁷

134 *Id.* at 1238, 1249.

135 *Id.* at 1249.

136 *Id.* at 1250.

137 *See infra* Section III.B.

Despite the uptick in attempts to ban books, it will take time for a case to get to the Supreme Court. Not all book bans make it to court at all. Even when someone files a lawsuit about a book ban, the case often results in a settlement. Sometimes settlements occur when students graduate and therefore lose standing.¹³⁸ Alternatively, one party will lose the desire to litigate. School districts often want to end lawsuits because of limited resources or an aversion to the bad press that book bans attract.¹³⁹ If a lawsuit stays in court, determining which rules apply will require creativity. Some authors have suggested abandoning *Pico*, either for something more explicitly akin to a *Tinker* test¹⁴⁰ or something like substantial truth in libel lawsuits.¹⁴¹ Although *Pico* has flaws, for politicized cases, it could have strength when combined with precedents from *Barnette* and *Brown*.

Before consulting cases that do not directly address book removals, courts should turn to *Pico* to see how Justice Rehnquist's dissent concedes potential agreement with the plurality in highly politicized circumstances. Justice Brennan's main plurality opinion described a hypothetical situation in which

[i]f 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 board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration.¹⁴²

Without additional facts, the Court could not determine the extent to which politics influenced the decision to remove the challenged books from Island Trees School District in *Pico*. Recognizing the risk of political motivations tainting public school library collections, Justice Rehnquist noted how he would "cheerfully concede all of this" but did not think such circumstances existed in *Pico*.¹⁴³ Beyond noting that he did not believe these motivations drove the school board in the case before the Court, Justice Rehnquist went on to express doubts that

138 See *Delcarpio v. St. Tammany Par. Sch. Bd.*, Nos. Civ. A. 92-3395 & Civ. A. 93-0531, 1996 WL 63076, at *1 (E.D. La., Feb. 13, 1996) (noting how leaving a school but staying in district does not always destroy standing).

139 The Island Trees School Board involved in the *Pico* litigation eventually voted to return the books to the school library. April Dawkins, *The Pico Case—35 Years Later*, OFF. FOR INTELL. FREEDOM AM. LIBR. ASS'N: INTELL. FREEDOM BLOG (Nov. 7, 2017), <https://www.oif.ala.org/oif/pico-case-thirty-five-years-later/> [https://perma.cc/5TCF-QPB7].

140 See Schroeder, *supra* note 31, at 387–88 (suggesting using *Tinker*).

141 See Morris, *supra* note 76, at 819–25.

142 *Bd. of Educ. v. Pico*, 457 U.S. 853, 870–71 (1982) (plurality opinion).

143 *Id.* at 907 (Rehnquist, J., dissenting).

such a situation would ever arise.¹⁴⁴ Nonetheless, events from the past few years demonstrate that American school boards have fallen short of Justice Rehnquist's expectations.

Recently, what Justice Rehnquist considered a remote risk has become reality. In 2020, an all-white school board in York, Pennsylvania, banned a four-page list of "Diversity Committee Resources."¹⁴⁵ While student and community activism led to the reversal of those removals,¹⁴⁶ a situation like this making it to court is not beyond the realm of possibility. Further, stances about including books that discuss race and sexuality in school libraries sharply reflect party lines. While recent efforts in places like Texas,¹⁴⁷ Oklahoma,¹⁴⁸ and Tennessee¹⁴⁹ have come from conservative groups, people could challenge books from multiple points on the political spectrum. An opinion piece published in a Florida newspaper suggested that proposed criteria to remove books from public school libraries would require removing any copies of the Bible.¹⁵⁰ Book banning that stems from political and ideological motivations has the most to gain from strengthening the *Pico* and *Miami-Dade* analysis with additional free-speech precedent.¹⁵¹ Even the *Pico* plurality acknowledged that grade-level academic appropriateness could provide a legitimate reason to remove a book from a collection.¹⁵² Both *Pico* and *Miami-Dade* involved situations in which school boards ignored recommendations regarding appropriateness from educators for the target audience of high school and elementary school students.¹⁵³ Given the concession in Justice Rehnquist's dissent in *Pico*, one might wonder whether the portions of the various concurring and

144 See *id.* at 908.

145 See Editorial, *Central York Unifies Behind Banned Books—but Stay Vigilant*, YORK DISPATCH (Jan. 24, 2022, 8:51 AM), <https://www.yorkdispatch.com/story/opinion/editorials/2021/10/01/central-york-unifies-behind-banned-books-but-stay-vigilant/5927356001/> [<https://perma.cc/R2V6-W369>]; *Diversity Committee Resources* (Aug. 25, 2020), <https://s3.documentcloud.org/documents/21052525/list-of-diversity-resources-banned-in-central-york-schools.pdf> [<https://perma.cc/4A7E-7HMX>].

146 See Editorial, *supra* note 145.

147 See Ellis, *supra* note 12.

148 See *Standridge Files Bills to Address Indoctrination in Oklahoma Schools*, *supra* note 11.

149 See Exum & Mangrum, *supra* note 18.

150 See Frank Cerabino, *Holier-Than-Thou Book Banners in Florida Ought to Start with the Bible*, PALM BEACH POST (Feb. 5, 2022, 4:40 PM), <https://www.palmbeachpost.com/story/news/columns/2022/02/05/florida-polk-county-public-school-library-book-banners-need-take-hard-look-bible-obscenity/6667340001/> [<https://perma.cc/4DGR-AS29>].

151 In the book-banning context, political and ideological motivations for removing books should be distinguished from lewd content. Discussions of lewd or obscene content are beyond the parameters of this paper.

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

153 *Id.* at 857–58; see also *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1184–85 (11th Cir. 2009).

dissenting opinions that the Justices agreed upon in *Pico* could create a precedent of some sort. *Marks v. United States* prevents that possibility with its statement that “[w]hen a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, ‘the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.’”¹⁵⁴ By using the word “concurred,” the Supreme Court indicated that lower courts cannot cobble together sentences from dissents and concurring opinions. Therefore, lower courts cannot splice together snippets of the various *Pico* opinions to form a precedent.

B. Turning to Other First Amendment Precedent

Although lower courts cannot forge a Franken-precedent from snippets of agreement among the various opinions from *Pico*, courts could use other First Amendment cases addressing the speech of children and students for guidance. In particular, *West Virginia State Board of Education v. Barnette*¹⁵⁵ and *Brown v. Entertainment Merchants Ass’n*¹⁵⁶ would provide the most relevant guidance. Neither case aligns perfectly with the facts surrounding a book removal from public school libraries, but they both have majority opinions,¹⁵⁷ which at least provide precedential guidance for lower courts.

1. Beginning with *Barnette*

When looking for other First Amendment cases that could guide lower court analysis when a public school library has removed books from its collection, *West Virginia State Board of Education v. Barnette* provides the best place to start. Justice Brennan, Justice Blackmun, and Justice Rehnquist all mention *Barnette* in their *Pico* opinions to support that public schools must avoid “prescrib[ing] what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁵⁸ *Barnette* addressed the constitutionality of a West Virginia statute that required students to salute the American flag while reciting the Pledge of Allegiance.¹⁵⁹ Students who failed to do so faced expulsion, and the lawsuit began when Jehovah’s Witness students got expelled from

154 430 U.S. 188, 193 (1977) (emphasis added) (quoting *Gregg v. Georgia*, 428 U.S. 153, 169 n.15 (1976) (opinion of Stewart, Powell & Stevens, JJ.)).

155 319 U.S. 624 (1943).

156 564 U.S. 786 (2011).

157 See *Barnette*, 319 U.S. at 625; *Brown*, 564 U.S. at 786.

158 See, e.g., *Bd. of Educ. v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion) (quoting *Barnette*, 319 U.S. at 642).

159 *Barnette*, 319 U.S. at 627–29.

school for not saluting the flag.¹⁶⁰ From these facts, key differences between *Barnette* and *Pico* emerge. *Barnette* involved a requirement and discipline, whereas *Pico* dealt with books that students could choose to read but did not need to read. Nonetheless, one can see overlap in how the Court chose to frame *Barnette* as presenting the question of “where the rights of one end and those of another begin.”¹⁶¹ While *Barnette* looked at the extent of student rights in the public school classroom, *Pico* considered the extent of student rights in the public school library.

Three key takeaways from *Barnette* thread through the three *Pico* opinions that mention the case: (1) “[f]ree public education, if faithful to the ideal of secular instruction and political neutrality, will not be partisan or enemy of any class, creed, party, or faction;”¹⁶² (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;”¹⁶³ and (3) “no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”¹⁶⁴ Since multiple opinions within *Pico* reference *Barnette*, these commonalities provide guidance for lower courts on how to apply free speech principles to public school libraries.

Despite the help *Barnette* provides, one cannot ignore the key differences between its facts and those present in book removal cases. First, *Barnette* places a strong emphasis on the compulsory nature of the expression at issue.¹⁶⁵ Further, the concept of “orthodoxy” seems more amorphous in the context of a public school library than the orthodoxy in requiring students to salute the American flag while reciting the Pledge of Allegiance. Removing a whole list of books about the Civil Rights Movement of the 1960s or books written by LGBTQ+ authors suggests that a school board wants to endorse an orthodox narrative about race or sexuality. Removing only a single book would make this comparison harder to draw. Nonetheless, numerous references to *Barnette* throughout *Pico* support the importance of including *Barnette* in any evaluation of banned books. Beyond *Barnette*, another case squarely addressed children’s choice: *Brown v. Entertainment Merchants Ass’n*.

160 *Id.* at 629–30.

161 *Id.* at 630.

162 *Id.* at 637.

163 *Id.*

164 *Id.* at 642.

165 *See id.* at 637–38.

2. Turning to *Brown v. Entertainment Merchants Ass'n*

Although *Brown v. Entertainment Merchants Ass'n*¹⁶⁶ did not involve students or schools, it did involve the First Amendment rights of children, so it can provide some guidance on how courts can think about the First Amendment in public school libraries. Similar to the conflict between parental rights and student speech rights at issue in book removal cases, *Brown* grappled with various perspectives about whose rights were at issue. *Brown* involved a California statute restricting the sale of violent video games to minors.¹⁶⁷ None of the Supreme Court opinions limited their analysis to the rights of the parties in the case: California's Attorney General and a video game industry organization. Justice Scalia's majority opinion explicitly took issue with how the statute "abridge[d] the First Amendment rights of young people whose parents (and aunts and uncles) think violent video games are a harmless pastime."¹⁶⁸ By framing the issue like this, Justice Scalia expanded the case to also address the rights of the children themselves. Book banning cases can draw similar conclusions about children's rights.

Justice Thomas's dissenting opinion in *Brown* focused on the rights of parents rather than the rights of children, the video game industry, or the government. In his split from Justice Scalia, Justice Thomas discussed his belief that "the founding generation understood parents to have a right and duty to govern their children's growth."¹⁶⁹ Even though the case did not involve schools, Justice Thomas extended his analysis to mention how "[t]he concept of total parental control over children's lives extended into . . . schools" and "extended to the books they read."¹⁷⁰ Similar to the book-banning context, in which the decision to frame the issue as either free speech or parental rights indicates the ultimate outcome an individual wants, using either the free speech or parental rights approach in *Brown* led to different results.

Since Justice Scalia's free speech conception of the case carried the day in *Brown*, as it should in public school libraries, courts should pay special attention to Justice Scalia's comments on uncomfortable ideas. Perhaps the best parallel between public school libraries and the *Brown* opinion comes from the majority's discussion of shielding children from uncomfortable ideas. While the majority acknowledged that "[n]o doubt a State possesses legitimate power to protect children from harm . . . that does not include a free-floating power to restrict

166 564 U.S. 786, 788 (2011).

167 *Id.* at 789.

168 *Id.* at 805.

169 *Id.* at 828 (Thomas, J., dissenting).

170 *Id.* at 830–31.

the ideas to which children may be exposed.”¹⁷¹ Since restricting the ideas children get exposed to provides one common justification for removing books from public school libraries, this portion of *Brown* seems particularly important for informing the relevant First Amendment analysis in book-ban cases. Courts should not uphold book removals rooted in free-floating restrictions upon the ideas contained in books on the shelves of children’s public school libraries.

3. Picking Books and Buying Video Games

Even though *Brown* explicitly dealt with video games, book-ban cases can draw from the discussion of books that appear throughout the dissenting, concurring, and majority opinions. For example, Justice Breyer’s dissent suggested that video games can cause more harm for children than violent books would.¹⁷² Justice Alito’s concurring opinion mentioned “the prevalence of violent depictions in children’s literature”¹⁷³ and Justice Scalia’s majority opinion noted how “Grimm’s Fairy Tales, for example, are grim indeed.”¹⁷⁴ Beyond merely mentioning books, Justice Scalia provided another parallel in looking at how various forms of media receive blame when people express concerns about the morals of children or adolescents. As Justice Scalia laid out, “[i]n the 1800’s, [sic] dime novels depicting crime and ‘penny dreadfuls’ (named for their price and content) were blamed in some quarters for juvenile delinquency. When motion pictures came along, they became the villains instead.”¹⁷⁵ Rather than types of media, book banning often shifts the blame from older books to newer ones. Some current “classic” books formerly faced challenges. For example, in the 1950s, the State Librarian of Florida advocated for removing books such as *The Wizard of Oz* and *The Hardy Boys* for being “poorly written, untrue to life, sensational, foolishly sentimental and consequently unwholesome for the children in your community.”¹⁷⁶ In a few decades, the books at issue today may be revered in popular culture.

Parallels between stores selling video games and children checking out books from public school libraries are apparent, despite the differences. When looking at libraries as spaces, both court cases and the historical record support classifying libraries as separate from

171 *Id.* at 794–95 (majority opinion) (first citing *Ginsberg v. New York*, 390 U.S. 629, 640–41 (1968); and then citing *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

172 *See id.* at 851 (Breyer, J., dissenting).

173 *Id.* at 812 (Alito, J., concurring in the judgment).

174 *Id.* at 796 (majority opinion).

175 *Id.* at 797 (citing Brief of the CATO Institute as Amicus Curiae Supporting Respondents at 6–7, *Brown*, 564 U.S. 786 (No. 08-1448)).

176 Editorial, *For a Political West Point: Dorothy the Librarian*, LIFE, Feb. 16, 1959, at 47.

classrooms and their curriculum.¹⁷⁷ When considering a case about children selecting books in a public school library, courts can draw some guidance from how *Brown* frames children's choice among video games. In this situation, focusing on Justice Brennan's characterization of public school libraries as spaces with a "regime of voluntary inquiry" becomes even more important.¹⁷⁸ Librarians and judges have historically considered libraries as spaces where students are encouraged to pick their own books.¹⁷⁹ Once a book has arrived in a library, removing it eliminates a child's choice to check it out. Not every student will read every book in a public school library's collection. When courts address First Amendment library collection cases, they need to draw upon broader precedents than those that only involve *required* expression.

Implementing more rigorous protection for books in public school libraries does not mean that every book will always remain in a collection. Justice Blackmun's concurring opinion in *Pico* highlighted the importance of "sufficiently compelling reasons" for removing books from schools.¹⁸⁰ Similarly, Justice Scalia's majority opinion in *Brown* acknowledged that "[n]o doubt a State possesses legitimate power to protect children from harm."¹⁸¹ Those protections could allow removal of books outlining specific procedures for committing acts of violence. For example, someone could take issue with children having access to *The Anarchist Cookbook* and its directions about building bombs.¹⁸² If a copy of *The Anarchist Cookbook* somehow made it through a public school library's screening process and onto the shelves of a grade school, concern for limiting acts of violence could provide reason for removal. Most situations in which parents propose book bans do not approach that threshold of danger. Rather than risks of physical danger, most bans relate to ideas that parents dislike.

C. A Hypothetical to Highlight Potential Problems

Finding First Amendment guidance from other cases is not a pointless quest for precedent but instead provides a test for book

177 See *supra* subsection I.C.2.

178 See *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (opinion of Brennan, J.).

179 See Peltz, *supra* note 69, at 109, 118.

180 See *Pico*, 457 U.S. at 877 (plurality opinion).

181 *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794 (2011) (first citing *Ginsberg v. New York*, 390 U.S. 629, 640–41 (1968); and then citing *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

182 For a discussion about banning *The Anarchist Cookbook*, see Tony Thompson, *Ban My Bombers' Guide, Says Author*, GUARDIAN: THE OBSERVER (June 11, 2000, 6:31 PM), <https://www.theguardian.com/uk/2000/jun/11/booksnews.uksecurity/> [https://perma.cc/MZC7-2QTN].

challenges that can ensure more consistent outcomes and shape which books can stay in public school libraries. A hypothetical will make the potential differences between the current amorphous *Pico* standard and a proposed *Pico + Barnette + Brown* standard more concrete. Envision a potential book ban in Florida, where the case would get appealed to the Court of Appeals for the Eleventh Circuit. There, the Eleventh Circuit's *Miami-Dade* factual inaccuracy test, described in Section II.D. would supplement *Pico*.

Recent book-banning efforts in Florida make it seem likely that a situation resembling the facts in *Miami-Dade* could soon reappear. Over the past few months, book banning has increased in Florida.¹⁸³ People anticipated that book-banning efforts would pick up even more after Governor DeSantis's ban of Critical Race Theory through the "Stop W.O.K.E. Act."¹⁸⁴ Some of this anticipation may have contributed to a fake list of books banned in Florida that circulated Twitter during the summer of 2022.¹⁸⁵ Misinformation about banning books is unfortunate, because it distracts from the hundreds of individual books that have *actually* been challenged throughout Florida. What follows in this section is a hypothetical that does not reflect an actual instance of book banning in Florida. Instead, it draws upon elements of various book bans and the circumstances surrounding *Miami-Dade* to demonstrate the danger of continuing in a post-*Pico* world without drawing upon precedents from *Barnette* or *Brown*. To parallel the facts of *Miami-Dade* as closely as possible, imagine that parents voice concerns at a school board meeting about *Little Leaders: Bold Women in Black History*. Written and illustrated by Vashti Harrison, *Little Leaders: Bold Women in Black History* includes brief biographies paired with portrait illustrations for forty African American women who changed history in everything from science to literature to politics.¹⁸⁶ Similar to *Vamos a Cuba*, this book is part of a larger series. *Bold Women in Black History* might face challenges even if the other books in the series did not. Like *Vamos a Cuba*, the target audience for this book is children, so there might be some simplification for age-appropriateness that parallels the simplification of the history of Cuba in *Vamos a Cuba*.

183 See, e.g., *Superintendent's Decision*, *supra* note 10.

184 See Press Release, Florida Governor Ron DeSantis, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://www.flgov.com/2021/12/15/governor-desantis-announces-legislative-proposal-to-stop-w-o-k-e-activism-and-critical-race-theory-in-schools-and-corporations/> [https://perma.cc/MK5H-B46J].

185 See Ali Swenson, *Florida Didn't Ban 'To Kill a Mockingbird,' as Fake List Suggests*, AP NEWS (Aug. 22, 2022), <https://apnews.com/article/fact-check-florida-schools-to-kill-a-mockingbird-201081596097/> [https://perma.cc/Y8HL-ZTCL].

186 See VASHTI HARRISON, *LITTLE LEADERS: BOLD WOMEN IN BLACK HISTORY* 2-3 (2017) (depicting a biography and illustration of Phillis Wheatley).

If someone challenged *Little Leaders: Bold Women in Black History* and the challenge ended up in court, the removal would likely prevail under the current *Pico* + *Miami-Dade* test. First, the district court would likely classify this a library issue rather than curriculum. Then, the court would try to cobble together some guidance from the *Pico* plurality. Since *Little Leaders: Bold Women in Black History* is nonfiction, a district court in Florida would supplement *Pico* with the Court of Appeals for the Eleventh Circuit *Miami-Dade* factual inaccuracy test.

First, the court would want to try to understand the motivation for removing the book. Under *Miami-Dade*, removal would be permissible if motivated by omissions or factual inaccuracies. Based upon the flaws in *Vamos a Cuba*, any inaccuracies in *Bold Women in Black History* could be minor. In *Miami-Dade*, incomplete illustrations and statements like “[p]eople in Cuba eat, play and go to school like you” sufficed for removal.¹⁸⁷ Drawings with anachronistic clothing or simple sentences that do not provide comprehensive context could justify removal of *Bold Women in Black History*. Take for example the excerpt about Bessie Coleman on page twenty-four of *Bold Women in Black History*:

Bessie knew that one day she would leave her small town. In 1915, she moved to Chicago to live with her older brothers. Returning from World War I, they told her all about being in France and about how the women there could fly planes—unlike the women in America.¹⁸⁸

These short, simple sentences provide sufficient information for the target reading age of third to fifth graders. However, a quick Google search for “first woman pilot” brings up Blanche Scott, an American woman who taxied a plane in 1910.¹⁸⁹ Would this example of an American woman pilot refute the statement of fact in *Bold Women in Black History*? Under *Miami-Dade*, combining this flaw with others in the illustrations or text of the book could combine for enough to remove it. Thus, by carefully framing their complaints about the book, parents could perhaps characterize their Stop W.O.K.E. Act concerns as accuracy concerns to further their book banning efforts. Judge Wilson’s note that *Miami-Dade* could provide pretextual ways to remove books that school boards did not agree with politically seems prescient.

To prevent this pretextual use of *Miami-Dade*, the First Amendment analysis under *Pico* needs support from *Barnette* and *Brown*. First,

187 *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1206, 1212 n.11 (11th Cir. 2009) (quoting *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 439 F. Supp. 2d 1242, 1283 (2006)).

188 HARRISON, *supra* note 186, at 24.

189 See *Blanche Stuart Scott*, NAT’L WOMEN’S HALL OF FAME, <https://www.womenofthehall.org/inductee/blanche-stuart-scott/> [<https://perma.cc/D36T-Y4PD>].

challenging a book in relation to Critical Race Theory would likely fall within the *Pico* plurality and dissent concerns about race being an unacceptable motivating factor for a ban. Further, under *Barnette*, removing books that do not align with a particular historical interpretation could impermissibly promote a particular orthodoxy of a national narrative that leaves out those perspectives. Overall, the strongest support for keeping a book like *Little Leaders: Bold Women in Black History* in a public school library collection comes from *Brown*'s emphasis on exposing children to a variety of ideas. Removing the book "abridges the First Amendment rights of young people whose parents" and other guardians approve of its content.¹⁹⁰ Perhaps attorneys could frame Governor DeSantis's goals of protecting children from ideas that allegedly encourage them "to hate our country or to hate each other" as an interest parents want to pursue.¹⁹¹ Under *Brown*, no moral judgment of the governor's goal is necessary to determine its impermissibility. The "legitimate power to protect children from harm . . . does not include a free-floating power to restrict the ideas to which children may be exposed."¹⁹² When children choose to read a book, courts cannot treat the situation as curricular. Until the Supreme Court decides a case more clearly on point, relying on *Brown* may provide the best avenue for determining the boundaries of free speech in public school libraries.

CONCLUSION

Whereas the example about *Bold Women in Black History* is purely hypothetical, tension over a selection of books purchased from Essential Voices Classroom Libraries in Duval County, Florida, could present a chance to reconsider *Miami-Dade*.¹⁹³ Similar to *Vamos a Cuba*, the primary audience for books from this reading list consists of elementary school students. Through a Freedom of Information Act request, the Florida Freedom to Read Project obtained a list of the books purchased but not placed into circulation by the Duval County Public Schools.¹⁹⁴ Essential Voices collections aim to "[e]ngage all . . . students in independent reading" by helping students "see themselves in what they read, developing an understanding and appreciation of

190 *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 805 (2011).

191 *See* Press Release, *supra* note 184.

192 *Brown*, 564 U.S. at 794–95 (first citing *Ginsberg v. New York*, 390 U.S. 629, 640–41 (1968)); and then citing *Prince v. Massachusetts*, 321 U.S. 158, 165 (1944)).

193 Kelly Jensen, *Duval County Public Schools Bought Dozens of New Books. They're Sitting Indefinitely in Storage*, BOOK RIOT (Aug. 25, 2022), <https://bookriot.com/duval-county-public-schools-book-removal/> [https://perma.cc/J6XB-96YP].

194 *Id.*

themselves as well as others around them.”¹⁹⁵ Each grade level’s list includes fiction and nonfiction books, such as *Dim Sum for Everyone!* by Grace Lin for first graders and *Women Who Broke the Rules: Sonia Sotomayor* by Kathleen Krull for fourth graders.¹⁹⁶ Similar to *Vamos a Cuba* as part of a geography series, the biography of Sonia Sotomayor is one book within the *Women who Broke the Rules* series, all of which are intended for elementary school students. A few differences in fact might make it difficult to completely translate *Pico* to the Justice Sotomayor biography. For example, the books were intended for public school classroom libraries rather than public school libraries, and the books were left in boxes and never unpacked rather than sitting on shelves and subsequently removed. Although there is not a case pending for the Duval County books, it will likely be only a matter of time before an actual fact pattern arises to give the Court of Appeals for the Eleventh Circuit the chance to reevaluate its application of *Miami-Dade* and perhaps instead supplement *Pico* with concepts from *Barnette* and *Brown*.

With the uptick in book bans across the United States, people will continue using a legal framework as they discuss the issue. Based upon definitions from the ALA, everyday use, and the explanation in Judge Charles Wilson’s *Miami-Dade* dissent, using any of the terms “ban,” “remove,” and “challenge” is appropriate. Regardless of the terms that parties use to describe the phenomenon, banning books should be framed as a First Amendment issue involving free speech rather than a parental rights issue. Once courts frame book bans as free speech issues, they should consider public school libraries as distinct from public school classrooms and ensure that book-ban cases do not receive the same treatment as curricular cases. Then, courts should distinguish between affirmatively requiring libraries to obtain books versus removing books. After public school librarians have deemed books educationally appropriate for the collection, any challenges must have a legitimate basis. To make this determination, lower courts should primarily rely upon the *Pico* plurality, which most directly addresses the issue of banning books. Since *Pico* leaves lower courts scrambling to articulate a clear test, lower courts should also draw upon other free speech precedents. Like the Justices in *Pico*, other federal judges can ensure that public schools honor *Barnette* and avoid creating a single orthodox national narrative within public school libraries. Further, lower courts can consider *Brown* to center the cases around children’s

195 *Essential Voices Classroom Libraries*, PERFECTION LEARNING, <https://www.perfection-learning.com/elementary/elementary-class-libr/essential-voices.html> [<https://perma.cc/3XLQ-DDYD>].

196 See Jensen, *supra* note 193.

rights. As the hypotheticals suggest, continuing to rely on only *Pico* will result in inconsistencies and uncertainty for public schools across the country.

As news reports indicate, attempts to ban books can lead to an outpouring of access. Anyone from age thirteen to twenty-two can apply for an eCard to access eBook versions of banned books through the Brooklyn Public Library's Books Unbanned program.¹⁹⁷ For physical books, NPR noted how shortly after a school board in Tennessee banned the graphic novel *Maus*, the town became inundated with copies of the book.¹⁹⁸ Similar support does not always appear, especially for beginning authors whose work gets banned and does not garner national attention.¹⁹⁹ Decline in local news coverage throughout the United States means that many book bans go unreported and unnoticed.²⁰⁰ Students should not need to rely on the court of public opinion to ensure access to books that were once in their public school libraries. Combining the free speech precedents from *Pico*, *Barnette*, and *Brown* will ensure that United States federal courts effectively protect student free speech rights. As Judge Wilson's dissent in *Miami-Dade* articulated, "[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."²⁰¹ How courts apply the First Amendment to banned book disputes in the present will shape how students understand and use the First Amendment in the future.

197 *Books Unbanned*, BROOKLYN PUB. LIBR., <https://www.bklynlibrary.org/books-unbanned/> [https://perma.cc/BVE4-2XD9].

198 See Rachel Treisman, *Why a School Board's Ban on 'Maus' May Put the Book in the Hands of More Readers*, NPR (Jan. 31, 2022, 12:19 PM), <https://www.npr.org/2022/01/31/1076970866/maus-banned-tennessee-school-board/> [https://perma.cc/G3CN-XVFL].

199 Connor Goodwin, *The Banned Books You Haven't Heard About*, THE ATLANTIC (Sept. 20, 2022), <https://www.theatlantic.com/books/archive/2022/09/banned-books-increased-sales/671479/> [https://perma.cc/K3T2-B4D8].

200 *Id.*

201 *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1236 (11th Cir. 2009) (Wilson, J., dissenting).