

OBSCENITY AND BOOK BANNING: PROPERLY DEFINING
“PERVASIVELY VULGAR”

*May Lonergan**

INTRODUCTION

Across the United States, parents, activists, school board officials, and lawmakers are attempting to limit the books available to children in bookstores, schools, and libraries at an alarming pace.¹ According to the American Library Association’s Office for Intellectual Freedom (OIF), which tracks book challenges and announces the “Top 10 Most Challenged Books” list each year, a book “challenge” constitutes an effort to eliminate or limit access to materials due to objections raised by an individual or group, while a book “ban” involves the actual removal of such materials.² Further, “challenges” extend beyond mere expressions of viewpoints, as they aim to restrict access by removing materials from the curriculum or library.³ The OIF found that most of the challenges take place in school libraries, and that six out of the ten most challenged books include LGBTQIA+ or implicit race issues.⁴ Further, the OIF reported that during a period of three months at the end of 2022, the number of reported cases already doubled the number of reports in all of 2021.⁵

In late September of 2021, a group of protestors in Wyoming filed criminal complaints with local prosecutors, seeking to press charges against a public library for stocking books they claim are

* George Mason University Antonin Scalia Law School, J.D. expected, 2024.

¹ Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (June 22, 2023), <https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html>.

² See *About Banned & Challenged Books*, ALA OFFICE FOR INTELL. FREEDOM, <https://www.ala.org/advocacy/bbooks/aboutbannedbooks> (last visited Nov. 4, 2023).

³ See *id.*

⁴ See *Top 10 Most Challenged Books Lists*, ALA OFFICE FOR INTELL. FREEDOM, <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10/archive> (last visited Dec. 14, 2022).

⁵ See *American Library Association Reports Record Number of Demands to Censor Library Books and Materials in 2022*, AM. LIBR. ASS’N, <https://www.ala.org/news/press-releases/2023/03/record-book-bans-2022> (last visited Oct. 30, 2023).

obscene in sections for children and teenagers.⁶ In October in North Carolina, Wake County pursued the removal of three books and the lieutenant governor for the state deemed the books “pornographic” and “inappropriate” for public school libraries.⁷ On November 1, 2021, Texas’s governor wrote the state’s association of school boards to “ensure that no child is exposed to pornography or other inappropriate content in a Texas public school.”⁸ About a week later, South Carolina’s governor wrote the South Carolina Superintendent of Education to launch the investigation of a book that contained “sexually explicit and obscene images or depictions.”⁹

By April 2022, Tennessee passed a controversial library bill that gives a politically appointed commission power to issue bans of challenged books in school libraries across the state.¹⁰ The act has received a variety of criticism. For example, the Tennessee Association of School Librarians stated that the Conference Committee Report “undermines Governor Lee’s Age Appropriate Materials Act, which was designed to maintain local control over book selection and reconsideration.”¹¹ In May 2022, Virginian petitioners sought to remove two books with sexual content from Barnes & Noble and independent booksellers.¹² Although a Virginia judge held that there was “probable cause that the books were obscene for unrestricted viewing by minors,”

⁶ David Sye, *Special Prosecutor Rejects Criminal Complaint Filed Against Campbell County Public Library*, ALA OFFICE FOR INTELL. FREEDOM (Dec. 14, 2021), <https://www.oif.ala.org/campbell-county-public-library-avoids-criminal-charges-over-lgbtqia-materials/#:~:text=Special%20Prosecutor%20Rejects%20Criminal%20Complaint%20Filed%20Against%20Campbell%20County%20Public%20Library,-December%2014%2C%202021&text=In%20late%20September%2C%20the%20Campbell,the%20Campbell%20County%20Public%20Library>.

⁷ See Anisa Khalifa, *How a National Debate Over Book Censorship is Playing Out in North Carolina*, WUNC 91.5 N.C. PUBLIC RADIO (Feb. 1, 2022, 5:20 PM), <https://www.wunc.org/2022-02-01/how-a-national-debate-over-book-censorship-is-playing-out-in-north-carolina>.

⁸ Letter from Greg Abbott, Gov., Tex., to Dan Troxell, Exec. Dir., Tex. Ass’n of Sch. Bds. (Nov. 1, 2021), <https://gov.texas.gov/uploads/files/press/TroxellDan.pdf>.

⁹ See S.C. Governor Wants to Investigate Obscenity in School Libraries After Concerns About Book from Fort Mill Parents, WBTV (Nov. 10, 2021, 5:20 PM), <https://www.wbvtv.com/2021/11/10/sc-governor-wants-investigate-obscenity-school-libraries-after-concerns-parents-about-book-fort-mill/>.

¹⁰ See Melissa Brown, *Tennessee Passes Controversial Library Bill Giving Textbook Panel Final Say Over Challenged Books*, THE TENNESSEAN (Apr. 28, 2022, 1:55 PM), <https://www.tennessean.com/story/news/politics/2022/04/28/tennessee-republicans-pass-school-library-bill-after-book-burning-comment/9570712002/>.

¹¹ See *id.*

¹² See Amanda Holpuch, *Virginia Judge Dismisses Case That Sought to Limit Book Sales*, N.Y. TIMES (Aug. 31, 2022), <https://www.nytimes.com/2022/08/31/us/virginia-obscenity-book-ban.html>;

the finding was vacated in August 2022 because the judge “did not have the authority to determine whether the books were obscene for minors.”¹³

This Comment will examine the 1982 Supreme Court case *Board of Education v. Pico*, where a plurality of judges determined that public schools may ban books that are “pervasively vulgar” or lack “educational suitability,” if their decision is not based on “narrowly partisan or political” grounds.¹⁴ The Supreme Court did not define these terms,¹⁵ and this Comment argues that the ambiguity left a variety of loopholes for school boards to interpret which books may be removed without violating a student’s First Amendment rights. This Comment argues that amidst a historic amount of book banning, courts should reexamine the *Pico* test. To create a clearer standard for book removal, courts should combine the *Pico* motivation test with the *Miller* test for obscenity, in which courts look at three factors to define the constitutional boundaries of obscene speech.¹⁶ Part I of the Background Section will examine the First Amendment and its limitations, such as the history of the obscenity doctrine. Part I will also examine the modern *Miller* test and how it impacts post-*Miller* obscenity cases. Then, Part II of the Background Section will shift away from the obscenity doctrine, by providing the historical background of book removal cases before the U.S. Supreme Court created the *Pico* test and contrasting various circuit decisions after *Pico*. Part I of the Analysis Section will discuss the *Pico* test’s effect on more recent book-banning cases. Finally, Part II of the Analysis Section will propose a potential solution that combines the *Miller* and *Pico* tests to focus on the obscene nature of the literature, thus creating a stricter standard for book removals.

see also In re: A Court of Mist and Fury, No. CL22-1984 (Va. Cir. Ct. May 18, 2022); *see also* In re: Gender Queer, No. CL22-1985 (Va. Cir. Ct. May 18, 2022).

¹³ *See id.*

¹⁴ *See* Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870–72 (1982).

¹⁵ *See id.*

¹⁶ *See* Miller v. California, 413 U.S. 15, 15 (1973) (internal citations omitted) (“(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest, (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law, and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”) (creating clearer guidelines for the court’s evaluation of what is considered “pervasively vulgar”).

BACKGROUND

I. THE FIRST AMENDMENT AND ITS OBSCENITY LIMITATION

The First Amendment of the Constitution protects several rights of individuals such as the right to speak, publish, read, practice religion, and petition the government.¹⁷ As part of this protection, the First Amendment establishes a framework that outlines the responsibilities of the government regarding free expression, thus “prevent[ing] public institutions from compromising individuals’ First Amendment freedoms.”¹⁸ Under certain circumstances, however, the government may place censorship restrictions on “the time, place, or manner” of expression.¹⁹ For example, the First Amendment may not always protect sexually explicit material, but censorship in compliance with the First Amendment “must rest squarely on an appraisal of the content of material” rather than a disagreement with the “social, political, or philosophical message” of the expression.²⁰ Further, “obscenity” is not protected under the First Amendment, and violations of federal obscenity laws are criminal offenses.²¹ The historical evolution of obscenity law is important to understand the limitations of the First Amendment.

A. *The History of Obscenity Law*

Throughout history, obscenity law has been a subject of debate and evolution within the context of the First Amendment. This legal

¹⁷ U.S. CONST. amend. I. (“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”).

¹⁸ *First Amendment and Censorship*, AM. LIBR. ASS’N (June 13, 2008), <http://www.ala.org/advocacy/intfreedom/censorship> (last visited Dec. 14, 2022).

¹⁹ *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93–94, 97 (1977) (determining that a township ordinance prohibiting the posting of real estate “For Sale” and “Sold” signs violated the First Amendment. Although the ordinance restricted only one method of communication, the court recognized that it left only more difficult and costly alternative communication channels open).

²⁰ *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 68–71 (1976) (concluding that sexual expression in adult films was not entitled to as much protection as political speech).

²¹ *Obscenity*, U.S. DEP’T OF JUST. (Mar. 29, 2021), <https://www.justice.gov/criminal-ceos/obscenity#:~:text=Obscenity%20is%20not%20protected%20under,if%20given%20material%20is%20obscene>.

framework seeks to strike a balance between the protection of free speech and the regulation of materials deemed obscene or offensive. Obscenity law has witnessed significant milestones, from its early origins in British case law to landmark decisions by the U.S. Supreme Court. These cases not only set significant legal precedents but also triggered extensive discussions regarding the definition of obscenity, societal norms, and the scope of constitutional safeguards.

1. *Regina v. Hicklin* (1869)

Early obscenity law in the United States began with the British case *Regina v. Hicklin*.²² In this case, following legislation authorizing the government to seize and destroy “obscene” materials, police officers presented the court with anti-Catholic pamphlets.²³ Portions of the defendant’s pamphlets included sexually explicit conversations between priests and female parishioners in confession.²⁴ Chief Justice Cockburn concluded that the pamphlets were considered “obscene” because portions of the pamphlets “would suggest to the minds of the young . . . thoughts of a most impure and libidinous character.”²⁵ Therefore, *Hicklin* provided the following test for obscenity: “whether the tendency of the matter . . . is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”²⁶

2. *Roth v. United States* (1957)

In 1957, the U.S. Supreme Court confronted the obscenity doctrine in *Roth v. United States*.²⁷ The Court, in an opinion drafted by Justice Brennan, determined whether sexually oriented expression is “obscene” and not protected by the First Amendment.²⁸ The defendant

²² See P. Heath Brockwell, Comment, *Grappling with Miller v. California: The Search for an Alternative Approach to Regulating Obscenity*, 24 Cumb. L. Rev. 131, 131 (1993) (explaining that American courts adopted the original obscenity test from *Regina v. Hicklin*, which assessed obscenity based on its potential to corrupt susceptible individuals’ minds)

²³ See *Regina v. Hicklin*, L.R. 3 Q.B. 360, 362–63 (1868).

²⁴ See *id.* at 362–63, 371.

²⁵ See *id.* at 371.

²⁶ *Id.*

²⁷ See *Roth v. United States*, 354 U.S. 476, 479 (1957).

²⁸ See *id.*

operated a business in the publication and sale of books, photographs, and magazines.²⁹ The District Court for the Southern District of New York had found the defendant guilty of mailing obscene circulars and an obscene book in violation of the federal obscenity statute.³⁰ On appeal, the Supreme Court determined that “obscene speech,” speech that predominantly appeals to the average person’s prurient interest, is “utterly without redeeming social importance” and not protected under the First Amendment.³¹

In *Roth*, the Court also examined the *Hicklin* test and held that it was “unconstitutionally restrictive” on the freedoms of speech and press.³² The Court determined that judging obscenity “by the effect of isolated passages upon the most susceptible persons” may also encompass materials “legitimately treating with sex.”³³ Instead, the Court agreed with the trial judge, who had instructed the jury to consider “whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest.”³⁴ Therefore, the Court differentiated the *Roth* test from the obscenity criteria in *Hicklin* by focusing on “the dominant theme” of the material, rather than isolated passages.³⁵ Further, the *Roth* test focused on the average person in the community, rather than the most susceptible person.³⁶

3. *Memoirs v. Massachusetts* (1966)

In *Memoirs v. Massachusetts*, the Supreme Court revisited the *Roth* test and, in a complicated plurality opinion, held that the book *John Cleland’s Memoirs of a Woman of Pleasure* was not obscene.³⁷ The Court determined that three elements must be present to be considered obscene:

²⁹ *Id.* at 480.

³⁰ *Id.*

³¹ *Id.* at 484–85.

³² *Id.* at 489.

³³ *Roth v. United States*, 354 U.S. 476, 489 (1957).

³⁴ *Id.* at 89–90.

³⁵ *See id.*

³⁶ *Id.*

³⁷ *A Book Named “John Cleland’s Memoirs of a Woman of Pleasure” v. Att’y Gen. of Com. of Mass.*, 383 U.S. 413, 419–21 (1966) (plurality opinion).

(a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.³⁸

Specifically, a three-member plurality led by Justice Brennan found that the *Roth* majority's reference to the material being "utterly without redeeming social importance" was in fact a requirement for obscenity.³⁹ Sexual expression with even minimal social value could not be deemed obscene because "the social value of the book can neither be weighed against nor canceled by its prurient appeal or patent offensiveness."⁴⁰ Justice Douglas concurred, arguing that "the First Amendment does not permit the censorship of expression not brigaded with illegal action"⁴¹ and judges are "not competent to render a judgment" as to literary worth.⁴²

Justice Stewart agreed with the *Roth* test, adding that "patent indecency" is a "further essential element" for speech to lose First Amendment protection as obscenity.⁴³ Justice Black, although concurring that the book was protected under the First Amendment, found the plurality's obscenity test to be "vague and meaningless."⁴⁴ Justice Black explained that "[s]ex is a fact of life" and the First Amendment protects even obscene expression.⁴⁵

In his dissent, Justice Harlan argued that federal suppression of obscenity should be limited to "hard-core pornography," which is "prurient material that is patently offensive or whose indecency is self-demonstrating."⁴⁶ Justice Harlan added that the States are better

³⁸ *Id.* at 418.

³⁹ *See id.* at 419.

⁴⁰ *Id.*

⁴¹ *Id.* at 426 (Douglas, J., concurring in the judgment).

⁴² *Id.* at 427.

⁴³ *Memoirs*, 383 U.S. at 421 (Stewart, J., concurring in the judgment for the reasons stated in his dissenting opinions in *Ginzburg v. United States*, 383 U.S. 463, 497–501 (1966), and *Mishkin v. New York*, 383 U.S. 502, 518 (1966)); *Ginzburg*, 383 U.S. at 499 (Stewart, J., dissenting).

⁴⁴ *Memoirs*, 383 U.S. at 421 (Black, J., concurring in the judgment for the reasons stated in his dissenting opinions in *Ginzburg*, 383 U.S. at 476–82, and *Mishkin*, 383 U.S. at 515–18); *Ginzburg*, 383 U.S. at 478 (Black, J., dissenting).

⁴⁵ *Memoirs*, 383 U.S. at 421 (Black, J., concurring in the judgment for the reasons stated in his dissenting opinions in *Ginzburg*, 383 U.S. at 476–82, and *Mishkin*, 383 U.S. at 515–18); *Ginzburg*, 383 U.S. at 481 (Black, J., dissenting).

⁴⁶ *Memoirs*, 383 U.S. at 457 (Harlan, J., dissenting).

judges of societal value, and could define proscribed obscenity in a flexible way if their definitions were “not wholly out of step with current American standards.”⁴⁷ Justice Clark also disagreed with the definition of obscenity and its emphasis on societal value in *Roth*⁴⁸ and similarly, Justice White contended that if “social importance” is an important factor in defining obscenity, then “obscene material, however far beyond customary limits of candor, is immune if it has any literary style.”⁴⁹ Justice White further argued that “social importance” was “relevant only to determining the predominant prurient interest of the material.”⁵⁰ This disagreement within the Court about the role of society’s values left this issue unresolved and ripe for further litigation.

4. *Miller v. California* (1973)

Ultimately, the Court would overturn the *Roth/Memoirs* test in *Miller v. California* in two fundamental ways: removing the “utterly without redeeming social value” prong for a more nuanced valuation, and by narrowing the standards to gauge offensiveness from a national understanding to a local community perspective.⁵¹ In *Miller*, the appellant sent brochures to a restaurant that advertised books with pictures explicitly depicting men and women engaging in sexual activities, “with genitals often prominently displayed.”⁵² Following the incident, writing for the majority, Justice Burger established a three-part test for juries in obscenity cases:

“(a) whether ‘the average person, applying contemporary community standards’ would find that the work, taken as a whole, appeals to the prurient interest; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.”⁵³

First, the Court applied community standards because “[p]eople in different States vary in their tastes and attitudes, and this diversity

⁴⁷ *Id.* at 458.

⁴⁸ *See id.* at 441 (Clark, J., dissenting).

⁴⁹ *Id.* at 461 (White, J., dissenting).

⁵⁰ *Id.* at 462.

⁵¹ *Miller v. California*, 413 U.S. 15, 36–37 (1973).

⁵² *Id.* at 18.

⁵³ *Id.* at 24–25 (citations omitted).

is not to be strangled by the absolutism of imposed uniformity.”⁵⁴ For example, California defines “obscene matter” as matters whose predominant, contemporary appeal to the average person “is to prurient interest, i.e., a shameful or morbid interest in nudity, sex, or excretion”⁵⁵

Second, the Court provided a couple of examples of what a state statute could define for regulation under part (b) of the *Miller* three-part test: “[p]atently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated” or “[p]atently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibition of the genitals.”⁵⁶

Third, the Court stressed that to merit First Amendment protection, “at a minimum, prurient, patently offensive depiction or description of sexual conduct must have serious literary, artistic, political, or scientific value.”⁵⁷ For example, books for educational purposes, such as “medical books for the education of physicians and related personnel,” may contain graphic illustrations and descriptions of human anatomy.⁵⁸ Although some readers might find those medical passages both pruriently appealing and patently offensive, such textbooks are protected by the First Amendment.⁵⁹

B. *Interpreting The Miller Test*

Moving forward in the field of obscenity law and the First Amendment, the Court uses the *Miller* test to “resolv[e] the inevitably sensitive questions of fact and law.”⁶⁰ In *Davis-Kidd Booksellers v. McWherter*, the court used the *Miller* test to determine that a Tennessee statute regulating the display of materials deemed obscene and harmful to minors was constitutional.⁶¹ The court contended that it was permissible to remove materials from display when “taken as a whole, [the materials] lack serious literary, artistic, political or scientific

⁵⁴ *Id.* at 33.

⁵⁵ *Id.* at 37 n.1 (Douglas, J., dissenting) (citing Cal. Penal Code § 311(a)).

⁵⁶ *Id.* at 25.

⁵⁷ *Miller v. California*, 413 U.S. 15, 26 (1973).

⁵⁸ *Id.*

⁵⁹ *See id.*

⁶⁰ *See id.*

⁶¹ *Davis-Kidd Booksellers, Inc. v. McWherter*, 866 S.W.2d 520, 522 (Tenn. 1993) (discussing TENN. CODE ANN., § 39-17-914).

value for a reasonable seventeen year old minor.”⁶² The court further explained that the statute was constitutional because there was only an “incidental burden on the rights of booksellers and adults.”⁶³

The Court also used the *Miller* test and the “community standard” to examine the constitutionality of preventing minors from accessing pornography online.⁶⁴ After lengthy litigation, in *Ashcroft v. American Civil Liberties Union*, the Court used a narrowly tailored analyses to determine that the Child Online Protection Act (COPA) was an unconstitutional restriction on the First Amendment.⁶⁵ COPA required all commercial distributors of “material harmful to minors” to restrict their sites from access by minors.⁶⁶ The Court, applying strict scrutiny, reasoned that filters would be a more efficient and less restrictive option than COPA, because filters “impose selective restrictions on speech at the receiving end, not universal restrictions at the source.”⁶⁷

More recently, in *State v. Watts*, as part of a sexually explicit online chat, the defendant sent photographs of women with exposed breasts to someone he thought was a thirteen year old girl.⁶⁸ The Utah Supreme Court applied the *Miller* test to examine the defendant’s conduct and the constitutionality of the Utah statute that criminalizes the provision of material that is harmful to a minor.⁶⁹ The court determined that the nude images were sent to entice a thirteen-year-old girl to have sex with an adult, satisfying the prurient interest requirement.⁷⁰ The images were also patently offensive and unsuitable for a thirteen year old, and the material lacked serious value for minors, therefore, all three prongs of the *Miller* test were satisfied and the statute was upheld.⁷¹

There are some limits to the *Miller* test. For example, in *Brown v. Merchants Association*, the Court did not use the *Miller* test when determining that a California law prohibiting the sale or rental of “violent video games” to minors violated the First Amendment.⁷²

⁶² *Id.* at 533.

⁶³ *See id.*

⁶⁴ *See Ashcroft v. ACLU*, 542 U.S. 656, 661-64 (2004).

⁶⁵ *See id.* at 672-73.

⁶⁶ *See id.* at 661-62.

⁶⁷ *Id.* at 658, 667.

⁶⁸ *State v. Watts*, 498 P.3d 365, 368-69 (Utah 2021).

⁶⁹ *See id.* at 377 (examining UTAH CODE ANN. § 76-10-1206).

⁷⁰ *See id.*

⁷¹ *See id.* at 377-78.

⁷² *See Brown v. Ent. Merchs. Ass’n*, 564 U.S. 786, 805 (2011).

The court reasoned that like the “protected books, plays, and movies,” video games qualify for First Amendment protection.⁷³ Specifically regarding the *Miller* test, the Court stated that the obscenity exception to the First Amendment does not cover whatever a legislature finds “shocking,” but only depictions of “sexual conduct.”⁷⁴

The Court in *Brown* also noted that both standards of the *Miller* test, and the prior obscenity criteria identified in *Ginsberg v. New York*,⁷⁵ could apply to minors.⁷⁶ *Miller* was written five years after *Ginsberg* and reaffirmed *Ginsberg*’s holding that different laws may be applied by states to material disseminated to children.⁷⁷ In the *Brown* majority, Justice Scalia stated that the New York Law in *Ginsberg* merely “adjust[ed] the boundaries of an existing category of unprotected speech to ensure that a definition designed for adults is not uncritically applied to children.”⁷⁸ Therefore, the language of *Ginsberg* still remains consistent with the *Miller* holding. Today, both Congress and many states have enacted legislation tailored to minors that contains language adopted from the *Miller* test.⁷⁹ Therefore, *Miller* primarily defines the constitutional boundaries of obscenity.⁸⁰

II. CENSORSHIP IN AN EDUCATIONAL SETTING VIA BOOK REMOVAL

Throughout history, the American people have considered education and access to knowledge as “matters of supreme importance” that must be “diligently promoted.”⁸¹ In the United States, the vigilant

⁷³ *Id.* at 790.

⁷⁴ *Id.* at 792–93.

⁷⁵ See *Ginsberg v. State of N.Y.*, 390 U.S. 629 (1968) (holding that it is constitutional for New York to criminalize the distribution of nude images to minors).

⁷⁶ See *Brown*, 564 U.S. at 794–95.

⁷⁷ See *State v. Watts*, 498 P.3d 365, 372–73 (Utah 2021).

⁷⁸ *Brown*, 564 U.S. at 794.

⁷⁹ See, e.g., 18 U.S.C. § 2252B; 47 U.S.C. § 231; CONN. GEN. STAT. § 53a-193(2) (2022); DEL. CODE ANN. tit. 11, §§ 1365(a)(1), 1366(b)(3) (2022); D.C. CODE § 22-2201(b); FLA. STAT. § 847.001 (2022); GA. CODE ANN. § 16-12-102(1) (2022); MINN. STAT. § 617.292(7) (2022); NEB. REV. STAT. § 28-807(6) (2022); N.M. STAT. ANN. § 30-37-1(F) (2022); 18 PA. CONS. STAT. § 5903(e)(6) (2022); S.D. CODIFIED LAWS § 22-24A-2(7) (2022); TENN. CODE ANN., § 39-17-901 (2022); UTAH CODE ANN. § 76-10-1201(5) (2022); WIS. STAT. § 450.155(1)(c) (2022); see also Todd E. Pettys, *Serious Value, Prurient Appeal, and “Obscene” Books in the Hands of Children*, 31 WM. & MARY BILL RTS. J. 1003, 1025 n.123 (2023).

⁸⁰ See *Miller v. California*, 413 U.S. 15, 26 (1973).

⁸¹ See *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (indicating that the state has a legitimate interest in encouraging the growth of a society that can engage in discussions of civic matters).

protection of constitutional freedoms is “vital” in American public schools.⁸² The Supreme Court also recognizes public education’s crucial role in society and the significance of education in preparing individuals to participate as citizens, and in the preservation of societal values.⁸³ These important priorities often clashed in the school library book removal cases from 1972 to 1982, prompting the Supreme Court to respond with the *Pico* test.

A. *Pre-Pico Book Removal Cases*

When examining First Amendment rights in the context of a school environment, the Supreme Court stressed that students do not “shed their [First Amendment] constitutional rights . . . at the schoolhouse gate.”⁸⁴ When ensuring proper progress of public education, however, local school boards have long maintained broad discretion in the management of school affairs.⁸⁵ Public education is controlled by state and local authorities, and courts must not intervene in conflicts that are rooted in the daily operation of school systems or conflicts that do not directly affect constitutional rights.⁸⁶ Nevertheless, the discretion of the states and local school boards are still somewhat limited in matters of education, and “must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.”⁸⁷

Recognizing the vital relationship between First Amendment objectives and the function of public schools, courts must sometimes

⁸² See *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) (reasoning that requiring teachers to disclose any association ties will disrupt teachers’ free “play of the spirit”).

⁸³ See *Ambach v. Norwick*, 441 U.S. 68, 76–78, 80 (1979) (asserting the state’s interest in charging teachers with instilling fundamental values necessary to the maintenance of a democratic political system).

⁸⁴ *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505–06 (1969) (finding that it is an unconstitutional denial of students’ First Amendment rights when school authorities prohibit students from wearing anti-Vietnam War armbands to schools and suspend any student refusing to remove the arm band).

⁸⁵ See *Meyer*, 262 U.S. at 400–01 (striking down a Nebraska statute that prohibited students of a certain age from being taught foreign languages).

⁸⁶ See *Epperson v. Arkansas*, 393 U.S. 97, 103–04 (1968) (determining that Arkansas’ anti-evolution statutes that forbid the teaching of evolution in public schools and in colleges and universities supported by public funds are contrary to First Amendment freedom of religion protections).

⁸⁷ See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982).

intervene in the administration of school affairs.⁸⁸ For example, it is unconstitutional for a state to only permit instruction in the English language to students below the eighth grade⁸⁹ or to forbid the teaching of evolution in public schools.⁹⁰ Further, the First Amendment protects the right of students from being pressured to express ideas with which they disagree⁹¹ and the right to express themselves in non-disruptive political protest.⁹² Even with some level of judicial interference, courts have determined that local authorities “must continue to be the principal policy makers in the public schools.”⁹³ A public school library is “a mighty resource in the marketplace of ideas.”⁹⁴ To avoid the danger of indoctrination, a balance between administrative powers and the First Amendment rights of those within the school system is essential.⁹⁵

Censorship in the educational setting highlights the struggle between protecting a student’s First Amendment rights and the standards of American society. More specifically, courts have held that “however absolute may be a school board’s discretion in selecting books, there are boundaries to its authority to remove a book from a library.”⁹⁶ Before the Supreme Court outlined the criteria for appropriate book removal from school libraries, book removal litigation erupted between 1972 and 1982.⁹⁷ During this time, trial and appellate courts struggled to draw a line between protecting student expression and respecting the authority of school officials to protect children.⁹⁸ With many of

⁸⁸ See *Right to Read Def. Comm. of Chelsea v. Sch. Comm. of City of Chelsea*, 454 F. Supp. 703, 710-12 (D. Mass. 1978) (determining that a school board does not have absolute freedom to remove books at its will).

⁸⁹ See *Meyer*, 262 U.S. at 400-03.

⁹⁰ See *Epperson*, 393 U.S. at 103.

⁹¹ See *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 624 (1943) (concluding that the action of a board of education in compelling the flag salute and pledge is violative of the First Amendment).

⁹² See *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969).

⁹³ See *Right to Read*, 454 F. Supp. at 710-11; See *Epperson*, 393 U.S. at 104 (“Courts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values”).

⁹⁴ See *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (finding that students have the right to receive information and school board officials do not have unlimited discretion to remove books from library shelves simply because they find the books objectionable).

⁹⁵ See *Right to Read*, 454 F. Supp. at 710-711, 715.

⁹⁶ See *id.* at 711.

⁹⁷ Joelle C. Achtmann, *Pico Takes a Visit to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?*, 63 U. MIAMI L. REV. 943, 949 (2009).

⁹⁸ *Id.*

the outcomes turning on a fact dependent analysis, this lack of proper guidelines resulted in unpredictable holdings and malleable rules.⁹⁹

1. The Second Circuit's Approach in 1972

In 1972, the Second Circuit examined constitutional claims stemming from the removal of Piri Thomas's autobiographical account of living in Spanish Harlem, *Down These Mean Streets*.¹⁰⁰ The community board removed the book from all junior high school libraries in the district because of graphically described "[a]cts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting."¹⁰¹ In response, a group of parents, students, and psychologists claimed that the book was "valuable" and had "no adverse effect on the development of the children."¹⁰² The court determined that the intrusion of the school board upon any First Amendment constitutional right was "miniscule," because, although the book was removed from the library, the librarian had not been penalized, and the teacher was still free to discuss the Spanish Harlem in the classroom or assign the book for outside reading.¹⁰³ Consequentially, the court reasoned that unless the situation is "rare and extreme," the court will not intrude upon a school's academic freedom by "review[ing] either the wisdom or the efficacy of the determinations of the Board."¹⁰⁴

2. The Sixth Circuit's Approach in 1976

In 1976, the Sixth Circuit found that book removal can be unconstitutional when the school board fails to offer a viewpoint-neutral reason for the removal.¹⁰⁵ The school board refused to approve *Catch 22* by Joseph Heller¹⁰⁶ and *God Bless You, Mr. Rosewater* by

⁹⁹ *Id.*

¹⁰⁰ *Presidents Council, Dist. 25 v. Cmty. Sch. Bd.*, 457 F.2d 289, 290–91 (2d Cir. 1972). *Down these Mean Streets* is a memoir by a Latino of Puerto Rican and Cuban descent who grew up in Spanish Harlem (East Side Barrio), a section of Harlem with a large Puerto Rican population. *Id.* at 291.

¹⁰¹ *Id.* at 290–91.

¹⁰² *Id.*

¹⁰³ *Id.* at 292.

¹⁰⁴ *Id.* at 291–92.

¹⁰⁵ *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976).

¹⁰⁶ *Id.* at 579. *Catch-22* was published during the Vietnam War and involves dark humor and a satirical tone highlighting the bureaucracy and absurdity of war. John W. Aldridge, *The*

Kurt Vonnegut¹⁰⁷ as texts or library books, and ordered *Catch 22* and *Cat's Cradle* by Kurt Vonnegut¹⁰⁸ to be removed from the library.¹⁰⁹ The court acknowledged that “judicial interposition in the operation of the public school system . . . raises problems requiring care and restraint” and that public education “is committed to the control of state and local authorities.”¹¹⁰ Here, the school board members merely found the books “distasteful,” and based on the lack of any “neutral” explanation of the school board’s removal of books, the court disagreed that the board “had the power, unfettered by the First Amendment, to censor the school library.”¹¹¹ Further, a “library is a storehouse of knowledge” and the school boards may not remove the privilege of knowledge based on the “desire to ‘winnow’ the library for books for the content of which occasioned their displeasure or disapproval.”¹¹²

3. Courts in the First Circuits’ Approach in 1978 and 1979

In 1978, in *Right to Read Defense Committee of Chelsea v. School Committee*, the U.S. District Court for the District of Massachusetts held that the school board’s content-based reasons for removing a book were pretextual and that the school board unconstitutionally removed the book based on the book’s views.¹¹³ The school board removed *Male and Female Under 18*, an anthology of prose and poetry written by students aged eight to eighteen, from the high school library when a student’s parent complained that a poem in the book contained “objectionable, salacious and obscene” language.¹¹⁴

Looney Horror of it All—Catch-22 Turns 25, N.Y. TIMES (Oct. 6, 1986), <http://www.nytimes.com/books/98/02/15/home/heller-loony.html>.

¹⁰⁷ *Minarcini*, 541 F.2d at 579. In *God Bless You, Mr. Rosewater*, “a sensitive Croesus named Eliot Rosewater, renounces the life of an international playboy and takes up poverty as a vocation.” *God Bless You, Mr. Rosewater, Or Pearls Before Swine*, N.Y. TIMES (Apr. 25, 1965), <https://www.nytimes.com/1965/04/25/books/vonnegut-rosewater.html>.

¹⁰⁸ *Minarcini*, 541 F.2d at 579. “In *Cat’s Cradle*, some Caribbean islanders, who practice a religion consisting of harmless trivialities, come into contact with a substance discovered by an atomic scientist that eventually destroys all life on Earth.” *Kurt Vonnegut*, ENCYC. BRITANNICA (Nov. 7, 2022), <https://www.britannica.com/biography/Kurt-Vonnegut>.

¹⁰⁹ *Minarcini*, 541 F.2d at 579.

¹¹⁰ *Id.* at 580 (citing *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968)).

¹¹¹ *Id.* at 582.

¹¹² *Id.* at 581.

¹¹³ *See Right to Read Def. Comm. v. Sch. Comm. of Chelsea*, 454 F. Supp. 703, 711 (D. Mass. 1978).

¹¹⁴ *Id.* at 706.

The school committee chairman characterized the challenged poem as “objectionable and outright obscene,” commenting that it was inappropriate “to allow this filth on the library shelves.”¹¹⁵ Even so, the superintendent warned against “setting in motion a chain of events that might lead to censorship.”¹¹⁶ When reviewing the book, the superintendent determined that the book may remain with the principal, although the superintendent believed the book was “sound and ha[d] educational value with the exception of the passage objected to and one other word in one other poem.”¹¹⁷ The district court held that the removal of the anthology from the library constituted an infringement of the First Amendment, because, although the language was “tough” and “thought provoking,” the book was not obscene.¹¹⁸ In addition to criticizing the defendants’ reasons for the book ban as “pretext,”¹¹⁹ the court provided a warning that “whether they do it book by book or one page at a time,” the risk of “school committees ‘sanitizing’ the school library of views divergent from their own is alarming.”¹²⁰

In 1979, a district court in the First Circuit examined a school board’s removal of *MS Magazine*, which was carried in the school library and was available upon request to students in the senior high school.¹²¹ In *Salvail v. Nashua Board of Education*, the court held that the magazine “failed to demonstrate a substantial and legitimate government interest sufficient to warrant the removal” of the material.¹²² The school board removed the magazine from the public high school library because a religious board member disliked advertisements portraying “‘vibrators’, contraceptives, materials dealing with lesbianism and witchcraft, . . . gay material, [and] a pro-communist newspaper.”¹²³ Members of the community held an opposing opinion, and a student argued that the magazine “discussed important social issues from a feminist viewpoint.”¹²⁴ Additionally, a former librarian at the school testified that the magazines were “neither obscene, patently offensive, nor in

¹¹⁵ *Id.* at 707 (internal quotations omitted).

¹¹⁶ *Id.* (internal quotations omitted).

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 14.

¹¹⁹ *Right to Read Def. Comm. v. Sch. Comm. of Chelsea*, 454 F. Supp. 703, 712 (D. Mass. 1978).

¹²⁰ *Id.* at 714.

¹²¹ *See Salvail v. Nashua Bd. of Ed.*, 469 F. Supp. 1269, 1271–72 (D.N.H. 1979).

¹²² *Id.* at 1275.

¹²³ *Id.* at 1271–72.

¹²⁴ *Id.* at 1272.

contravention of community standards, and . . . [the magazine] was of value as a research tool.”¹²⁵ Based on the facts of the record, the district court found that, “despite protestations” by the school board, it was the “‘political content’ of [the] magazine more than its sexual overtones that led to its arbitrary displacement,” and “[s]uch a basis for removal of the publication is constitutionally impermissible.”¹²⁶ Moreover, the court determined that the school board’s removal of the magazine “contravene[ed] the plaintiffs’ First Amendment rights, and as such it [was] Plainly wrong.”¹²⁷

4. The Seventh Circuit’s and Second Circuit’s Approach in 1980

In 1980, students alleged that the school board’s decision to ban a school library book “stemmed from their social, political and moral tastes and not from educational criteria.”¹²⁸ In *Zykan v. Warsaw Community School Corporation*, the Seventh Circuit determined that the school board’s decision did not infringe upon the First Amendment, as there was no indication that the administrators’ choices were rooted in “some rigid and uniform view” that the Constitution deems inappropriate for shaping educational decisions.¹²⁹ The court explained that a school administrator would be “irresponsible” if they did not monitor the contents of a book that “use . . . valuable shelf space.”¹³⁰ Nevertheless, an administrator may not remove a book from the library “as part of a purge of all material offensive to a single, exclusive perception of the way of the world, any more than they may originally stock the library on this basis.”¹³¹

During the same year, in *Bicknell v. Vergennes Union High School Board of Directors*, the Second Circuit held that there was no First Amendment violation when the school board removed two books based on vulgarity and indecency of language.¹³² Students alleged that the school board’s action was “motivated solely by the ‘personal

¹²⁵ *Id.*

¹²⁶ *Id.* at 1274.

¹²⁷ *Salvail v. Nashua Bd. of Ed.*, 469 F. Supp. 1269, 1275–76 (D.N.H. 1979).

¹²⁸ *See Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1306 (7th Cir. 1980).

¹²⁹ *Id.* at 1306.

¹³⁰ *Id.* at 1308.

¹³¹ *Id.*

¹³² *Bicknell v. Vergennes Union High Sch. Bd. of Dir.*, 638 F.2d 438, 440, 442 (2d Cir. 1980).

tastes and values' of the Board members."¹³³ The court held that the removal was constitutional because there was "no suggestion that the books were complained about or removed because of their ideas, nor that the Board members acted because of political motivation."¹³⁴ The court further emphasized that when materials are removed and are "permissibly considered to be vulgar or indecent, it is no cause for legal complaint that the Board members applied their own standards of taste about vulgarity."¹³⁵

5. The First Circuit's Approach in 1982

In 1982, a district court in the First Circuit enjoined a school from banning the book *365 Days* by Ronald J. Glasser, a compilation of nonfictional Vietnam War accounts by American combat soldiers.¹³⁶ In *Sheck v. Baileyville School Community*, the court held that the removal of the book was unconstitutional because the removal was a result of "arbitrary official standards of vocabular taste."¹³⁷ Although the banning of the book "could be viewed as not directly and sharply implicating a basic constitutional right,"¹³⁸ the court determined that the "social value of [the book's] content is roundly praised and stands unchallenged by the state."¹³⁹ Additionally, the court stated, "[a]s long as words convey ideas, federal courts must remain on first-amendment alert in book-banning cases, even those ostensibly based strictly on vocabular considerations."¹⁴⁰ The court added, "[a] less vigilant rule would leave the care of the flock to the fox that is only after their feathers."¹⁴¹

¹³³ *Id.* at 441.

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 681 (D. Me. 1982).

¹³⁷ *See id.* at 687.

¹³⁸ *Id.* at 684.

¹³⁹ *Id.* at 687.

¹⁴⁰ *Id.* at 687–88.

¹⁴¹ *Sheck*, 530 F. Supp. at 688.

B. *The Pico Test*

In 1982, the Supreme Court finally reviewed its only case relating to the removal of public school library books.¹⁴² In *Board of Education Island Trees Union Free School District No. 26 v. Pico*, a New York school board received a complaint from a group of politically conservative parents who attended a conference sponsored by the Parents of New York United.¹⁴³ The members who attended this conference obtained a list of “objectionable” books considered “improper fare for school students.”¹⁴⁴ Members of the school board found that the Island Trees High School library held nine of the listed books,¹⁴⁵ another listed book was in the junior high school library,¹⁴⁶ and another “objectionable” book was in the curriculum of a twelfth-grade literature course.¹⁴⁷ At a school board meeting, the school board gave an “unofficial direction” that these books should be removed from the library shelves and examined by board members.¹⁴⁸

After reading the books in question, the school board determined that one book would be returned without restriction,¹⁴⁹ another book would be returned with student access conditioned on parent approval,¹⁵⁰ and the remaining nine books would “be removed from

¹⁴² See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (plurality opinion).

¹⁴³ *Id.* at 856.

¹⁴⁴ *Id.*

¹⁴⁵ The nine books in the High School library were:

- (1). KURT VONNEGUT, *SLAUGHTERHOUSE FIVE* (1965);
- (2). LANGSTON HUGHES, *BEST SHORT STORIES BY NEGRO WRITERS* (1967);
- (3). PIRI THOMAS, *DOWN THESE MEAN STREETS* (1967);
- (4). LANGSTON HUGHES, *BEST SHORT STORIES BY NEGRO WRITERS* (1967);
- (5). ANONYMOUS, *GO ASK ALICE* (1971);
- (6). OLIVER LA FARGE, *LAUGHING BOY* (1929);
- (7). RICHARD WRIGHT, *BLACK BOY* (1945);
- (8). ALICE CHILDRESS, *A HERO AIN'T NOTHIN' BUT A SANDWICH* (1973); and
- (9). ELDRIDGE CLEAVER, *SOUL ON ICE* (1968).

See *id.* at 856 n.3.

¹⁴⁶ The book was *A READER FOR WRITERS*, (Jerome Archer & Joseph Schwartz eds., 1971). *Id.*

¹⁴⁷ The book was BERNARD MALAMUD, *THE FIXER* (1966). *Id.*

¹⁴⁸ See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 857 (1982) (plurality opinion).

¹⁴⁹ *Id.* at 858.

¹⁵⁰ *Id.*

elementary and secondary libraries and [from] use in the curriculum.”¹⁵¹ The board removed these nine books from the library after determining that they were “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.”¹⁵² The board added that it is the board’s “duty” and “moral obligation . . . to protect the children in [the] schools from this moral danger as surely as from physical and medical dangers.”¹⁵³

Following back and forth litigation, in June 1982 the U.S. Supreme Court decided in a 5-4 decision, without a controlling majority opinion, that the Island Trees School District should not have removed the books, and that the book banning infringed on students’ right to freedom of speech.¹⁵⁴ The plurality opinion, written by Justice Brennan, stressed that this case “does not involve textbooks, or indeed any books that Island Trees students would be required to read.”¹⁵⁵ Instead, “the only books at issue in the case [were] library books, books that by their nature are optional rather than required reading.”¹⁵⁶ Additionally, when describing the protection of rights in a school setting, Justice Brennan stated, “the special characteristics of the school library make that environment especially appropriate for the recognition of the First Amendment rights of students.”¹⁵⁷ Justice Brennan further specified that courts must look to “[t]he motivation behind [the board’s] actions.”¹⁵⁸ The board exercised its discretion in violation of the Constitution if the board intended “to deny [students] access to ideas with which [the board] disagreed” and this was the “decisive factor” in the board’s decisions.¹⁵⁹

C. *The Splintered Pico Opinion*

Unfortunately, although the Court in *Pico* addressed standards for book banning, the fractured *Pico* opinion left many questions

¹⁵¹ *Id.* (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 391 (E.D.N.Y. 1979)).

¹⁵² *Id.* at 857 (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

¹⁵³ *Id.* (quoting *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F. Supp. 387, 390 (E.D.N.Y. 1979)).

¹⁵⁴ *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 872 (1982) (plurality opinion).

¹⁵⁵ *Id.* at 861–62.

¹⁵⁶ *Id.* at 862 (emphasis removed).

¹⁵⁷ *Id.* at 868 (emphasis removed).

¹⁵⁸ *Id.* at 871.

¹⁵⁹ *Id.*

unanswered. Aside from the main opinion, *Pico* included six diverse opinions from the various justices, each of whom presented complex legal questions underlying book banning in public schools ranging from exploring the balance between state regulation and the right to receive information,¹⁶⁰ to examining the underlying motivation for removing books.¹⁶¹ Another issue raised was whether school boards should be given broad or narrow judicial deference to monitor school libraries.¹⁶²

Further, several dissenting justices took issue with the broad standard set by the plurality opinion.¹⁶³ In his dissent, Justice Burger objected to the plurality's protection of the right to receive information, stating "no such right . . . has previously been recognized."¹⁶⁴ He further explained that with such a broad right, "[n]o amount of 'limiting' language could rein in the sweeping 'right' the plurality would create."¹⁶⁵ Justice Burger also disagreed with the plurality's use of the "standardless" phrases "pervasively vulgar" and "educationally unsuitable."¹⁶⁶ For example, Justice Burger argued, "[W]hy must the vulgarity be 'pervasive' to be offensive? . . . [A] school board might reasonably conclude that even 'random' vulgarity is inappropriate for teenage school students."¹⁶⁷

Similarly, Justice Powell was concerned with the manipulability of the plurality's proposed standard.¹⁶⁸ Justice Powell argued that the plurality relied on a "standardless standard" that only offers "subjective guidance to school boards, their counsel, and to courts that now will be required to decide whether a particular decision was made in a 'narrowly partisan or political manner.'"¹⁶⁹ Justice Rehnquist, in

¹⁶⁰ See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 879–80 (1982) (Blackmun, J., concurring) ("[W]e strike a proper balance here by holding that school officials may not remove books for the *purpose* of restricting access to the political ideas or social perspectives discussed in them, when that action is motivated simply by the officials' disapproval of the ideas involved.").

¹⁶¹ See *id.* at 883 (White, J., concurring) ("The unresolved factual issue . . . is the reason or reasons underlying the school board's removal of the books").

¹⁶² See *id.* at 884 ("We should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here.").

¹⁶³ See *id.* at 885 (Burger, C.J., dissenting); *id.* at 893–94 (Powell, J., dissenting); *id.* at 910 (Rehnquist, J., dissenting).

¹⁶⁴ See *Pico*, 457 U.S. at 887 (Burger, C.J., dissenting).

¹⁶⁵ *Id.* at 892.

¹⁶⁶ See *id.* at 890.

¹⁶⁷ See *id.* at 890.

¹⁶⁸ See *id.* at 895 (Powell, J., dissenting).

¹⁶⁹ *Id.*

his dissent, echoed these criticisms, stating that what is considered pervasively vulgar and educationally unsuitable are still standards “based as much on the content of the book as determinations that the book espouses pernicious political views.”¹⁷⁰ Lastly, in Justice O’Connor’s shorter dissent, she argued that although she disagrees with the school board’s action, “it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards.”¹⁷¹

The Court in *Pico* addressed the limitations to the power of school boards to remove books.¹⁷² The Court barred the removal of books from a school library shelf simply because the school boards “dislike the ideas contained in those books and seek by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”¹⁷³ Although the case does not provide a flawless explanation of the extensiveness of the school board’s right to restrict access, the Supreme Court still established two standards that may allow for removal: “pervasive[] vulgar[ity]” or “lack of educational suitability.”¹⁷⁴

ANALYSIS

I. THE *PICO* PLURALITY TEST IS DIFFICULT FOR FUTURE COURTS TO USE

Post-*Pico* cases interpret the complex plurality opinion of *Pico* differently,¹⁷⁵ and there needs to be a clearer standard for courts to use when looking at book removals in public school libraries. The following sections will discuss the splintered *Pico* opinion and its consequences.

¹⁷⁰ See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 917 (1982) (Rehnquist, J., dissenting).

¹⁷¹ See *id.* at 921 (O’Connor, J., dissenting).

¹⁷² See *id.* at 872 (plurality opinion) (quoting W. Virginia State Bd. Of Educ. V. Barnette, 319 U.S. 624, 642 (1943)).

¹⁷³ *Id.*

¹⁷⁴ See *id.* at 871.

¹⁷⁵ See discussion *infra* Analysis Section I.A.

A. *Post-Pico Book Removal Cases*

In *Campbell v. St. Tammany Parish School Board*, the Fifth Circuit held that there was insufficient evidence of any unconstitutional motivation behind a school board's removal of a book about African medicine men, *Voodoo & Hoodoo* by Jim Haskins.¹⁷⁶ Although the court applied the *Pico* test, the Fifth Circuit acknowledged the shortcomings of *Pico*'s plurality opinion, stating that the court "do[es] not read *Pico* as establishing a *per se* rule, requiring a merits trial in *every* instance in which a court must decide the constitutionality of removal of a school library book."¹⁷⁷ Further, although the Fifth Circuit mentioned the *Pico* test, the court instead stressed that the motivation standard from *Pico* provided only "guidance" for the court's decision.¹⁷⁸ The court ultimately found insufficient evidence to determine whether the school board acted on the basis of improper motives.¹⁷⁹ Therefore, the Fifth Circuit protected the board's decision by "subtly" adopting a new standard that required substantially more evidence to find improper motives for the book removal.¹⁸⁰

In *Case v. United School District No. 233*, a school board removed the book *Annie on My Mind* by Nancy Garden, which concerned LGBTQIA+ issues and a lesbian romance between two high schoolers.¹⁸¹ Students challenged the school board's decision to remove this book from their secondary school libraries, and the court found that the school board's actual motivation for removing the book was the disdain for the ideas expressed in the books.¹⁸² The court acknowledged that *Pico* is the only Supreme Court "decision dealing specifically with the removal of books from a public school library"¹⁸³ and held in favor of the students by applying *Pico*'s motivation standard.¹⁸⁴ Though the court narrowed *Pico*'s motivation standard, stating that it must "determine

¹⁷⁶ See *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 191 (5th Cir. 1995).

¹⁷⁷ *Id.* at 189.

¹⁷⁸ *Id.*

¹⁷⁹ See *id.* at 191.

¹⁸⁰ See Ryan L. Schroeder, Comment, *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, 380 (2021).

¹⁸¹ *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 865, 867 (D. Kan. 1995).

¹⁸² See *id.* at 865–66, 875–76.

¹⁸³ See *id.* at 875.

¹⁸⁴ See *id.* at 876.

the ‘actual motivation’ of the school board,” suggesting that the removal would be improper if the ideas in the book were the “decisive factor.”¹⁸⁵ Surprisingly, the court did not emphasize the viewpoint-based statements by the board, and instead relied on evidence such as the “highly irregular and erratic” way the school board removed *Annie on My Mind* from the school libraries.¹⁸⁶ Therefore, the court did not fully examine school board motivations, but focused on suspicious procedural information.¹⁸⁷

In *Counts v. Cedarville School District*, the court held that a school board’s attempt to limit access to *Harry Potter* books was a violation of students’ First Amendment Rights.¹⁸⁸ The school board voted to have all *Harry Potter* books removed from school library shelves and placed where they are not accessible to students unless they are checked out with “a signed permission statement from their parent or legal guardian.”¹⁸⁹ The school board members voted for restricted access, but not because of concerns of “profanity, sexuality, obscenity, or perversion in the books.”¹⁹⁰ Further, out of the four *Harry Potter* books available at the time, only one of the three board members had read the first book in the series, *Harry Potter and The Sorcerer’s Stone*, and no board members had read the remaining three books in the series.¹⁹¹ Here, extensive evidence of viewpoint-based motivations, such as the overall disapproval of witchcraft, was available to the court because the removal was based on “their shared belief that the books promote a particular religion.”¹⁹² As the court relied on more obvious viewpoint-based motivations, the court’s analysis still left an uncertain exception for the removal of books if the board did have proper motivations.¹⁹³

In *Sund v. City of Wichita Falls, Texas*, a group of residents objected to the inclusion of the books *Heather Has Two Mommies* and *Daddy’s Roommate*, which depict children with gay and lesbian parents, in the children’s section of the public library.¹⁹⁴ In response,

¹⁸⁵ *Id.* at 875.

¹⁸⁶ *See id.* at 876.

¹⁸⁷ *See* Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 876 (D. Kan. 1995).

¹⁸⁸ *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1005 (W.D. Ark. 2003).

¹⁸⁹ *Id.* at 1001.

¹⁹⁰ *Id.*

¹⁹¹ *Id.*

¹⁹² *Id.* at 1004.

¹⁹³ *See id.*

¹⁹⁴ *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 533 (N.D. Tex. 2000).

the City of Wichita Falls passed a resolution stating that residents could remove books from the children's section.¹⁹⁵ To do so, residents had to gather 300 signatures of library card holders.¹⁹⁶ Although this was a public library case, rather than a public school library case, the court referred to the motivation test in *Pico*.¹⁹⁷ The court determined that "the principles set forth in *Pico* . . . have even greater force when applied to public libraries" and in this setting, the "government's ability to restrict patrons' First Amendment rights is extremely narrow."¹⁹⁸ Therefore, the court held that the removal of the two books constituted impermissible content-based and viewpoint-based discrimination, and "the city cannot limit access to library materials solely on the basis of the content of those materials."¹⁹⁹

More recently, in *ACLU v. Miami-Dade County School Board*, the case arose from the removal of the book *¡Vamos a Cuba!*, which "targets readers between the ages of 4 to 8 years old, and [is] written to provide basic information about what life is like for a child" in Cuba.²⁰⁰ A parent, who was formerly a prisoner in Cuba, objected to the book because it contained an inaccurate portrayal of Cuban life.²⁰¹ The school board's argument that the book was inaccurate was "just pretext, a cover for the anti-Castro goals of the Board," and the court used *Pico* to determine "the decisive factor" that motivated the board."²⁰² The court noted that the book was not technically "banned," because the board removed the book from its own school libraries, the board had purchased the book with board funds, and the board did not prohibit anyone else from owning, possessing, or reading the book.²⁰³ The court permitted the school board's book removal, determining that removing *¡Vamos a Cuba!* from the school library shelves was based on factual inaccuracies, not the board's personal disapproval of the

¹⁹⁵ *Id.* at 533–34.

¹⁹⁶ *See id.* at 534–35.

¹⁹⁷ *See id.* at 548.

¹⁹⁸ *Id.* (emphasis removed).

¹⁹⁹ *Id.*

²⁰⁰ *See* Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1183 (11th Cir. 2009) (quoting Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1248 (S.D. Fla. 2006)).

²⁰¹ *Id.* at 1182.

²⁰² *See id.* at 1206.

²⁰³ *Id.* at 1218.

book's content.²⁰⁴ Although the court stressed that "[i]f there had been no factual inaccuracies, the book would not have been removed,"²⁰⁵ factual inaccuracies were never directly considered in *Pico*.²⁰⁶ Further, the dissent disagreed with the majority's reasoning, arguing that "the School Board engaged in viewpoint discrimination, and that . . . was the decisive factor in its motivation."²⁰⁷

Recently, book removal cases have become increasingly common,²⁰⁸ and, as mentioned above, courts are left with only one plurality U.S. Supreme Court opinion that has been interpreted in vastly different ways.²⁰⁹ The majority of post-*Pico* courts align with Justice Brennan's plurality opinion that public school officials have "significant discretion to determine the content of their school libraries," but they cannot make removal decisions "in a narrowly partisan or political manner."²¹⁰ The book removal cases after *Pico* show that courts commonly referred to the motivations test from *Pico*, yet these post-*Pico* courts often adopted their own versions of the test, or otherwise took advantage of the plurality opinion's malleability, leading to inconsistent results.²¹¹ Further, because the decision in *Pico* was penned by a plurality and not by a majority of the Court, it is not binding precedent.²¹² Nevertheless, *Pico* "still maintains significant influence as persuasive authority," and although the *Pico* plurality is frequently employed in book-banning cases, there currently a debate about whether to apply another standard instead.²¹³

²⁰⁴ See *id.* at 1227.

²⁰⁵ See *id.*

²⁰⁶ See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982) (plurality opinion).

²⁰⁷ *Miami-Dade*, 557 F.3d at 1234 (Wilson, C.J., dissenting).

²⁰⁸ See Harris, *supra* note 1.

²⁰⁹ See discussion *infra* Analysis Section I.A.

²¹⁰ See *Pico*, 457 U.S. at 870 (plurality opinion); see also discussion *infra* Analysis Section I.A.

²¹¹ See Schroeder, *supra* note 180, at 382.

²¹² See *Marks v. United States*, 430 U.S. 188, 193 (1977) (differentiating plurality decisions from majority decisions, because plurality opinions do not carry the same precedential weight as majority decisions).

²¹³ Katherine Fiore, Note, *ACLU v. Miami-Dade County School Board: Reading Pico Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students' First Amendment Right Violations*, 56 VILL. L. REV. 97, 106–07 (2011).

II. POSSIBLE SOLUTION

The *Pico* test contains multiple factors that are considered when examining the constitutionality of a school board's decision to ban a book.²¹⁴ One possible solution for books that contain sexually explicit material is to properly define Justice Brennan's standard for what is considered "pervasively vulgar."²¹⁵ To do so, courts should keep the motivation standard of the *Pico* test and look to the *Miller* test of obscenity when examining the sexual content in the book.

A. Combining the *Miller* Test with "Pervasively Vulgar" in *Pico*

Pico established that although school boards cannot ban books for political reasoning, school boards may challenge books that they claim are unsuitable for children.²¹⁶ Coincidentally, in 2021, many of the top challenged books contained LGBTQIA+ or racial issues.²¹⁷ For example, in the "Top 10 Most Challenged Books of 2021" the top three books, *Gender Queer* by Maia Kobabe,²¹⁸ *Lawn Boy* by Jonathan Evison,²¹⁹ and *All Boys Aren't Blue* by George M. Johnson²²⁰ were challenged because of both LGBTQIA+ and sexually explicit content.²²¹ Owing to such controversial topics in challenged books, under the lens of the *Pico* test, it is difficult to determine exactly what motivated the school boards to challenge or ban the books. For example, although Justice Brennan concluded that a book could be properly removed if considered "pervasively vulgar," the post-*Pico* cases that examine books containing sexual content, such as *Case* and *Sund*, focus more on

²¹⁴ See *Pico*, 457 U.S. at 870–72 (plurality opinion) (stating that public schools may ban books that are "pervasively vulgar" or lack "educational suitability," so long as the discretion is not in a "narrowly partisan or political manner").

²¹⁵ See *id.* at 871.

²¹⁶ See *id.* at 870–71.

²¹⁷ See ALA OFFICE FOR INTELL. FREEDOM, *supra*, note 4.

²¹⁸ *Gender Queer* tells a story about being nonbinary and queer, using "e, em, eir" pronouns. See MAIA KOBABE, *GENDER QUEER: A MEMOIR* 194–95 (Andrea Colvin & Grace Bornhoft eds., 2019).

²¹⁹ *Lawn Boy* tells a story of about being a Mexican American gay male. See JONATHAN EVISON, *LAWN BOY* 41, 241 (2019).

²²⁰ *All Boys Aren't Blue* tells a story about being Black and queer. See GEORGE M. JOHNSON, *ALL BOYS AREN'T BLUE: A MEMOIR-MANIFESTO* 11 (2020).

²²¹ See ALA OFFICE FOR INTELL. FREEDOM, *supra*, note 4.

the school board's motivation and the procedures used to remove the book, rather than proving the content was "pervasively vulgar."²²²

Many aspects of the *Pico* test could be altered as a possible solution to the malleability of the plurality's proposed standard. One solution for books that contain sexually explicit material is to properly define Justice Brennan's standard for what is considered "pervasively vulgar."²²³ More specifically, Justice Burger argued that Justice Brennan's holding in *Pico* provided little instruction for determining what books are "pervasively vulgar."²²⁴ In his dissent, Justice Burger warned against this vague standard in *Pico*, questioning the Court, "[W]hy must the vulgarity be 'pervasive' to be offensive?"²²⁵ Justice Burger expressed his concern that vulgarity may be "random" or vulgarity may be "concentrated in a single poem or a single chapter or a single page, yet still be inappropriate."²²⁶ Justice Burger's implicit suggestion to examine the entire work to determine what is "vulgar," resembles the *Miller* test's requirement that to constitute "obscenity," the work should be examined "as a whole."²²⁷

Additionally, Justice Burger further stated that "parents, teachers, and local school boards" should regulate the standards of morality and vulgarity in the classroom.²²⁸ Similarly, the *Miller* test's language of applying "contemporary community standards" mirrors Justice Burger's dissent.²²⁹ Therefore, in addition to the current motivation test under *Pico*, courts should also look at the *Miller* test of obscenity to determine if a school board can remove a book if the material is "obscene" rather than the vague phrase, "pervasively vulgar."²³⁰

²²² See *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875–76 (D. Kan. 1995); See *Sund v. City of Wichita Falls, Tex.*, 121 F. Supp. 2d 530, 548, 550, 551, 553 (N.D. Tex. 2000).

²²³ See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (plurality opinion).

²²⁴ See *id.* at 890 (Burger, C.J., dissenting)

²²⁵ *Id.*

²²⁶ *Id.*

²²⁷ See *id.* at 890–91; *Miller v. California*, 413 U.S. 15, 24 (1973).

²²⁸ *Pico*, 457 U.S. at 893 (Burger, C.J., dissenting).

²²⁹ See *id.*; *Miller*, 413 U.S. at 24.

²³⁰ See *Pico*, 457 U.S. at 871 (plurality opinion)

B. *Applying the New Book Removal Test*

A new test for sexually explicit books could combine *Pico* and *Miller* in an analysis that upholds local control at the selection stage but provides clearer standards for a school board's discretion in the removal process. More specifically, when a school board challenges a book containing sexually explicit content, the Supreme Court should keep the present *Pico* test and adopt a *Miller*-like standard for book removals. Therefore, based on *Pico*, "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books."²³¹ When defending their decision to ban a book containing sexually explicit material, instead of proving that the work was "pervasively vulgar," a school board should use the *Miller* test to show that the challenged work satisfied all elements of "obscenity":

"(a) whether the 'average [minor], applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest [of minors]; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value [for minors]."²³²

For example, if a school board were to remove *Gender Queer* by Maia Kobabe from public school libraries, the school board must adequately demonstrate that their motivation to remove the book was not based on "narrowly partisan or political" grounds.²³³ To do this, the court should examine evidence as to whether the school board failed to employ "established, regular, and facially unbiased procedures for the review of controversial materials."²³⁴ Examples of biased school boards include expressing disapproval of the ideas in the book, claiming that there are obscene passages when there was no such language, or offering no statement of reasons for removal.²³⁵

Furthermore, the court and school board should examine the entire book, applying local community standards to determine whether the content of the book appeals to the prurient interest of minors and

²³¹ *Id.* at 872.

²³² *Miller*, 413 U.S. at 24 (modified to include language that focuses on minors).

²³³ *See Pico*, 457 U.S. at 870 (plurality opinion).

²³⁴ *See id.* at 874.

²³⁵ *See id.* at 873, 875.

lacks any value. This third prong of the *Miller* test, which requires some measurement of value, reveals that even if a work appeals to the prurient interest or is patently offensive, it is not constitutionally sufficient to justify the loss of valuable speech.²³⁶ As the third prong of the *Miller* test is a more difficult standard, combining the *Pico* motivation test with the *Miller* test will hopefully ensure that book censorship is met with greater scrutiny.

While the proposed approach seeks to provide clearer standards for school boards' discretion in book removals, the fluidity of the *Pico* test and Justice Harlan's perspective on the flexible definition of obscenity should not be dismissed. The inconsistent nature of past cases may reflect the context-dependent nature of the obscenity question. It is possible that attempting to impose a more rigid standard could risk stifling valuable speech and neglecting the unique circumstances of each case. Overall, there needs to be a carefully balanced standard.

CONCLUSION

It is relatively straightforward why certain books available to children today are controversial among a variety of groups, such as parents, school officials, and lawmakers.

The First Amendment protects the right to receive information and ideas, but under certain circumstances, schools may use book banning and censorship to protect students.²³⁷ In *Pico*, the Court held that public schools may ban books that are "pervasively vulgar" or lack "educational suitability," but their discretion to remove books may not be based on "narrowly partisan or political manner."²³⁸ Recently, with a historic amount of book banning, courts should reexamine the *Pico* standard and add the *Miller* test of obscenity, thus creating clearer guidelines for the court's evaluation of what is considered "pervasively vulgar." Ultimately, under the proposed test, when a school board bans books containing sexual content, the board must provide evidence of proper motivation behind the removal and must also prove that the book, as a whole, lacks any value and depicts or describes, in a patently offensive way, sexual conduct that appeals to the prurient interest of an average minor.

²³⁶ See *Miller*, 413 U.S. at 26.

²³⁷ See *Pico*, 457 U.S. at 870–71, 874 (plurality opinion).

²³⁸ *Id.* at 870–71.