

**BATTLE OF THE BOOKS: HOW NEW STATE LAWS LEGITIMIZE
THE RESURGENCE OF BOOK BANNING EFFORTS AND PROVE
THE INADEQUACY OF CURRENT JUDICIAL STANDARDS TO
PROTECT STUDENT FIRST AMENDMENT RIGHTS**

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*“There must be something in books, things we can’t imagine,
to make a woman stay in a burning house; there must be
something there. You don’t stay for nothing.”*

—Ray Bradbury¹

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1. RAY BRADBURY, *FAHRENHEIT* 451 at 48 (Simon & Schuster 2018) (1953).

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I. INTRODUCTION

Once a year, libraries, publishers, booksellers, schools, and bibliophiles across the country celebrate Banned Books Week; a time to rejoice in the freedom to read; “to seek and to express ideas.”² In 2022, the event was held the week of September 18th; the theme: “Books Unite Us. Censorship Divides Us.”³ This theme highlights the disturbing surge in book bans across the country as states enact statutes that prohibit certain topics from being taught in schools.

Beginning with Florida’s “Parental Rights in Education” bill, a new wave of educational gag orders has been signed into law which cripple the First Amendment rights of students.⁴ These “Don’t Say Gay” bills and educational gag orders legitimize hateful and malicious efforts to curtail student speech and expression. They also provide an interesting look at how parental rights, student rights, and the rights of states to direct education intersect.

This Note focuses on three new laws—passed by Alabama, Utah, and Arizona respectively—which can, will, and have been used to curtail the First Amendment rights of students. These laws do this in a number of ways, but this Note zeroes in on their role in legitimizing and furthering the resurgence of book banning seen across the country. By restricting what can be taught or discussed in a classroom, restricting the types of materials that can be found in a school, or allowing parents to hold teachers liable for instructing on topics they do not find appropriate, these laws provide mechanisms for parents and school boards to remove books from school libraries and classrooms or to restrict student access to them. Each of these laws also helps to illustrate how current standards

2. *About, BANNED BOOKS WEEK*, <https://bannedbooksweek.org/about/> [<https://web.archive.org/web/20230131235747/https://bannedbooksweek.org/about/>] (last visited Oct. 22, 2023).

3. *Id.* In 2023, Banned Books Week begins on October 1st, with a theme of “Let Freedom Read!” *Id.* Some titles from “The Top 13 Most Challenged Books of 2022”—highlighted by Banned Books Week’s official website—included: *Gender Queer* by Maia Kobabe, *All Boys Aren’t Blue* by George M. Johnson, *A Court of Mist and Fury* by Sarah J. Maas, *Me and Earl and the Dying Girl* by Jesse Andrews, and *The Bluest Eye* by Toni Morrison. *Id.*

4. *See infra* Part IV.

used by courts fail to adequately protect student First Amendment rights.

Part II of this Note provides a brief history of book banning in the United States. It also highlights the recent, revitalized movement to remove certain types of books from schools and looks at how parental rights are being weaponized against books on school shelves. Book banning is inherently tied with First Amendment rights, so Part III provides an overview of current First Amendment jurisprudence in the school book banning context. With that discussion also comes a mention about the failings of current standards.

Part III of this Note also argues that whatever distinctions between school libraries and school curriculum have been made in the past should be reevaluated. There is a certain overlap between school libraries and curriculum when it comes to certain classroom exercises like independent reading projects. Additionally, some schools do not have libraries and, even in those that do, it is common to find bookshelves in the classrooms themselves, with the books supplied by the teacher.

Part IV begins the analysis of the three state laws that were passed following Florida's "Don't Say Gay" bill. After a brief discussion of the latter law, this Note takes a deep dive into the three different statutes and analyzes the effects they could have on book banning, student First Amendment rights, and why they are evidence that the current judicial standards need to change. Finally, Part V concludes with suggestions on how the Supreme Court could stem the flow of book bans by applying a narrower standard by which school boards can remove books from school shelves and expanding the circumstances in which the standard is applicable.

II. BACKGROUND

A. *History of Book Banning in the United States*

The banning of books⁵ has roots dating back to the early Colonial Era when Puritan religious leaders banned and burned pamphlets which

5. For the purposes of this Note, a book ban is defined—in the school context—as being:

[A]ny action taken against a book based on its content and as the result of [a] parent . . . 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.

supported Christian values.⁶ In the 1850s, copies of Harriet Beecher Stowe's *Uncle Tom's Cabin* were publicly banned and burned for "expos[ing] the evils of slavery."⁷ After the Civil War, focus shifted to texts that were considered immoral, indecent, or obscene.⁸ This included content discussing contraception,⁹ Ernest Hemingway's *A Farewell to Arms*, and Walt Whitman's *Leaves of Grass*.¹⁰

School libraries became ground zero for book censorship even as society became more and more progressive in the twentieth century.¹¹ There was no one reason why parents and administrators attempted to ban reading materials; some were considered inappropriate due to sexual content or language used, others "challenged longstanding narratives about American history or social norms."¹² This, even decades later, has not changed.¹³ In the 1950s Jim Crow South, attempts were made to ban a children's book by Garth Williams called *The Rabbits' Wedding*, depicting a black rabbit marrying a white rabbit; it was believed by opponents to promote interracial relationships.¹⁴ During that time, other

Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: Rising School Book Bans Threaten Free Expression and Students' First Amendment Rights (April 2022)*, PEN AM., <https://pen.org/banned-in-the-usa/> (last visited Oct. 22, 2023).

6. See Erin Blakemore, *The History of Book Bans—and Their Changing Targets—in the U.S.*, NAT'L GEOGRAPHIC (Apr. 24, 2022), <https://www.nationalgeographic.com/culture/article/history-of-book-bans-in-the-united-states>.

7. *Id.* During the Civil War, abolitionist materials were banned from the South and materials deemed "pro-Southern" were banned by the Union. *Id.*

8. *Id.*

9. Terry Gross, *How an Anti-Vice Crusader Sabotaged the Early Birth Control Movement*, NPR (July 7, 2021, 12:50 PM), <https://www.npr.org/2021/07/07/1013592570/how-an-anti-vice-crusader-sabotaged-the-early-birth-control-movement>. Passed by Congress in 1873, the Comstock Act made it illegal to distribute, mail, sell, or possess materials considered "obscene," contraception included. *Id.*

10. Blakemore, *supra* note 6.

11. *Id.*

12. *Id.*

13. The ALA, American Library Association, has reported the top three reasons why books are challenged to be: "(1) the material was considered to be 'sexually explicit,' (2) the material contained 'offensive language,' [and] (3) the material[] was 'unsuited to any age group.'" *Banned Book FAQ*, AM. LIBR. ASS'N, <https://www.ala.org/advocacy/bbooks/banned-books-qa> (last visited Oct. 22, 2023).

14. Blakemore, *supra* note 6. History repeated itself in 2018 when *A Day in the Life of Marlon Bundo* by Jill Twiss was number two on the ALA's list of "Top 11 Most Challenged Books of 2018." *Top 10 Most Challenged Books Lists*, AM. LIBR. ASS'N, <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10/archive> (last visited Oct. 22, 2023). The book depicts Marlon, a boy bunny who lives with former Vice President Mike Pence, falling in love with another boy bunny. *Last Week Tonight with John Oliver Presents: A Day in the Life of Marlon Bundo*, CHRONICLE BOOKS, <https://www.chroniclebooks.com/products/last-week-tonight-with-john-oliver-presents-a->

attempts were made to ban books like *To Kill a Mockingbird* and *The Catcher in the Rye*, which were thought to promote Communism or Socialism.¹⁵

The United States has a long and storied history with book banning, and unfortunately, it is not something that is going away anytime soon. The movement to remove certain books from public schools has continued to evolve and has now gained new momentum thanks to state governments.

B. Book Banning in the 2021–2022 School Year and Continuing Trends

It is important to note that efforts to ban books are not usually limited to individual parents who take issue with a book they find in their child's backpack.¹⁶ Mostly, they are the product of organized groups advocating for censorship of certain ideas in schools.¹⁷ The beginning of the 2021–2022 school year saw only a modest level of challenges, but as the year went on, it “grew into a full-fledged social and political movement.”¹⁸

Groups responsible for public school books bans¹⁹ have been known to use a variety of tactics to accomplish their goals. They demand libraries use new rating systems, swarm school board meetings, and “us[e] inflammatory language about ‘grooming’ and ‘pornography.’”²⁰ They will even go so far as to file criminal complaints against librarians, teachers, and school officials.²¹ These efforts were advanced and

day-in-the-life-of-marlon-bundo?_pos=1&_sid=ceebf784c&_ss=r (last visited Oct. 22, 2023). It was challenged for a few reasons, one being its inclusion of LGBTQ+ content. *Top 10 Most Challenged Books Lists*, *supra*.

15. Blakemore, *supra* note 6.

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

17. *Id.*

18. *Id.* (“This movement to ban books is deeply undemocratic, in that it often seeks to impose restrictions on all students and families based on the preferences of those calling for the bans and notwithstanding polls that consistently show that Americans of all political persuasions oppose book bans.”).

19. PEN America was able to identify—at the local, state, and national levels—at least fifty groups involved in book banning. *Id.* Most of these groups were formed in 2021 and have already had a significant impact on the number of books being banned in schools. *Id.*

20. *Id.*

21. *Id.*

legitimized when states throughout the country began passing legislation that implicate restrictions on books.²²

Even now, in the 2020s, efforts are still being made to remove books from schools that center on racial issues, including the history of racism and slavery.²³ To that end, campaigns were started to enact educational gag orders that “focused on misapplications of the academic term ‘critical race theory.’”²⁴ In the short time since, these efforts have evolved to include an increased focus on LGBTQ+ issues.²⁵ Many books that have been challenged are labeled “obscene”—however, they are no such thing.²⁶ “Obscenity” has a specific legal test that sets a very high bar which books in schools are unlikely to meet.²⁷ The meaning behind the word is “being stretched in unrecognizable ways because the concept itself is widely accepted as grounds for limiting access to content.”²⁸

Out of 1,648 unique titles banned between July 2021 and June 2022, 41% of those books contained explicit discussions of LGBTQ+ themes.²⁹ Of all the book bans reported over the course of the 2021–2022 school

22. *Id.* This resurgence of book banning has led to preemptive bans where school officials will remove books without formal challenges to the books being filed. *Id.* One school district in Tennessee removed 327 books in anticipation of a state law that was never passed. *Id.*

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.* Another instance of using obscenity as grounds for book banning comes from the state of Virginia. *Virginia Obscenity Proceedings Against Two Books*, ACLU, <https://www.aclu.org/cases/virginia-obscenity-proceedings-against-two-books> (last updated June 22, 2022). A decades-old law was used to file a petition claiming two books were obscene. *Id.* Should the judge have found they contained “probable obscenity,” distribution, sale, and publication of the books in the state would have had to cease. *Id.* The first book challenged was an autobiographical graphic novel called *Gender Queer, a Memoir*, by Maia Kobabe depicting their experiences as a non-binary person. *Id.* The second book was *A Court of Mist and Fury* by Sarah J. Maas, the second book in a series of high fantasy novels—*A Court of Thorns and Roses*—depicting powerful beings called Fae. *Id.*; see also *A Court of Mist and Fury*, SARAH J. MAAS, <https://sarahjmaas.com/books/a-court-of-thorns-and-roses-series/a-court-of-mist-and-fury/> (last visited Oct. 22, 2023). *Gender Queer* was cited as containing “obscene graphic and vivid illustrations of minors performing fellatio on each other, among other disturbing and obscene images, innuendos, and excessive content that is sexual in nature.” Petitioner’s Omnibus Brief in Opposition of Respondents’ Motions at 4, *In re Gender Queer: A Memoir* (2022) (No. CL22-1985) and *In re A Court of Mist and Fury* (2022) (No. CL22-1984). *A Court of Mist and Fury* was cited as “sensualiz[ing] abusive sexual relationships, overstimulat[e] young readers with extreme sexual words, phrases, and ideology.” *Id.* at 8.

27. See *Growing Movement*, *supra* note 16.

28. *Id.*

29. *Id.* Of the unique titles banned, a whopping 75% of those titles were fiction books and 49% were intended for Young Adult readers. *Id.*

year, 96% of them were enacted without following the suggested guidelines.³⁰ Following the passage of Florida’s “Parental Rights in Education” law in March 2022—and similar bills in other states—book banning advocates zeroed in on books involving LGBTQ+ issues.³¹ In the three months that followed, books centered on LGBTQ+ identities or issues made up a third of all recorded bans.³² “[T]he efforts to target books containing LGBTQ+ characters or themes are frequently drawing on long-standing, denigrating stereotypes that suggest LGBTQ+ content is inherently sexual or pornographic.”³³

C. *A Look Towards Parental Rights*

One common thread throughout this revitalized book banning movement has been the invocation of parental rights as an excuse for why books can be taken out of public schools.³⁴ This political rhetoric is being abused to “undermine, intimidate, and chill the practices” of school administrators, librarians, and teachers,³⁵ which can have a powerful impact on student learning and their right to access information and ideas.³⁶

The acknowledgment of parental rights in schools dates back to the 1920s and *Meyer v. Nebraska*³⁷ and *Pierce v. Society of the Sisters*.³⁸ *Meyer* recognized a parent’s liberty interest to “bring up children” and struck down a statute that prohibited students, until they reached a certain age, from being taught any language other than English.³⁹ Only two years later, in *Pierce*, the Supreme Court ruled that a statute requiring students to attend public school was unconstitutional.⁴⁰ The Court reasoned that the statute “unreasonably interfere[d] with the liberty of

30. *Id.* These suggested guidelines come from the ALA and the National Coalition Against Censorship. *Id.* They attempt to create objective criteria by which a book may be removed from schools. See *Guidelines for Reconsideration Committees*, AM. LIBR. ASS’N, <https://www.ala.org/tools/challengesupport/reconsiderationcommittees> (last visited Oct. 22, 2023).

31. See *Growing Movement*, *supra* note 16.

32. *Id.* Over that same period, April 2022 to June 2022, about two-thirds of all recorded book bans “touch[ed] on topics related to sexual content, such as teen pregnancy, sexual assault, abortion, sexual health, and puberty.” *Id.*

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. 262 U.S. 390 (1923).

38. 268 U.S. 510 (1925).

39. *Meyer*, 262 U.S. at 399–400, 403.

40. *Pierce*, 268 U.S. at 534–35.

parents and guardians to direct the upbringing and education of children under their control.”⁴¹

How does this translate to book banning? A parent absolutely has the right to dictate what *their* child can and cannot read. They should not, however, have the right to tell a school district a book should be banned for *other* students;⁴² by adhering to such a parent’s command, the district is elevating the one parent’s substantive due process rights over the First Amendment rights of every student. This is important, now more than ever, not only because parental rights are often cited as reasons why books can be banned, but also because some states now have laws legitimizing these specific efforts.⁴³

III. THE CURRENT STATUS OF STUDENT FIRST AMENDMENT RIGHTS AND PRACTICAL CONSIDERATIONS WHICH RENDER STANDARDS DIFFICULT TO IMPLEMENT

A. *Tinker*, *Pico*, and “*Educational Suitability*”

The removal of books from school library shelves raises important questions about what First Amendment rights students possess. In the landmark Supreme Court case *Tinker v. Des Moines Independent School District*, Justice Fortas famously stated, “It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”⁴⁴ The Court made it clear, however, that these rights were not absolute and that school officials could curtail conduct or expression when it could be shown that such conduct would “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”⁴⁵

41. *Id.*

42. Shane Morris, Note, *The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right*, 13 DREXEL L. REV. 787, 817 (2021) (discussing a First Circuit case that stated *Meyer* and *Pierce* stood for “the right of parents to choose where to send their children to school—not to dictate the content of the school’s curriculum”).

43. See *infra* Part IV.

44. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 506 (1969) (ruling that school officials could not deny students permission to wear black arm bands that expressed their disapproval for the Vietnam War).

45. *Id.* at 505 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)); see also *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1225 (11th Cir. 2009) (“Federal courts should not arrogate to themselves power over educational suitability questions. Such questions are the perfect example of a core educational policy matter within the exclusive province of local school boards.”).

Since *Tinker*, the Court has noted a number of situations in which school officials can curb student speech, including profane speech and speech advocating the use of illegal drugs.⁴⁶ In *Hazelwood School District v. Kuhlmeier*, the Court ruled school officials were also allowed to censor student speech in school newspapers, yearbooks, and other school publications.⁴⁷ *Hazelwood* emphasized the authority of educators to control student speech as it pertained to school curriculum.⁴⁸ The Court did not take up the issue of book banning until almost two decades after *Tinker*, and even when it did, the ruling left something to be desired.

In 1982, the Supreme Court finally tackled the question of whether the First Amendment imposed limits to a school board's authority to remove books from junior and high school libraries.⁴⁹ Justice Brennan authored the plurality opinion, which Justices Marshall and Stevens joined.⁵⁰ Justices Blackmun and White each wrote concurring opinions, agreeing with the decision but disagreeing with its reasoning.⁵¹ While not binding precedent, the Court held school officials cannot remove books from the shelves of school libraries "simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"⁵² In other words, a school board cannot remove a book based on the viewpoints expressed in that book. Justice Brennan thought, here, that a student's right to receive ideas and information transcended a school board's authority.⁵³ He recognized, however, that a legitimate and substantial role was held by local school boards to decide the content of a school library.⁵⁴ This created an "offramp option" that allows school

46. *Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 685 (1986); *Morse v. Frederick*, 551 U.S. 393, 408 (2007).

47. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273–76 (1988).

48. *See id.* at 271.

49. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 855–56 (1982).

50. *Id.* at 855.

51. *Id.* at 875–76 (Blackmun, J., concurring); *id.* at 883 (White, J., concurring).

52. *Id.* at 872 (majority opinion) (quoting *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)); *see also* Pamela Callahan and Joel Miller, *Does Pico Still Go to School? Book Challenges and Diverse Classroom Libraries*, 378 ED. L. REP. 1, 6 (2020) (explaining that "courts reference *Pico* to show that (a) school libraries are distinct from the curricular realm of the classroom, and (b) library materials cannot be removed simply on the basis of a political disagreement on the part of school actors.").

53. *Pico*, 457 U.S. at 866–67 ("And we have recognized that 'the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge.' In keeping with this principle, we have held that in a variety of contexts 'the Constitution protects the right to receive information and ideas.'" (internal citations omitted)).

54. *Id.* at 869.

boards to argue a book “removal was motivated by . . . content, rather than the board’s viewpoint about that content.”⁵⁵ The result being that school boards are invited to create pretextual justifications that easily conceal their true agenda.⁵⁶

Pico is the only case taken by the Supreme Court addressing book banning in public school libraries,⁵⁷ but that has not stopped the issue from being litigated in lower courts.⁵⁸ Perhaps most notably, the Eleventh Circuit, in *ACLU v. Miami-Dade County School Board*, sided against student rights, ruling that a book the school board removed from the library was not “educationally suitable.”⁵⁹ The circuit court found the school board was properly motivated to remove the book by its factual inaccuracies.⁶⁰ While the dissent agreed that school boards had the power to remove books deemed to contain “gross factual inaccuracies” or those that were “educationally unsuitable,” they believed the school board had been motivated by “viewpoint discrimination.”⁶¹ *Miami-Dade’s* ruling raised two questions: (1) to what degree do claims of factual inaccuracies lead to book bans, and (2) who makes that determination.⁶² Scholars noted that “every book in every school library has inaccuracies, especially when the test for inaccuracy can be colored by subjective views of history, past and present.”⁶³

Miami-Dade demonstrated that the *Pico* standard was insufficient to protect student First Amendment rights.⁶⁴ The Eleventh Circuit “distorted the *Pico* standard into one analogous to [*Hazelwood*] by limiting its analysis to the book’s educational suitability.”⁶⁵ According to *Pico*, the latter case should have no place in a discussion about removing

55. 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, 384 (2021).

56. *Id.* at 385.

57. *Id.* at 373.

58. See generally *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995); *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 865 (D. Kan. 1995).

59. *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1227 (11th Cir. 2009).

60. *Id.*

61. *Id.* at 1233–34 (Wilson, J., dissenting).

62. Callahan & Miller, *supra* note 52, at 8.

63. Bruce S. Rogow, *Two Years of the First Amendment in the United States Court of Appeals: The 2007 and 2008 Yin and Yang over Speech and Punishment*, 63 U. MIAMI L. REV. 813, 832 (2009). “Thus, if inaccuracy were the test, our school library bookshelves would likely be barren.” *Id.*

64. See 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, 99 (2011).

65. *Id.* at 121.

books from school libraries. *Hazelwood* was about curricular concerns, but school libraries were seen by the courts as distinguishable.⁶⁶

The question remains undecided; is *Pico* the proper standard that should be applied, or should courts look to *Miami-Dade's* ruling? Generally, courts have shown a preference for the *Pico* standard,⁶⁷ but that does not mean it cannot be improved upon to better protect student First Amendment rights.⁶⁸ Recent book challenges have brought to light disconnects in the legal standard expected under *Pico* and practical realities.⁶⁹ Among these are the “physical demarcations between classroom and school libraries . . . and the nebulous terminology of a [book] removal.”⁷⁰

Pico stood for a narrow definition of a book ban: simply the removal of said book from a school's library.⁷¹ In reality, however, school boards implement a variety of responses to challenges.⁷² For instance, other than simply removing the book entirely from all district libraries, a book might be moved to higher level schools or classrooms, permission from parents might be required, or a book might be removed from sight.⁷³ Since Justice Brennan's opinion stood for students having free access to ideas and viewpoints from a variety of sources,⁷⁴ any restriction on any student's access to a book available in the school would seem to violate that student's First Amendment rights.⁷⁵ Additionally, a divide between classroom curriculum and school libraries is no longer practically feasible.

B. *Blurring the Line Between School Libraries and Classroom Curriculum*

While courts have typically tried to distinguish between a school's library and classroom curriculum, practically, the lines are a little more blurred. School libraries are a great place for students to avail themselves

66. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868–69 (1982) (discussing how school libraries allow students the freedom to explore topics not covered in classroom instruction).

67. See Morris, *supra* note 42, at 808.

68. *Id.* at 814.

69. Callahan & Miller, *supra* note 52, at 9.

70. *Id.* One other disconnect is the difference between the realities of school board behavior and Justice Brennan's “conceptualization” of the book banning process. *Id.*

71. *Id.* at 11.

72. *Id.*

73. *Id.*

74. *Id.*

75. PEN America also views book banning similarly. See Friedman & Johnson, *supra* note 5.

of new material for leisure reading, but they are also great places for students to grab books for their classroom assignments. However, the shelves of a school library are not the only place a student can find books to read.

Teachers will often have bookshelves in their own classrooms,⁷⁶ and in schools that do not have their own libraries, these serve an essential function.⁷⁷ Although smaller than a school library, there is still opportunity for teachers to provide students with books that cover a wide range of topics and themes.⁷⁸ Because teachers are best positioned to know the reading levels of their students, the books in a classroom library can be specifically tailored to that group of students.⁷⁹ Where do these mini libraries fall along the line of school library versus classroom curriculum? Regardless of where they fall, they—like classic school libraries and course materials—serve to educate young minds and a student should be free to enjoy their fruits.

Education is primarily the function of the states, and it is up to those legislative bodies—and local communities—to determine academic standards.⁸⁰ These standards inform what students are expected to learn.⁸¹ Typically, each state sets similar standards for core subjects such as mathematics, science, and English to be taught in classrooms.⁸² Once set, a school board must follow those standards, however, they have some leeway in how that can be accomplished.⁸³

Books are not just for pleasure or required reading; one way students can meet state English standards is through activities such as independent reading projects and book reports. Not only that, but schools

76. See Claire Woodcock, *Florida Teachers Are Emptying Classroom Libraries to Avoid Going to Jail*, VICE (Jan. 31, 2023, 9:00 AM), <https://www.vice.com/en/article/bvmq54/florida-teachers-are-removing-classroom-libraries-to-avoid-going-to-jail>.

77. *Classroom Libraries*, CAPSTONE, <https://www.capstonepub.com/teachers/classroom-libraries#:~:text=What%20is%20a%20Classroom%20Library,selective%20reading%20skills%20as%20well> (last visited Oct. 22, 2023).

78. *Id.*

79. *Id.*

80. Andrew M.I. Lee, *State Academic Standards: What You Need to Know*, UNDERSTOOD, <https://www.understood.org/en/articles/state-academic-standards-what-you-need-to-know> (last visited Oct. 22, 2023). Curriculum and academic standards are different; curriculum refers to the content taught to students. *Id.*

81. *Id.*

82. See Diane Ravitch, *50 States, 50 Standards: The Continuing Need for National Voluntary Standards in Education*, BROOKINGS (June 1, 1996), <https://www.brookings.edu/articles/50-states-50-standards-the-continuing-need-for-national-voluntary-standards-in-education/>.

83. See Lee, *supra* note 80.

function to “socialize [students] to cultural norms and expectations.”⁸⁴ These classroom exercises are a great way for students to meet both state standards and social developmental goals.

Independent reading occurs across all grade levels and has a huge impact on student success.⁸⁵ It “include[s] time for students to read, access to books that represent a wide range of characters and experiences, and support within a reading community that includes teachers and students.”⁸⁶ The ability of students to choose their own reading materials “is essential because it motivates, engages, and reaches a wide variety of readers.”⁸⁷

Crucially, through books, students are able “to see their own experiences, the experiences of others, and the correlation between the two.”⁸⁸ It allows them to gain knowledge and awareness of the surrounding world and the people within it.⁸⁹ Independent reading allows isolated students to affirm their own experiences and “provides students an opportunity to explore topics they might not otherwise have a chance to and equips them with a multitude of lenses through which to see the world.”⁹⁰

Unlike independent reading, book reports—since they are viewed as mainly classroom exercises—might not provide students as much choice in what they read.⁹¹ Despite that, they still allow students the opportunity to have meaningful engagement with books, both fiction and non-fiction, and encourage others to do the same.⁹² Students can be

84. *Practical Foundations and Principles for Teaching*, LUMEN, <https://courses.lumenlearning.com/suny-jefferson-practicalfoundations/chapter/four-basic-purposes-of-schools/> (last visited Oct. 22, 2023); see also Katie Terrell Hanna, *Definition: K-12*, WHATIS.COM, <https://www.techtarget.com/whatis/definition/K-12> (last visited Oct. 22, 2023) (listing “social and emotional development” as one of the benefits of a K-12 education).

85. Directly tied to independent reading is the advancement in vocabulary, grammar, spelling, reading comprehension, and writing style. Rita Shaffer et al., *Statement on Independent Reading*, NAT'L COUNCIL TCHRS. ENG., <https://ncte.org/statement/independent-reading/print/> (last visited Oct. 22, 2023).

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

91. See Richard Nordquist, *Book Report: Definition, Guidelines, and Advice*, THOUGHTCO., <https://www.thoughtco.com/what-is-book-report-1689174> (Oct. 30, 2018).

92. *Id.* (describing how book reports allow students to give their own opinions and judgments on the book they read and can help fellow students choose if they too want to read the book).

required to present on their books to the class or their reports may be passed around for others to read.⁹³

There is no denying the divide between public school libraries and classrooms. Holistically, they both serve different functions, however, there is an overlap. A school library is there for a student's voluntary engagement,⁹⁴ but when students need to choose a book for a classroom assignment, the school's library is there for perusal. If the classroom has its own miniature library, the student may look there, and they might *have* to if the school itself does not contain a library. Classroom libraries also serve to encourage voluntary student interaction with books, just in a different location.⁹⁵ *Pico's* standard becomes even more complicated to apply as these lines continue to blur;⁹⁶ and given the pervasiveness of book bans in recent years, and with the passing of laws that could be used to remove books from both school libraries and classroom shelves, it no longer makes sense for there to be any distinction between the two in this context.

IV. A NEW WAVE OF SUPPRESSION

In early 2022, the state of Florida made national news headlines when Republican Governor Ron DeSantis signed H.B. 1557, the "Parental Rights in Education" bill, into law.⁹⁷ Opponents of the bill—which has the effect of banning public school teachers from instructing about LGBTQ+ issues—have dubbed the bill "Don't Say Gay."⁹⁸ While not necessarily a new tactic to suppress support for the LGBTQ+ community,⁹⁹ Florida's bill was the first in a new wave of laws introduced and passed that affect what students can be taught.¹⁰⁰

93. *Id.*

94. See Callahan & Miller, *supra* note 52, at 9 (discussing Justice Brennan's demarcation of school libraries and classrooms by noting the "at-will nature" of selecting materials from the library).

95. *Id.* at 10.

96. *Id.*

97. Jaelyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022, 2:33 PM), <https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis>.

98. *Id.*

99. Dustin Jones & Jonathan Franklin, *Not Just Florida. More than a Dozen States Propose So-Called 'Don't Say Gay' Bills*, NPR (Apr. 10, 2022, 7:01 AM), <https://www.npr.org/2022/04/10/1091543359/15-states-dont-say-gay-anti-transgender-bills> (explaining how, in the past, "no promo homo" laws were used to prohibit people from saying positive things about members of the LGBTQ+ community in classrooms).

100. About a month after DeSantis signed the Parental Rights in Education bill into law, numerous states had already introduced their own versions of a "Don't Say Gay" bill. *Id.*

Advanced to protect “the fundamental right of parents to make decisions regarding the upbringing and control of their children in a specified manner,”¹⁰¹ the bill prohibits classroom instruction on gender identity or sexual orientation beginning in kindergarten through the third grade or “in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.”¹⁰² Critics of the bill have expressed concern about the impact on the mental health of LGBTQ+ youth.¹⁰³ Adding to the already existing discrimination and stigma surrounding the LGBTQ+ community puts the youth members at a higher risk of bullying, depression, and suicide.¹⁰⁴ Additionally, the bill would also prevent teachers from discussing LGBTQ+ history and their LGBTQ+ family members.¹⁰⁵

For example, according to the text of the statute, if a student is asked to draw a picture of their family and a child draws their two dads and shares their drawing with the class, a parent could sue the school if they feel there was an inappropriate discussion of sexual orientation or gender identity.¹⁰⁶

Teachers who fear lawsuits might exclude those students with LGBTQ+ family members from participating in these kinds of activities.¹⁰⁷

Florida’s “Don’t Say Gay” bill—and similar laws—also acts as a mechanism by which school boards can remove books from not only classrooms but also from school libraries.¹⁰⁸ What follows is a discussion of three different state statutes passed in 2022. The language and scope of these statutes vary, but they all lead to the infringement of student First Amendment rights.

101. H.B. 1557, 2022 Sess. (Fla. 2022).

102. *Id.* § 1 (codified as amended at Fla. Stat. § 1001.42(8)(c)(3) (2022)).

103. Meredith Johnson, *The Dangerous Consequences of Florida’s “Don’t Say Gay” Bill on LGBTQ+ Youth in Florida*, 23 GEO. J. GENDER & L. 3, pt. 3 (2022), <https://www.law.georgetown.edu/gender-journal/online/volume-xxiii-online/the-dangerous-consequences-of-floridas-dont-say-gay-bill-on-lgbtq+-youth-in-florida/>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. A Florida Superintendent—rather than waiting for the bill to go into effect in July 2022—began removing books from classroom and school library shelves for review mere days after the bill was signed. Kim Swan, *PBC Schools Remove Books on Trans Kids in Light of ‘Don’t Say Gay’ Law*, S. FLA. GAY NEWS (Apr. 7, 2022), <https://web.archive.org/web/20220407141924/https://southfloridagaynews.com/Local/pbc-schools-remove-books-on-trans-kids-in-light-of-don-t-say-gay-law.html>.

A. *Alabama's Blatant Attack on the LGBTQ+ Community*

Alabama's House Bill 322 ("H.B. 322") was signed by the state's governor on April 8, 2022.¹⁰⁹ While section one of the bill prohibits transgender individuals from using the bathroom of the gender they identify with,¹¹⁰ section two is Alabama's "Don't Say Gay" law.¹¹¹ The bill states:

An individual or group of individuals providing classroom instruction to students in kindergarten through the fifth grade at a public K-12 school shall not engage in classroom discussion or provide classroom instruction regarding sexual orientation or gender identity in a manner that is not age appropriate or developmentally appropriate for students in accordance with state standards.¹¹²

When the law was adopted by the state board of education, they clarified in the rule "that 'in determining age or developmental appropriateness, local education agencies may consider, but not be limited to, the Alabama Core Teaching Standards, Rule 290-3-3.04 . . . and the Alabama Educator Code of Ethics.'"¹¹³ Teachers became concerned about the subjective language used in the rule and its lack of clarity.¹¹⁴ All it would take was for one complaint from an aggressive parent to jeopardize a teacher's career.¹¹⁵

H.B. 322 is your typical "Don't Say Gay" bill. While both Florida's "Parental Rights in Education" bill and this one use similar language, Alabama's bill takes things a couple steps further.¹¹⁶ The Florida legislature at least attempted to disguise a law motivated by hate

109. H.B. 322, 2022 Leg. (Ala. 2022); Caleb Turrentine, *Gov. Ivey Signs Bill Banning Medication to Transgender Youth and Transgender Bathroom Bill*, ABC3340 NEWS (Apr. 8, 2022, 6:20 PM), <https://abc3340.com/news/local/gov-ivey-signs-bill-banning-medication-for-transgender-youth-and-transgender-bathroom-bil-alabama-governor-kay-ivey-legislative-session-state-house-dont-say-gay-bill-trans-lgbtq-rights-parents-doctors-medical-care-gender>.

110. Ala. H.B. 322 § 1.

111. *Id.* Alabama's Board of Education later voted unanimously to approve the language of the bill. Jacob Holmes, *Alabama Board of Education Codifies "Don't Say Gay" Law*, ALA. POL. REP. (Sept. 9, 2022, 7:10 AM), <https://www.alreporter.com/2022/09/09/alabama-board-of-education-codifies-dont-say-gay-law/>.

112. Ala. H.B. 322 § 2(a).

113. Holmes, *supra* note 111.

114. *Id.*

115. *See id.*

116. *Compare* Ala. H.B. 322, *and* H.B. 1557, 2022 Sess. (Fla. 2022).

towards the LGBTQ+ community as a law bolstering parental rights.¹¹⁷ Alabama's legislature offered no such guise. Additionally, where H.B. 1557 supposedly stops restrictions at grade three, Alabama extends theirs to grade five.¹¹⁸ Notably, Alabama also restricts teachers from simply discussing, not only instructing on, gender identity and sexual orientation in the classroom setting.¹¹⁹

The restriction on what topics cannot be discussed in the classroom has a significant impact on how assignments, like independent reading projects and book reports, can be implemented in practice. The beauty of an independent reading project is that it allows students the choice of what material to engage in.¹²⁰ H.B. 322 takes that choice away. Further, the rules are rather subjective—what might be deemed age appropriate by one person might not by another. Teachers will have to ensure every student is reading “appropriate” material because they could be seen as “instructing” on sexual orientation or gender identity if a student chooses to read a book that touches on those topics. This seems especially relevant when the teacher has provided that book on classroom shelves. All it would take was one parent complaining their child was provided the book for the teacher's career to be put in jeopardy.

Additionally, because H.B. 322 prohibits teachers from simply facilitating discussion on LGBTQ+ issues, even if a student were able to read a book that touched on those topics, that student would not be able to present on their readings or report. Independent reading projects and book reports can allow for students to discuss what they have read with their peers.¹²¹ They can share their feelings, thoughts, and ideas on the material and even encourage others to read the book.¹²² This law makes such an exchange within the classroom impossible without opening the teacher up to liability. The student might be completely left out of an important exercise, and their peers would be missing out on that exchange of information.

117. See Diaz, *supra* note 97.

118. Compare Ala. H.B. 322, and Fla. H.B. 1557. In April 2023, another house bill was introduced in the Alabama legislature that would extend H.B. 322 through the eighth grade. H.B. 354, 2023 Leg. (Ala. 2023). Additionally, the language of the bill would allow for discussion of sexual orientation or gender identity to be limited to what was deemed developmentally or age appropriate. See *id.*; *HB 354 – “Don’t Say Gay” Extension*, ACLU ALA., <https://www.aclualabama.org/en/legislation/hb-354-dont-say-gay-extension> (last visited Oct. 22, 2023).

119. Ala. H.B. 322 § 2(a).

120. See *supra* notes 84–92 and accompanying text.

121. See *supra* notes 84–92 and accompanying text.

122. See *supra* notes 84–92 and accompanying text.

The fear of liability will pressure teachers to “sanitize”¹²³ their classroom bookshelves. It would force them to scrutinize every single book a student reads for a class project or assignment. Even just the slightest chance that the book could be “problematic” would cause a teacher to take the book, and the option, away from their students. The effect this could have on a student who chose a book which they thought sounded interesting—and which discussed LGBTQ+ topics—is alarming. Their teacher would have to tell them that they were not allowed to read that book. The more this happens, the more likely those students are going to believe that the ideas and topics addressed in the book are forbidden to them or are wrong.

This law infringes on a student’s First Amendment right to receive information and access ideas—not only by limiting a student’s access to certain books in the classroom setting—but also by potentially limiting meaningful student engagement in classroom assignments. Even though the law singles out classrooms for its restrictions, school libraries are also implicated when students are restricted in what type of material they are allowed to engage in for their assignments. Alabama’s H.B. 322 is not the only educational gag order that followed the passing of Florida’s “Don’t Say Gay” bill. While it is probably one of the more blatant attempts to prevent LGBTQ+ topics from being addressed in public schools, other states have passed laws that could be considered broader and even more subjective.

B. Utah’s Broadly Applicable Restrictions on Learning Materials

Utah’s House Bill 374 (H.B. 374), entitled “Sensitive Material in Schools,” was also passed in 2022.¹²⁴ The language of the bill reads: “A public school may not: adopt, use, distribute, provide a student access to, or maintain in the school setting, sensitive materials; or permit a speaker or presenter in the school setting to display or distribute sensitive materials.”¹²⁵ The law refuses to draw a line between school libraries and classrooms by defining a “school setting” to mean in a school library,

123. Merriam-Webster dictionary defines “sanitize” as: “to make (something, such as text) more acceptable by removing, hiding, or minimizing any unpleasant, undesirable, or unfavorable parts.” *Sanitize*, MERRIAM WEBSTER: DICTIONARY, <https://www.merriam-webster.com/dictionary/sanitize> (last visited Oct. 22, 2023). Such a definition perfectly describes what book banning efforts are truly about.

124. H.B. 374, 64th Leg., 2022 Gen. Sess. (Utah 2022), Sensitive Materials in Schools, ch. 377, 2022 Utah Laws 2925.

125. *Id.* at § 3(2)(b).

classroom, or on school property.¹²⁶ “Sensitive materials” are defined as pornographic or indecent instructional materials.¹²⁷

The bill, however, gives no further definition of those terms; instead, it cites to definitions within the state’s criminal statute.¹²⁸ According to the Utah’s Criminal Code, “Pornographic or indecent material” can mean material that is “harmful to minors,”¹²⁹ meaning:

[T]hat quality of any description or representation . . . of nudity, sexual conduct, sexual excitement, or sadomasochistic abuse when it: taken as a whole, appeals to the prurient interest in sex of minors; is patently offensive to prevailing standards in the adult community as a whole with respect to what is suitable material for minors; and taken as a whole, does not have serious value for minors.¹³⁰

The term “serious value” is only meant to include “serious literary, artistic, political or scientific value for minors.”¹³¹

“Pornographic or indecent material” can also mean material that is, obviously, pornographic or an indecent public display.¹³² The criminal code’s definition of pornographic materials is very similar to the code’s definition of what is harmful to minors.¹³³ Indecent public displays¹³⁴ “do

126. *Id.* at § 3(1)(f)(i).

127. *Id.* at § 3(1)(g)(i). “Materials” is defined in the statute, according to Utah’s Criminal Code, to mean “anything printed or written . . . which is or may be used as a means of communication.” *Id.* at (3)(1)(c); UTAH CODE ANN. § 76-10-1201 (West 2023).

128. H.B. 374 refers to title 76, chapter 10 of the Utah Criminal Code to define “pornographic or indecent materials.” Utah H.B. 374 § (3)(1)(g)(i); UTAH CODE ANN. § 76-10-1235 (West 2023).

129. The code reads: “‘Pornographic or indecent material’ means any material: defined as harmful to minors in Section 76-10-1201; described as pornographic in Section 76-10-1203; or described in Section 76-10-1227.” § 76-10-1235 at (1)(a).

130. § 76-10-1201 at (5)(a).

131. *Id.* at (5)(b).

132. § 76-10-1235; See Utah H.B. 374 § 3(1)(g)(i), *and* UTAH CODE ANN. § 76-10-1227 (West 2023).

133. Compare § 76-10-1235, *with* UTAH CODE ANN. § 76-10-1203 (West 2023).

Any material . . . is pornographic if: the average person, applying contemporary community standards, finds that, taken as a whole, it appeals to prurient interest in sex; it is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and taken as a whole it does not have serious literary . . . value.
§ 76-10-1203 at (1)(a)–(c).

134. Utah’s Criminal Code defines indecent public displays to be:

“Description or depiction of illicit sex or sexual immorality” means: human genitals in a state of sexual stimulation or arousal; acts of human masturbation, sexual intercourse, or sodomy; fondling or other erotic touching of human genitals or pubic region; or fondling or other erotic touching of the human buttock or female breast.

not apply to any material which, when taken as a whole, has serious value for minors . . . taking into consideration the ages of all minors who could be exposed to the material.”¹³⁵

Literature is notoriously subjective.¹³⁶ Everyone has their own preferences, views, and interpretation of a literary work, be it a poem or a horror novel.¹³⁷ What is so problematic about Utah’s law barring sensitive materials from public schools is that it not only refuses to make any sort of distinction between libraries and classrooms, but it still leaves much up to subjective interpretation. What is acceptable for some people is not acceptable for others. The language of Utah’s Criminal Code, which helps to define the bounds of H.B. 374, almost mirrors the test to determine if speech is obscene and can, therefore, be censored.¹³⁸ Despite what *should* be a hard bar to meet, “obscenity” is commonly cited as a reason why books should be removed from schools.¹³⁹ The term has been distorted in such a way that it has lost all true meaning in the book banning context.¹⁴⁰

Utah, by passing H.B. 374, is allowing this fraudulent practice to continue under the legitimacy of law. In doing so, the State is allowing students’ First Amendment rights that were so important in *Pico* to be infringed. It is very easy to see how a parent, teacher, or administrator could argue a book—at any level of grade school—is harmful to minors, or pornographic and lacking serious literary value. Whether a parent’s motivations are pure or driven by a desire to keep children ignorant on LGBTQ+ or racial issues will not matter. Even if it is very clear that the challenged book does not meet that criteria, teachers and school officials will still be wary of keeping that book on shelves for fear of retaliation.

Even though Utah seems to be providing a few more guidelines for book removal, there is no promise that school officials will review the challenged book under those strictures. In the past, very few book bans were enacted pursuant to suggested guidelines aimed to best protect student rights.¹⁴¹ Further, several cases showed that school officials were

§ 76-10-1227 at (1)(a)(i)–(iv).

135. *Id.* at (2).

136. Michele Dunaway, *Why Literary Analysis is Subjective*, VISUAL THESAURUS (Dec. 14, 2009), <https://www.visualthesaurus.com/cm/teachersatwork/why-literary-analysis-is-subjective/#:~:text=So%20remember%2C%20literary%20analysis%20is,baggage%20to%20the%20reading%20experience>.

137. *See id.*

138. *Compare* § 76-10-1203, *with* *Miller v. California*, 413 U.S. 15, 24 (1973).

139. *See* Friedman & Johnson, *supra* note 16.

140. *See id.*

141. *See id.* Less than 4% of book bans enacted in the 2021–22 school year were enacted by following suggested guidelines. *Id.*

willing to completely ignore or circumvent the district's own policies.¹⁴² Given the immense pressure on school boards brought by politics and parents, there is nothing to stop them from bypassing these new guidelines just as they did in the past.¹⁴³

Although Utah's attorney general has instructed the Utah State Board of Education to only remove books that meet the definition of pornography, in practice, schools have removed books containing *any* sexual content; including Margaret Atwood's modern classic *The Handmaid's Tale*; *This Book is Gay* by Juno Dawson; and John Green's *Looking for Alaska*.¹⁴⁴ Across thirty-four of forty-one school districts in the state, some other titles commonly being challenged and removed include all five books in Sarah J. Maas's *A Court of Thrones and Roses* series—along with several more of Maas's books, *Crank* by Ellen Hopkins, and Elana Arnold's *What Girls Are Made Of*.¹⁴⁵ Immediately after it's enactment, H.B. 374 caused one Utah school district to announce they would be pulling fifty-two books from their school libraries.¹⁴⁶ All the books selected were deemed to contain "sensitive material" under H.B. 374 and lacked "literary merit."¹⁴⁷ After national pushback, the school board chose to keep the books on the shelves,¹⁴⁸ however, access to

142. *Id.*

143. As of November 2022, the Utah Board of Education recorded 280 complaints about books. Jordan Smith, *Utah HB 374 and the Book Challenge Landslide*, COMIC BOOK LEGAL DEF. FUND (Nov. 4, 2022), <https://cbldef.org/2022/11/utah-hb-374-and-the-book-challenge-landslide/>. The bill has also affected the amount of time and money school districts have had to spend in response to challenges; \$20,000 of funds and 500 hours of labor just in one district. *Id.*

144. Memorandum from Sean D. Reyes, Att'y. Gen., on Laws Surrounding Sch. Libraries to Utah State Bd. of Educ. 1–2, 9 (June 1, 2022), <https://attorneygeneral.utah.gov/wp-content/uploads/2022/06/2022-06-01-Official-Memo-Re-Laws-Surrounding-School-Libraries.pdf>; Kasey Meehan & Jonathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (April 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/>.

145. See Aimee Cobabe et al., *Utah Book Challenges by the Numbers: A KSL Investigation*, KSL NEWS RADIO 102.7FM (June 21, 2023, 8:09 AM), <https://kslnewsradio.com/2013792/utah-book-challenges/>.

146. *Utah School District's Reversal on Decision to Remove 52 Books from School Libraries Is an Important Step in Recognizing Students' Speech Rights*, PEN AM. (Aug. 11, 2022) [hereinafter *Utah School District's Reversal*], <https://pen.org/press-release/utah-school-districts-reversal-on-decision-to-remove-52-books-from-school-libraries-is-an-important-step-in-recognizing-students-speech-rights/>. Among the titles selected for removal were Jodi Picoult's *Nineteen Minutes* and Mariko Tamaki's *This One Summer*. *Id.*

147. See *Id.* Of the books selected, 42% touched on LGBTQ+ themes or contained LGBTQ+ characters. *Id.*

148. Friedman & Johnson, *supra* note 16.

the books was temporary restricted.¹⁴⁹ While still infringing on a student's free access to information and ideas, this was certainly a step in the right direction.

Not every book that has been challenged has been removed, even if the same book has been challenged and removed in a different district.¹⁵⁰ While this indicates there might be some districts that are properly evaluating challenged books, the evidence of H.B. 374's practical effects prove it is just another way to legitimize efforts to ban books from schools for arbitrary and hateful reasons.

C. *Parental Rights on a Pedestal in Arizona*

Out of the four different bills discussed in this Note, Arizona's is arguably, on its face, the most innocuous. Passed as a "Parents' Bill of Rights," Arizona House Bill 2161 (H.B. 2161) allows parents to sue teachers for interfering with their fundamental right "to direct the upbringing, education, health care and mental health of their children."¹⁵¹ Dig a little deeper and one realizes that, without any evidence parental rights had been impeded, Arizona passed a law that allows conservative parents with "absurd educational demands" to keep children ignorant.¹⁵²

H.B. 2161, unlike other new laws restricting classroom instruction, is not limited to the content of classroom instruction. By the broad language of the statute, a parent may take issue with any subject a teacher instructs on—be it race, women's studies, or sexual orientation and gender identity.¹⁵³ To facilitate parent involvement, school boards are required to develop policies and procedures that allow parents to learn about courses of study, review learning materials, and learn the source of "[s]upplemental educational materials."¹⁵⁴ Once a parent objects to an activity or any learning material, they will be allowed to remove their child from that classroom, activity, or program.¹⁵⁵

149. *Utah School District's Reversal*, *supra* note 146. The books were to be contained in certain areas of the libraries and a parent's permission was needed for students to be able to read and check them out. *Id.*

150. *See* Cobabe, *supra* note 145.

151. H.B. 2161 § (E), 55th Leg., 2d Reg. Sess. (Ariz. 2022).

152. Ja'han Jones, *Arizona Republicans Are Working Hard to Keep Their Kids Ignorant*, MSNBC: REIDOUT BLOG (Apr. 21, 2022, 7:57 AM), <https://www.msnbc.com/the-reidout/reidout-blog/arizona-hb-2161-rcna25179>.

153. *Id.*; *see also* Ariz. H.B. 2161.

154. Ariz. H.B. 2161 § (2)(A)(3). School boards are required to work in conjunction with teachers, administrators, and parents when creating their policies and procedures. *Id.* § (2)(A).

155. *Id.* § (2)(A)(3).

Additionally, the bill provides that school boards must come up with “[p]rocedures by which parents will be notified in advance of and given the opportunity to opt their children in to any instruction, learning materials or presentations regarding sexuality, in courses other than formal sex education curricula.”¹⁵⁶

In practice, the requirements imposed by H.B. 2161 are difficult to implement without infringing on the right of all students to receive ideas and information. Because schools must allow parents a chance to review all learning materials and the sources of supplemental materials, they might be obliged to compile a list of all books in the school and their descriptions to parents. Are students to be restricted in accessing every single book in the school until every single parent has given their consent to the book’s existence in the library or classroom? While students might eventually gain access back, their rights are still being curtailed in the interim. Further, would an objection by one or two parents for a certain book lead the school board to believe the book itself needs to be removed rather than just restricting those particular students’ access to it? This is getting into the territory of a parent’s rights affecting students who are not their own children.

A similar phenomenon would occur if a teacher assigns students an independent reading project. The teacher will have to compile a list of all the books the students chose to read for review by all parents if the projects are going to be presented on or discussed amongst the class. What happens when one parent objects to a book another student is going to read? Does that parent’s child get removed from the exercise, or does the student whose book was objected to get told they cannot read that book? Either way, one student would be missing out on valuable educational opportunities and their right to receive information is being impeded, or another student’s rights are being infringed upon.

This law also fails to consider at what point and at what age students should be able to make their own determinations on what they can and want to read. Surely if fourteen is considered old enough to weigh in on their preference for which parent gets custody in child custody cases,¹⁵⁷ a fourteen-year-old student can choose what book they can read. In fact, they can likely make that decision at a younger age. H.B. 2161 also functions to elevate parents’ knowledge of what is beneficial for students’

156. *Id.* § (2)(A)(5).

157. *1 in 4 States Don’t Require Judge to Consider Child’s Custody Preference*, CUSTODY XCHANGE (Nov. 17, 2020), <https://www.custodyxchange.com/topics/research/custody-preferences-children.php>. Not all states require a judge to take the child’s preference into account; but when they are required, the child must be considered mature and, most commonly, a child is considered so at age fourteen. *Id.*

education over teachers, the very people trained to provide the best possible education for students.

On top of all this is the thought that teachers would be so fearful that one overzealous parent could hold them liable under the bill, that they would simply avoid any type of instructional or learning materials that might become problematic. This affects all students, not just the students whose parents might take issue with a book their teacher might stock on the classroom shelf. While parents absolutely have the right to direct the upbringing of their children—although a question arises at what age even this becomes questionable—that right should not be extended to allow them to direct the upbringing of another’s child. Unfortunately, that is the effect Arizona’s statute might have, and given that parental pressures on school boards have been known to influence book bans at the expense of the entire student body,¹⁵⁸ this effect seems likely.

V. WHAT CAN BE DONE TO PREVENT BOOK BANS FROM ESCALATING?

It is apparent that the *Pico* standard is no longer sufficient to protect students’ First Amendment rights from this new wave of book challenges. As illustrated by this Note, the school library/classroom curriculum divide no longer makes sense. Not only do new state laws legitimize arbitrary efforts to remove books from schools for hateful reasons, but they either fail or refuse to recognize the distinction between school libraries and classroom curricula that was noted by the Court. Even if school libraries are not directly implicated and restrictions are put specifically on classroom instruction, the ever-increasing existence of classroom libraries and the co-mingling of school libraries with classroom assignments calls into question which is the best standard to follow: is it *Pico* or something closer to *Miami-Dade* and *Hazelwood*?

It has been suggested that the Supreme Court should adopt a standard more akin to *Tinker*, requiring a school board to “[p]rove that inclusion of the book would ‘materially and substantially disrupt the work and discipline of the school.’”¹⁵⁹ This continues to support school libraries as non-curricular—which ultimately is probably the best fit—and provides a narrow, objective standard by which challenged books can be removed.¹⁶⁰ Greater emphasis should also be placed on the process school boards take to select books for school libraries; it is there that a

158. See *supra* Part II.

159. See Schroeder, *supra* note 55, at 387 (citing *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

160. *Id.* at 386–87.

book's educational suitability can be judged the most honestly based on the book's merits.¹⁶¹

In light of the new laws and changing practical considerations that come with classroom libraries and how school libraries might co-mingle with classroom assignments, the Supreme Court should make a few more things clear. School libraries need to include classroom libraries; a hard line separating the two makes little sense anymore. Despite the difference in their location, a student's engagement in each is ultimately the same. Once those books have been made available, it is a student's voluntary choice whether to select reading material from those shelves.¹⁶² Even when students are assigned independent reading or book reports, they do not always have to select a book from school libraries or classrooms, they may have books at home or public libraries at their disposal.

The Court also needs to be careful about defining book removals too narrowly. As evidenced, school boards might not simply remove books from library shelves or classrooms.¹⁶³ Any action that schools take that restricts access for books for any student infringes on their First Amendment rights. The Court must keep those realities in mind and should clarify that book removal not only means taking books off the shelves completely, but also restricting student access to them; they must make clear that even if a book is challenged, it should remain where all students can access it until a final determination is made. At that point, it should be left up to teachers, parents, and librarians to make recommendations at an individual level as to what books a student should be reading. Teachers and librarians should limit their recommendations based on that student's interests and reading abilities.¹⁶⁴ Parents, as is their right, can make the determination about whether they want their child reading a particular book, but their decision should not affect the other students in the school.

All of this is not to say that a school board cannot decide against stocking a particular book; that is within the purview of a state's right to set educational standards and a school board's right to implement those standards at the local level. Nothing is stopping officials from choosing not to purchase a certain book for school libraries or choosing to leave

161. *Id.* at 388.

162. *See supra* Part III.

163. *See supra* Part III.

164. *See* Meredith Critchfield, *5 Book Selection Strategies for Your Classroom*, GRAND CANYON UNIV.: TEACHING & SCH. ADMIN. BLOG (Oct. 22, 2019), <https://www.gcu.edu/blog/teaching-school-administration/5-book-selection-strategies-your-classroom>; Benjamin Barbour, *3 Key Roles of School Librarians*, EDUTOPIA (May 5, 2022), <https://www.edutopia.org/article/3-key-roles-school-librarians/>.

particular books off required or recommended reading lists. It is another thing entirely for school boards to have books removed from shelves once they have already been placed there and students have had access to them; and it is another thing to prevent students from speaking on books they have read if those books are not seen as “appropriate.” Administrators would even be able to prohibit teachers from providing certain books in classrooms, so long as this occurred before a teacher has already made those books available.¹⁶⁵

VI. CONCLUSION

Book banning has a long and sordid past in the United States. In the last few years, attempts to remove books from schools have only increased and are now being aided by state legislatures. Following Florida’s “Don’t Say Gay” bill, multiple states have passed laws that can be used to ban books from both school libraries and classrooms, infringing on important First Amendment rights of students. Through an analysis of these laws and the practical realities of schools, it is apparent that standards set by the Supreme Court in *Pico* are insufficient to protect those rights. There is no longer a clear divide between classrooms and school libraries; and school boards take steps *other* than completely removing books from school shelves that restrict student access. The Supreme Court should consider a new standard, one more akin to that in *Tinker* to provide more robust protection of student First Amendment rights. Such a standard would allow for more objective reviews of book challenges and leave the determination as to the appropriateness of a book for a particular student to those who are best positioned to make that call.

Reading is a joy. It opens students up to new ways of thinking, new ideas, and allows them to see their experiences reflected and validated. Book banning efforts have never been anything but a movement to suppress the spread of ideas by groups determined to further their own hateful agendas. Schools are places of not only traditional education but also social development; books are a key component of that learning. Restricting what students can and cannot read not only impedes their ability to become productive members of society but it takes away some of the most important rights that made up the foundation upon which the United States was built.

¹⁶⁵ This Note does not discuss what First Amendment rights teachers possess, but this is perhaps a situation in which those rights should be considered.