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Are "Book Bans" Unconstitutional? Reflections on Public School Libraries and the Limits of Law

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Abstract. Since 2021, the number of demands that public school libraries remove materials from their shelves based on content has accelerated almost too quickly to track. Book removal incidents are more prevalent today than at any time since data became available, doubling between 2021 and 2022. Such "book bans" (as opponents characterize them) or "targeted book removals" (as the courts call them) arise in the context of intense political and cultural divisions and, in turn, exacerbate those conflicts. Indeed, national organizations as well as politicians at every level have played a role in the contemporary attack on library materials, which disproportionately targets books about or by LGBTQ+ people and racial and ethnic minorities. Targeted book removals have led to a spate of litigation, most of it still working its way through the judicial system.

While it might seem a simple proposition that removing books from school libraries based on their content always violates the First Amendment, the governing law is far more complex. Public schools exist in a special constitutional zone in which students and others have a limited right to free expression. Libraries play a special role within that zone, it is argued, as a place devoted to free inquiry, where students have asserted a right to receive information.

This Essay delves into the granular distinctions among settings, decisionmakers, and materials in public schools before analyzing the current constitutional status of targeted book removals. When courts consider legal challenges to book removals, they face a number of complexities, including (1) the fragility and diminished stature of the sole Supreme Court case addressing library book removals, which is the basis of students' right to receive information; (2) limited (or no) guidance from appellate courts; and (3) the need to assess the standing of a variety of plaintiffs (including students, teachers, and librarians

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as well as authors and publishers) in relation to a range of distinct constitutional claims that receive different levels of judicial review. Meanwhile, competing visions of parental rights add to the stakes.

The Essay reveals the jurisprudential obstacles to successfully challenging targeted book removals in court. It argues, however, that—with the right plaintiffs—a range of constitutional arguments offer a path to keeping controversial library books available to public school students in every jurisdiction.

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Introduction[1]

"Book bans are unconstitutional censorship," the ACLU of Texas asserted in an Instagram post.[2] The plain text of the Free Speech Clause of the First Amendment might suggest that is the case. If only the law were so simple.

This Essay examines proliferating campaigns to remove books from public school libraries amid heightened cultural and political divisions and the spate of lawsuits filed since 2022 challenging those removals.[3] I analyze the extent to which current constitutional doctrine prohibits book removals that serve an ideological or partisan agenda. As I will show, the legal analysis is often far more complex—and more discouraging to those who value freedom of expression—than the ACLU's post claims. The doctrine is inchoate and confusing. Little appellate guidance exists for trial courts considering challenges to library book removals. The outcome in any particular lawsuit asserting that a book removal is unconstitutional depends in large part on factors such as which of the limited precedents the court follows, the context of the removal itself, the motivation for the removal, and the identity of the challenger.

An advocate for robust student speech rights would hope to find that contemporary constitutional doctrine offers a clear path to challenging the decimation of school library shelves. But the record of the past few decades—and especially of the last two years—has not been encouraging. The acceleration of successful attacks on school library books takes place in the shadow of a pattern of public schools regularly silencing and punishing constitutionally protected student speech. As I showed in *Lessons in Censorship: How Schools and Courts Subvert Students' First Amendment Rights*, schools convey to students by their policies and disciplinary actions that the First Amendment is a false promise,[4] a "mere platitude[],"[5] and not a principle that extends to them now or when they become adults. Schools that strip students of the right

1. The legal landscape and the facts discussed in this Essay are developing rapidly. Materials cited are current as of April 2024.

2. ACLU of Texas (@aclutx), INSTAGRAM (July 31, 2023), https://perma.cc/XYN9-RK8G; *see also* Asher Lehrer-Small, *The ACLU's Fight Against Classroom Censorship, State by State*, THE 74 (updated Sept. 16, 2022), https://perma.cc/CVH4-VN7K (reporting an ACLU attorney's statement that the organization is filing lawsuits to challenge laws banning a variety of books and curricula "on race and gender").

3. *E.g.*, Complaint at 4-6, H.A. *ex rel.* Adams v. Matanuska-Susitna Borough Sch. Dist., No. 23-cv-00265 (D. Alaska Nov. 17, 2023), https://perma.cc/H3MC-NX2F (alleging that a school district violated students' rights by removing fifty-six books). Most of the lawsuits discussed in this essay remain in preliminary stages. None have been resolved as of April 2024.

4. CATHERINE J. ROSS, LESSONS IN CENSORSHIP: HOW SCHOOLS AND COURTS SUBVERT STUDENTS' FIRST AMENDMENT RIGHTS 6 (2015).

5. *See* W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943).

to speak or to question received wisdom and popular ideology teach the wrong lessons about the very meaning of democracy and citizenship. The same concerns animate my reflections on school library book removals—which teach students that ideas we disagree with should be buried. These are hardly the lessons in liberty school officials should model for their students, whether through their responses to the students' own speech or by removing controversial materials from libraries.

Part I of this Essay lays out the scope of contemporary attacks on books through state and local regulation and the explosion of book removal incidents, and explains why courts reject the notion of "book bans" in school, preferring the term "targeted book removals." Part II places the targeted removal problem in the context of First Amendment jurisprudence governing curricular decisions, the autonomy of teachers to provide supplementary materials, and the function of school libraries. Part III analyzes the appellate jurisprudence governing targeted book removals, including *Board of Education v. Pico*,[6] the only Supreme Court case that addresses the issue, and the limited guidance provided by the Courts of Appeals. It then sets out and analyzes the unique doctrine governing the speech rights of public school students. Part IV returns to the contemporary landscape, considering the role of elected school boards and explaining how targeted removals became national politics, including through the "parents' rights" movement. It then analyzes the standing of various potential plaintiffs in cases challenging targeted removals. Finally, Part V analyzes the First and Fourteenth Amendment claims available to plaintiffs who challenge targeted removals and describes the class of plaintiffs best positioned to succeed under each claim.

I. Contemporary Developments

Legal disputes over book removals occur in the context of political friction and debate on the issue. In a 2023 video announcing that he would seek reelection, President Biden called "MAGA extremist[]" book banners a threat to democracy.[7] Congressional committees led by both political parties have held hearings on book bans,[8] which have predictably reached diametrically opposed

6. 457 U.S. 853 (1982).

7. Joe Biden, *Joe Biden Launches His Campaign for President: Let's Finish the Job*, at 00:30-00:50, YOUTUBE (Apr. 25, 2023), https://perma.cc/BFQ8-7TM8 (to locate, select "View the live page"); Manuela López Restrepo, *Book Bans Are Getting Everyone's Attention—Including Biden's. Here's Why*, NPR (Apr. 25, 2023, 5:32 PM ET), https://perma.cc/NJ7H-DREW.

8. *Protecting Kids: Combating Graphic, Explicit Content in School Libraries: Hearing Before the Subcomm. on Early Childhood, Elementary, & Secondary Educ. of the H. Comm. on Educ. & the Workforce*, 118th Cong. (2023) (Republican majority); *Free Speech Under Attack: Book Bans and Academic Censorship: Hearing Before the Subcomm. on C.R. & C.L. of the H. Comm.*
footnote continued on next page

conclusions. Democrats asserted that the challenges to library books stemmed from "moral panic" and violated the First Amendment.[9] In stark contrast, Republicans characterized targeted removals as mere "content moderation" aimed at "pornographic" materials that threatened children's "innocence."[10] The Republican-run Committee majority deemed the books so dangerous that its summary of the hearing included a "Disclaimer" warning: "The following hearing recap contains direct quotations from children's books . . . . [N]o children should read beyond this point."[11]

A. State and Local Regulation

State and local officials are weighing in, too—mostly on the side of shrinking the marketplace of ideas. Between January 2021 and September 2023, state and local officials "enacted or adopted over 200 . . . laws limiting K-12 curricula."[12] Those laws affect more than 22 million children, almost half of the country's public school students.[13]

Legislation in many states, including Florida and Texas, bars schools and individual teachers from addressing or accurately teaching topics that could

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on Oversight & Reform, 117th Cong. (2022), https://perma.cc/YYP2-KVGY [hereinafter *Free Speech Under Attack*] (Democratic majority).

9. *See Free Speech Under Attack*, *supra* note 8, at 3-4 (statement of Rep. Jamie Raskin, Chairman, Subcomm. on C.R. & C.L.). As a law professor, Representative Raskin authored a book about constitutional law issues affecting students, such as freedom of speech: JAMIE B. RASKIN, WE THE STUDENTS: SUPREME COURT CASES FOR AND ABOUT STUDENTS (1st ed. 2000).

10. *See Hearing Recap: Explicit Children's Books Edition*, COMM. ON EDUC. & THE WORKFORCE (Oct. 19, 2023), https://perma.cc/S5ZU-J386.

11. *Id.* (capitalization altered).

12. JONATHAN FEINGOLD & JOSHUA WEISHART, NAT'L EDUC. POL'Y CTR., HOW DISCRIMINATORY CENSORSHIP LAWS IMPERIL PUBLIC EDUCATION 9 (2023), https://perma.cc/D8LH-68U8; *see also* TAIFHA ALEXANDER, LATOYA BALDWIN CLARK, KYLE REINHARD & NOAH ZATZ, UCLA SCH. OF L. CRITICAL RACE STUD., CRT FORWARD: TRACKING THE ATTACK ON CRITICAL RACE THEORY 6 (2023), https://perma.cc/4R79-QC8M.

    As this Essay went to press, new laws affecting school library collections went into effect in three states: Utah (barring "pornographic or indecent material" without reference to its artistic or other merit); South Carolina (imposing a statewide form for complaints about books containing sexual content, requiring districts to list all materials available, but preserving some district control over how to handle complaints); Tennessee (codifying the definition of suitability for children and providing under certain circumstances for review by a state commission, whose decision to remove material would apply statewide). Elizabeth A. Harris, *More States Are Passing Book Banning Rules. Here's What They Say.*, N.Y. TIMES (updated Aug. 7, 2024), https://perma.cc/HV2Y-M2XG.

13. FEINGOLD & WEISHART, *supra* note 12, at 9 (quoting ALEXANDER ET AL., *supra* note 12, at 4).

stir controversy, including race, the history of slavery, gender identity, and gender equity.[14] Some statutes also prohibit the use or discussion of materials containing any sexual content, including scientific information about sex.[15] Definitions of forbidden books are sometimes so broad that they encompass standard dictionaries, which define terms like sexual intercourse.[16] Attacks on books in public school libraries reflect the same concerns and deny students access to those topics at school.[17]

Authorities including local elected school board members and school administrators have increasingly adopted regulations and used their executive

14. *See id.* at 3, 10-12 (discussing "discriminatory censorship laws"); *Book Ban Data*, AM. LIBR. ASS'N, https://perma.cc/E5EG-NVT5 (archived May 12, 2024) ("Titles representing the voices and lived experiences of LGBTQIA+ and BIPOC individuals made up 47 percent of those targeted in censorship attempts."); Press Release, Am. Libr. Ass'n, American Library Association Reports Record Number of Unique Book Titles Challenged in 2023 (Mar. 14, 2024), https://perma.cc/MXU2-U6M6 (reporting an increase in the number of challenges to library books with a dramatic increase in incidents involving public libraries).

    Those who oppose books or curricular offerings pertaining to race, slavery, and topics regarded as "divisive" commonly label the lessons as "critical race theory." *See* Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AM. (Sept. 19, 2022), https://perma.cc/H9HA-EALY (finding that 41% of books targeted for removal are about LGBTQ+ persons or themes, 40% involve major characters who are persons of color, and 21% directly concern race and racism); FEINGOLD & WEISHART, *supra* note 12, at 7 (noting that the Florida social studies curriculum "suggested enslaved people benefitted from slavery" and used "self-described right-wing" materials from PragerU—a conservative organization). Representatives of PragerU have admitted that the organization seeks to "indoctrinate kids." *Id.* (quoting Valerie Strauss, *Florida Says It Doesn't Want Indoctrination in Schools—But Look at the Materials It Just Approved*, WASH. POST (Aug. 10, 2023, 9:03 AM EDT), https://perma.cc/8LVE-8HTU).

15. Friedman & Johnson, *supra* note 14 (discussing state efforts to restrict educators' coverage of topics and viewpoints deemed "divisive" through legislation, policy, and executive orders). Some statutes appropriately exempt subjects like art history, science, and sex education from such restrictions. *E.g.*, MO. REV. STAT. § 573.550(1) (2024).

16. In response to a new state law, a school district in Florida removed more than 1,600 titles from its libraries because they mentioned "sexual conduct"; the books removed included several children's dictionaries, such as *Webster's Dictionary and Thesaurus for Children* and *Merriam-Webster's Elementary Dictionary*. Justine McDaniel & Hannah Natanson, *Florida Law Led School District to Pull 1,600 Books—Including Dictionaries*, WASH. POST (Jan. 11, 2024, 9:02 PM EST), https://perma.cc/6MSP-FEAY. The district considered other reference books for removal, including the *World Book Encyclopedia of People and Places* and the *World Almanac and Book of Facts*, but it is unclear whether those titles were ever removed from classroom or library collections. *Id.* The district may have returned the dictionaries to the shelves following adverse publicity related to litigation filed by PEN America. *See id.* For further discussion on the litigation, see notes 189-97 and the accompanying text below.

17. *See infra* note 198 and accompanying text.

powers to limit educators' discretion.[18] Officeholders also use their platforms less formally to diminish the range of materials available to students. For instance, Texas state representative Matt Krause proposed banning approximately 850 books, leading some school districts to pull books from shelves in classrooms and libraries in a frenzy.[19]

B. Incidence of Book Removals and Terminology

Since 2021, the pace at which books have been targeted for removal from libraries and classrooms has accelerated almost too quickly to track.[20] PEN America reported 3,362 documented "book bans" affecting at least 1,557 titles during the 2022-2023 school year—an increase of 33% over the record high reported the previous year.[21] The American Library Association (ALA) similarly sounded alarms about an unparalleled number of challenges to books in public school libraries.[22] In 2022, the ALA documented 1,269 demands to censor library books, nearly double the number of challenges from the previous year and the largest number in the twenty years the organization has tracked such incidents.[23] Both PEN America and the ALA advise that the

18. *See* Jeremy C. Young & Jonathan Friedman, *America's Censored Classrooms*, PEN AM. (Aug. 17, 2022), https://perma.cc/5CKL-NW3D (tracking and summarizing proposed state "gag orders" that restrict what K-12, college, and university educators are allowed to cover and finding a 250% increase from 2021 to 2022).

19. *See* Cassandra Pollock & Brian Lopez, *Texas Lawmaker Keeping Mum on Inquiry into What Books Students Can Access as School Districts Grapple with how to Respond*, TEX. TRIB. (updated Oct. 29, 2021, 8:00 PM CT), https://perma.cc/2K3N-5LT5; Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES (updated June 22, 2023), https://perma.cc/99KY-NVSY.

20. At least fifty organized groups, many with multiple sub-chapters, coordinate campaigns to challenge books in school libraries or curricula. Most were established in or after 2021. Friedman & Johnson, *supra* note 14.

21. Kasey Meehan, Tasslyn Magnusson, Sabrina Baêta & Jonathan Friedman, *Banned in the USA: Mounting Pressure to Censor*, PEN AM., https://perma.cc/5QR8-3NNQ (archived May 12, 2024) [hereinafter Meehan et al., *Mounting Pressure*]; *see also* Kasey Meehan, Sabrina Baêta, Madison Markham & Tasslyn Magnusson, *Banned in the USA: Narrating the Crisis*, PEN AM. (Apr. 16, 2024), https://perma.cc/NP4V-S4MN (reporting that over 4,000 books were banned during the fall of 2023, which exceeded the total number of banned books in the entire previous school year).

22. *See Book Ban Data*, *supra* note 14; Letter from Deborah Caldwell-Stone, Dir., Off. for Intell. Freedom, Am. Libr. Ass'n, to Rep. Jamie Raskin, Chairman, Subcomm. on C.R. & C.L., House Comm. on Oversight & Reform, & Rep. Nancy Mace, Ranking Member, Subcomm. on C.R. & C.L., House Comm. on Oversight & Reform 1 (Apr. 5, 2022), https://perma.cc/CYY6-F5GJ (noting that the ALA is "alarmed by an increasing trend of censorship campaigns directed at libraries," including school libraries).

23. Press Release, Am. Libr. Ass'n, American Library Association Reports Record Number of Demands to Censor Library Books and Materials in 2022 (Mar. 22, 2023), https://perma.cc/K832-KW5X.

number of incidents is likely higher than their reports indicate due to underreporting by librarians and limited local news coverage.[24]

Politicians, organizations like PEN America and the ALA, plaintiffs seeking restoration of library books, journalists, and civil libertarians label these incidents "censorship," "book bans," and the like,[25] but I shall use the term "targeted removal." A targeted removal occurs when officials single out one or more volumes for review and removal based on complaints about their content or viewpoint. Regardless of what terminology is used, demands to remove books from the library's existing collection trigger First Amendment alarms because the objections always stem from the books' content or viewpoint. Restrictions on speech based on either its content (that is, its subject matter) or viewpoint (the position a speaker takes with respect to a subject) are presumptively unconstitutional.[26] First Amendment concerns may also be triggered when the process for reviewing or removing the material disregards established neutral procedures.[27]

The term "ban" is particularly provocative in First Amendment parlance because it signals a constrained marketplace of ideas. In schools, a ban could transform students into "closed-circuit recipients of only that which the State chooses to communicate," an outcome once deemed impermissible by the Supreme Court.[28] A ban signals a total prohibition—that is, classic "censorship"—while "targeted removal," though also content-based, indicates a more limited incursion on the ideas in circulation.

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24. *See Book Ban Data*, *supra* note 14 (characterizing the report as only a "snapshot" of censorship because many incidents are not reported or covered in the press); Friedman & Johnson, *supra* note 14 (footnote omitted) ("[T]here are likely additional bans that have not been reported.").

25. *See, e.g.*, Michelle Goldberg, Opinion, *If You Care About Book Bans, You Should Be Following This Lawsuit*, N.Y. TIMES (May 19, 2023), https://perma.cc/4DRG-3SKF; ACLU of Texas, *supra* note 2; Meehan et al., *Mounting Pressure*, *supra* note 21; Friedman & Johnson, *supra* note 14.

26. *See* Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015) (recognizing that all content-based laws are subject to strict scrutiny regardless of motive); Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."); Rosenberger v. Rector & Visitors of Univ. of Va., 515 U.S. 819, 829 (1995) (explaining that regulation of speech based on the speaker's viewpoint or opinion is an "egregious form of content discrimination" and presumptively unconstitutional).

27. *See, e.g.*, Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 874 (1982) (plurality opinon) (explaining that if a school board removed books under an "established, regular, and facially unbiased procedure[] for the review of controversial materials," the board's "substantive motivations" to remove books would "not be decisive").

28. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969).

In 2009, the Eleventh Circuit critiqued the use of "overwrought rhetoric" and declared that the term "book ban" is only appropriate in limited circumstances, such as when "a government or its officials forbid or prohibit others from having a book."[29] That "pejorative label" is inapplicable, the court concluded, where a school "simply" removes a book from library shelves—so long as the book remains available in other settings, including public libraries or the general marketplace.[30]

Recent lower court decisions agree about the correct legal terminology. Denying a preliminary injunction against a school library, a federal district court in Missouri unequivocally stated that "this case does not involve banning books."[31] There is no book ban, the court explained, where no one is prohibited from "reading, owning, possessing, or discussing any book."[32] The court emphasized that students remained free to acquire the books anywhere, to lend them to each other, to bring their own copies to school and, during free time, to discuss them and even urge peers to read them.[33] Beyond that, the accessibility of books on the internet reinforces the notion that targeted removals rarely amount to an enforceable ban.

Targeted book removals occur in a broader context of decisions about what materials students are exposed to in official school curricula and classrooms, to which we now turn.

II. The Legal Basics of Choosing Educational Materials

Before analyzing the constitutional status of targeted book removals, we must distinguish books that are in a school's library collection from materials that have never been available to students at that school. The constitutional

29. ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1218 (11th Cir. 2009); *see also Pico*, 457 U.S. at 886 (Burger, C.J., dissenting) (pointing out that, even if books are removed, students remain "free to read the books in question, which are available at the public library and bookstores; they are free to discuss them in the classroom").

30. *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1217-19. The Eleventh Circuit emphasized that none of the seven separate opinions issued in *Pico* used the term "ban"—not even once—but instead collectively characterized the issue as book "'removal' or a derivative of that [term]." *Id.* at 1220. According to the Eleventh Circuit, the seven *Pico* opinions used removal and variations thereon a total of 107 times. *Id.*

31. C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 909 (E.D. Mo. 2022).

32. *Id.*

33. *Id. But see* Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 999-1000, 999 n.2 (W.D. Ark. 2003) (citing Reno v. ACLU, 521 U.S. 844, 880 (1997)) (holding that a student's ability to access books at home does not mitigate the infringement of her First Amendment rights where her school puts the books in a restricted section that requires parental consent for access).

status of targeted removals initially turns on whether and in what context the school once made the materials available to students: in the curriculum, in supplemental classroom materials or lectures, or in the school library. And courts may need to consider who decided to deny students access to these books at school and under what circumstances that decision was made.

Materials may be inaccessible for a variety of distinguishable reasons, including: (1) authorities never acquired them or approved of their use ("never selected"); (2) authorities barred teachers from offering the materials for use in the classroom as supplements to curricular assignments or as part of an in-class library ("expressly unauthorized"); or (3) the materials once were available in the school library but have been permanently or temporarily removed ("targeted removals").[34]

A. Curricular Choices

When authorities omit topics or materials, their vast discretion over curricular choices almost always protects them from legal challenges.[35] Discretionary curricular choices include what subjects are required or permitted, which instructional materials are used to teach those subjects, and which viewpoint a course should promote.[36] From the earliest litigation concerning state regulation of curriculum—*Meyer v. Nebraska*[37]—until today, no teachers,

34. "Targeted removals" may include books that remain in the library collection but are no longer in general circulation. Materials that were once on open shelves may be unavailable to students below a certain grade level or may require parental consent.

35. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 869-70 (1982) (plurality opinion) (observing that school boards "might well defend their claim of absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values," but that this duty does not extend "beyond the compulsory environment of the classroom"). Although curricular choices (both to add and remove topics and materials) and targeted removals call for distinct constitutional analyses, a statute might classify a work that appears in both settings as unsuitable, or a district might remove library materials from the curriculum's required or optional reading. *See, e.g.*, GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *1 (S.D. Iowa Dec. 29, 2023) (explaining that the state's restrictions apply to curricular and library materials in a specified range of school grades), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024). When a case alleges targeted removals in both settings, courts should analyze the curriculum and the library separately.

36. 4 JAMES A. RAPP, EDUCATION LAW § 11.02[2](d)(i) (LexisNexis 2023).

37. 262 U.S. 390, 399-402 (1923) (overturning a school's ban on teaching certain foreign languages as a violation of parents' and teachers' substantive due process rights but noting that the no party challenged "the State's power to prescribe a curriculum for institutions which it supports"); *see also* Amended Complaint at 18 n.3, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024), ECF No. 27, https://perma.cc/Z6BX-FMYM ("Plaintiffs' claims in this action do not involve, rely on, or challenge any action taken by Defendants with respect to any classroom curricular materials, whether optional or required . . . ."). But lawsuits based

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parents, or students have challenged the state's power to choose subjects of study or classroom materials based solely on students' expressive rights.

Two sets of considerations bolster the state's discretion to control curricular decisions. Judicial prudence has led courts to defer to school officials' comprehensive authority and to refrain from "interven[ing] in the resolution of conflicts which arise in the daily operation of school systems."[38] Equally important from a doctrinal perspective, a school's curricular decisions are government speech to which the First Amendment does not apply.[39] In order to communicate at all, the government must necessarily differentiate among possible messages and ways to communicate those messages.[40] These considerations give the state virtually free rein to decide what subject matter public schools cover, how school curricula will define and treat the subjects, and what textbooks teachers will use.

B. Supplementary Classroom Materials and Teachers' Voices

Despite the state's broad authority over education, many teachers introduce other ideas in classrooms and offer supplementary materials that complement the mandated curricular materials. Supplementary materials are often selected precisely to expose students to different ways of thinking about a given subject, including conflicting viewpoints or alternative evidence.[41] Offering students these additional materials, whether required or optional, encourages engaged classroom discussions and promotes critical thinking.[42]

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on other constitutional guarantees may succeed. For example, in *González v. Douglas*, the court held that a statute barring ethnic studies courses was motivated by racial animus and violated the Fourteenth Amendment as applied to Mexican American studies in a district subject to a desegregation order. 269 F. Supp. 3d 948, 950, 972-73 (D. Ariz. 2017). The court further found that barring the subject violated students' First Amendment right to receive information. *Id.* at 973. In rare cases, a challenge to curricular requirements that violate the Establishment Clause may succeed—but these challenges are based on religious freedom grounds, rather than solely on students' expressive rights. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97, 103 (1968) (overturning a ban on teaching evolution); Edwards v. Aguillard, 482 U.S. 578, 593 (1987) (overturning a requirement that schools that teach evolution also teach Bible-based creationism).

38. *Epperson*, 393 U.S. at 104. But courts must ensure that such authority is exercised "consistent with fundamental constitutional safeguards." Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969).

39. *See* ROSS, *supra* note 4, at 111. Government speech is discussed below at notes 81-90, 197-98, and the accompanying text.

40. *See* ROSS, *supra* note 4, at 111-12; Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 207-08 (2015) (explaining that, in general, the government may promote a specific position and that it needs the ability to communicate its views in order to accomplish its functions).

41. *See* ROSS, *supra* note 4, at 110-12.

42. *See id.* at 112.

Students may find the marketplace of ideas in their classes limited when laws and school officials label teachers' supplementary materials "expressly unauthorized."[43] Pervasive state regulation limits teachers' ability to introduce facts, interpretations, or materials that differ from the curricular message, and K-12 educators lack constitutional protection if they share material that competes with the viewpoint of the district or school.[44]

C. School Libraries

This brings us to decisions about what materials a school library acquires and the circumstances that can lead it to remove a book from circulation. Much turns on the school library's function and whether the district (or the reviewing court) views the library as an extension of the school's curriculum or a place for free-ranging student inquiry. Justice Brennan's plurality opinion in *Board of Education v. Pico*—the Supreme Court's only school library case—strongly endorsed the latter view.[45] The opinion underscored that "*library* books . . . by their nature are optional rather than required reading."[46] It is, Justice Brennan posited, "especially appropriate" that the First Amendment rights of students be respected given the "special characteristics of the school *library*," including its role as "the principal locus" of free inquiry.[47] The school library gives students "an opportunity at self-education and individual enrichment," in contrast to the "compulsory environment of the classroom."[48]

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43. *See supra* text accompanying note 34.

44. *See* ROSS, *supra* note 4, at 112-16; *see, e.g.*, Mayer v. Monroe Cnty. Cmty. Sch. Corp., 474 F.3d 477, 479-80 (7th Cir. 2007) (explaining that because the school system "hires" a teacher's speech, which the teacher "sells to her employer in exchange for a salary," K-12 educators cannot "cover topics, or advocate viewpoints, that depart from the [school's] curriculum"); Evans-Marshall v. Bd. of Educ., 624 F.3d 332, 334 (6th Cir. 2010) (holding that the First Amendment does not apply to teachers' curricular speech, including the choice of assigned reading). School districts vary in their level of tolerance for supplementary materials, including the teacher's own classroom speech. It may also matter whether the students are required to use the supplementary materials or are merely free to peruse them—in other words, whether the supplements resemble curricular or library materials.

45. 457 U.S. 853, 862 (1982) (plurality opinion).

46. *Id. Pico* is discussed further in Part III.A below.

47. *Id.* at 868-69.

48. *Id.* at 869. A more authoritarian view of the school's function treats the library as an extension of its "inculcative" curriculum and has no qualms with limiting its collection to materials supporting the school's messages. *Id.* at 915 (Rehnquist, J., dissenting) (asserting that, aligning with primary and secondary school curricula, "elementary and secondary school libraries are not designed for freewheeling inquiry").

Regardless of the school library's function, acquisitions of books—like curricular decisions—typically do not generate legal challenges.[49] As far as I know, litigation has only been filed to challenge removals from the shelves or restrictions on who can access the materials. However, hypothetical situations could plausibly raise constitutional questions about library acquisitions. What if the school library *only* acquires books by Republicans, or Democrats, or White authors, or Black authors, or if it *never* acquires books by Jewish or Palestinian authors, Black authors, or LGBTQ+ authors?[50]

The relatively granular distinctions set out in this Part only hint at the importance of the contextual and legal complexities that impede litigants who seek to overturn so-called book bans. But, as the next Part demonstrates, the appellate courts have provided little guidance on how to address those complexities.

III. The Limited Jurisprudential Guidance for Reviewing Targeted Book Removals

Litigants, attorneys, and district court judges who are engaged with cases involving targeted book removals will find sparse guidance in appellate decisions. The applicable precedents are few, most are dated, and some confuse rather than clarify.

A. Legal Doctrine Affecting Targeted Book Removals

In 1943, long before the Supreme Court's 1982 decision in *Pico*—its first and only case about targeted book removals—the Court held in *West Virginia State Board of Education v. Barnette* that students have First Amendment rights in

49. *But see* Chiras v. Miller, 432 F.3d 606, 607, 611-15 (5th Cir. 2005) (holding that a textbook author has no right to a court order requiring a state board of education to approve his book for state funding). Although a few book removal cases plausibly involve a demand that a school library acquire specific materials, that issue is not the central question in those cases. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1207 (11th Cir. 2009) (noting that a parent has no right to demand that the school district remove a book and replace it with a book reflecting a different viewpoint).

50. *See Pico*, 457 U.S. at 870-71 (plurality opinion) (venturing that "few would doubt" that a decision by members of the other major party to remove all books by Republicans or Democrats or "an all-white school board, motivated by racial animus, decid[ing] to remove all books authored by blacks" would violate the constitutional rights of students, but declining to restrict "the discretion of a local school board to choose books to *add* to the libraries of their schools"); *see also* GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *18 (S.D. Iowa Dec. 29, 2023) ("The *removal* of books from a school library is different for First Amendment purposes than the *acquisition* of books."), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

public schools.[51] In 1969, the Court reiterated in *Tinker v. Des Moines Independent Community School District* that public school students have First Amendment rights, including the right to express their own views.[52] Those rights, however, are not coextensive with rights outside of school. The *Tinker* Court crafted a unique standard for evaluating claims that schools violated student speech rights in light of the "special characteristics of the school environment" and its civic mission.[53]

Barnette and *Tinker* comprised the universe of Supreme Court student speech rights cases when the Court took up the library book removal problem in 1982. In *Pico*, a group of high school and junior high school students challenged the local board of education's removal of nine books from their school libraries.[54] The removals occurred after three board members attended a meeting of a politically conservative parents' organization that distributed a list of "objectionable" books.[55] The board later described these books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy."[56]

Alleging a violation of their First Amendment rights, students sued in federal court seeking an injunction ordering the district to return the books to the shelves and to lift a prohibition on using the materials in the curriculum. The district court granted summary judgment to the defendant school board after accepting what the court regarded as the parties' "substantial[] agree[ment]" that the board acted on "its conservative educational philosophy," which informed its view that the books were, among other things, "vulgar, immoral, and in bad taste," rendering them "educationally unsuitable."[57] A divided Second Circuit panel reversed and remanded for trial and the Supreme Court granted certiorari.[58]

A splintered Supreme Court issued five opinions. Justice Brennan's plurality opinion announced the judgment of the Court and was joined in full

51. 319 U.S. 624, 637 (1943) (holding that schoolchildren can enforce their First Amendment rights against boards of education, which are constrained by "the limits of the Bill of Rights" via the Fourteenth Amendment).

52. 393 U.S. 503, 506 (1969); *see also Pico*, 457 U.S. at 864-66 (plurality opinion) (discussing *Barnette* and *Tinker*).

53. *Tinker*, 393 U.S. at 506.

54. *Pico*, 457 U.S. at 856-59 (plurality opinion).

55. *Id.* at 856-57.

56. *Id.* at 857 (alteration in original) (quoting Pico *ex rel.* Pico v. Bd. of Educ., 474 F. Supp. 387, 390 (E.D.N.Y. 1979)). There was no allegation that the materials met the legal definition of obscenity as applied to minors. *See infra* notes 205-07 and accompanying text.

57. *Pico*, 457 U.S. at 859 (quoting *Pico*, 474 F. Supp. at 391-92).

58. *Id.* at 860-61 (summarizing the case's procedural posture).

by two other Justices and in part by Justice Blackmun.[59] Justice White's concurrence gave a portion of the plurality opinion a fifth vote on the narrowest of grounds: He concluded that the Court had granted certiorari improvidently and the case should be remanded for development of the facts about the board's motivation for removing the books.[60]

Responding to the broad strokes of the constitutional analysis in Justice Brennan's plurality opinion, Chief Justice Burger's dissent emphasized that "there is no binding holding of the Court on the critical constitutional issue presented."[61]

The four dissenting Justices did not agree that the Constitution limited a school board's discretion to remove library books.[62] They did, however, agree with the plurality on one point: "[A]s a matter of *educational policy* students should have wide access to information and ideas."[63] But the dissenters deferred to the discretion of elected school boards which, they said, are uniquely accountable to local communities through elections.[64]

Justice Brennan posited that the right to receive information implicit in the Speech Clause limits school boards' discretion to cull library shelves.[65] The right to receive information, Justice Brennan explained, flows from the speaker's right to share his ideas, from the willing recipient's need for information in order to enjoy "meaningful exercise of his own" expressive rights, and, in the case of students, from the need to prepare for meaningful citizenship.[66]

The plurality of four Justices proposed a new standard: "[S]chool boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to 'prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.'"[67] But a removal would not offend the Constitution "if it were

59. *Id.* at 855.

60. *Id.* at 883 (White, J., concurring).

61. *Id.* at 885-86, 886 n.2 (Burger, C.J., dissenting).

62. Each conservative member of the Court—Chief Justice Burger, Justice Powell, Justice Rehnquist, and Justice O'Connor—wrote a dissenting opinion. *See id.* at 885 (Burger, C.J., dissenting); *id.* at 893 (Powell, J., dissenting); *id.* at 904 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting). All of the dissenters also signed the Chief Justice's opinion, *id.* at 885 (Burger, C.J., dissenting), which garnered more votes than Justice Brennan's three-person plurality opinion locating the students' constitutional claim in the right to receive information. *Id.* at 867-68 (plurality opinion); *see infra* notes 65-66 and accompanying text.

63. *Id.* at 891 (Burger, C.J., dissenting).

64. *Id.*

65. *See id.* at 867-69 (plurality opinion).

66. *Id.* at 867-68. Justice Blackmun did not join this part of the analysis. *See id.* at 855.

67. *Id.* at 872 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

demonstrated that the removal decision was based solely upon the 'educational suitability' of the books in question."[68]

Educational suitability is a flexible concept. The plurality did not define it beyond noting that "pervasive[] vulgar[ity]" could render a book unsuitable.[69] Other valid considerations may include the age of students, the accessibility of the language, and, in the case of nonfiction, the accuracy of the information.[70]

But, the *Pico* plurality emphasized, a school board's discretion to remove books "may not be exercised in a narrowly partisan or political manner."[71] This standard requires a court to scrutinize the motive underlying a targeted book removal.[72] Based on decades of doctrine that "no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," Justice Brennan explained that an intent to impose a "pall of orthodoxy over the classroom" would render book removals constitutionally suspect.[73] Accordingly, a school that removed books primarily in order to prevent students from being exposed to disfavored ideas would likely violate the students' right to access information.

68. *Id.* at 871 (quoting Transcript of Oral Argument at 53, *Pico*, 457 U.S. 853 (No. 80-2043)).

69. *Id.* All parties in all of the cases discussed throughout this Essay concede that the disputed materials do not satisfy the legal definition of obscenity. Nor do the targeted materials meet the more easily satisfied definition of variable obscenity applicable to minors, which is discussed below in notes 202-06 and the accompanying text.

70. *See, e.g.*, *id.* at 873-74 (noting that these factors "appear on their face to be permissible"); ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1202 (11th Cir. 2009) (explaining that students have no right to access nonfiction library books containing "factual inaccuracies," whether by omission or commission).

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

72. *See id.* at 872-75 (discussing the evidence of motive and finding a need for additional fact-finding at trial). Many of the opinions cited in this Essay address motions that did not require factual hearings; later proceedings may develop a factual record that reveals the school district's motives. *See, e.g.*, L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *1 (W.D. Mo. Feb. 23, 2023) (denying a motion for preliminary injunction without a hearing); C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 912, 920 (E.D. Mo. 2022) (same).

73. *Pico*, 457 U.S. at 870 (plurality opinion) (first quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943); and then quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)); *see also id.* at 871 n.22 (referencing the *Mt. Healthy City School District Board of Education v. Doyle* test for identifying unconstitutional deprivations where the exercise of First Amendment rights was an impermissible "substantial factor"); Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle, 429 U.S. 274, 287 (1977) (applying the "substantial factor" test in a school employment decision); *Pico*, 457 U.S. at 879 & n.2 (Blackmun, J., concurring) (arguing that the state may not "single out an idea for disapproval and then deny access to it").

B. *Pico*'s Precarious Precedential Value

Until the early 2000s, lower courts regularly cited and applied the *Pico* plurality's approach to targeted library book removals.[74] Several twenty-first century courts, however, have vehemently criticized lower courts' reliance on the plurality's reasoning and test.[75] In *ACLU of Florida, Inc. v. Miami-Dade County School Board*—the only federal appellate decision that has squarely considered targeted book removals in school libraries since *Pico*[76]—the Eleventh Circuit proclaimed: "*Pico* is a non-decision so far as precedent is concerned. It establishes no standard."[77] Despite that conclusion, the court still considered whether the plaintiffs could prevail under *Pico*, rather than accepting the school board's argument for a more deferential standard.[78]

74. *See, e.g.*, Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 188-91 (5th Cir. 1995) (relying on *Pico* to remand for an inquiry into whether the school board's removal of a book was "substantially based on an unconstitutional motivation"); Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 874-75, 877 (D. Kan. 1995) (relying on *Pico* to enjoin a book removal); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1004-05 (W.D. Ark. 2003) (drawing from *Pico* to grant summary judgment to plaintiffs who challenged a school district's restriction of access to certain books in its library); *see also* Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1024-25, 1027 n.5 (9th Cir. 1998) (relying on *Pico* to rule on a school's curricular decisions). Some courts still apply the *Pico* test. *See* González v. Douglas, 269 F. Supp. 3d 948, 950, 972-73 (D. Ariz. 2017) (applying *Pico* to the removal of ethnic studies from the school's curriculum).

75. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1200 (11th Cir. 2009) ("*Pico* is of no precedential value as to the application of the First Amendment to these issues." (quoting Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (Former 5th Cir. 1982) (en banc)); *see also* GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *14 (S.D. Iowa Dec. 29, 2023) (explaining that the "splintered" decision in *Pico* "provides some guidance" about whether a school board's decision to remove books from the school library would be unconstitutional, but that it would be "difficult to apply . . . without additional guidance"), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

76. 557 F.3d 1177. Another appellate court has issued an opinion since *Pico* in a controversy arising at least in part from targeted book removal, but the book removal was not the central question in the appeal, and the court did not rule on it. Book People, Inc. v. Wong, 91 F.4th 318, 339-41 (5th Cir. 2024) (holding that the rights of book sellers were likely violated when the state compelled them to speak by rating books as a condition to sell books in schools); *see also* Case v. Unified Sch. Dist. No. 233, 157 F.3d 1243, 1246 (10th Cir. 1998) (noting that the district court ruled for the plaintiffs on book removal but that the appeal was limited to attorneys' fees).

77. *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1200; *see also* Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *7 (N.D. Fla. Apr. 25, 2024) ("[T]he issue of how and to what extent the First Amendment limits [school officials' substantial discretion over school library content] is surprisingly unsettled").

78. *Miami-Dade Cnty. Sch. Bd.*, 557 F.3d at 1202-03, 1206-07, 1230 (vacating the district court's preliminary injunction and concluding that, even under *Pico*, factual inaccuracies in a non-fiction book about Cuba constituted a "legitimate pedagogical reason[]" for removal despite significant community debate).

Seven of the twelve circuit courts with general jurisdiction have *never* rendered an opinion on targeted removals of library books.[79] Another four circuits have not heard a case involving the targeted removal of school library books since *Pico* was decided.[80] And many aspects of First Amendment doctrine have changed since 1982, including the introduction and interpretation of the concept of government speech[81] and a series of Supreme Court decisions narrowing public school students' speech rights.[82]

79. These are the First, Third, Fourth, Fifth, Ninth, Tenth, and D.C. Circuits.

80. These are the Second, Sixth, Seventh, and Eighth Circuits. *See* Pico *ex rel.* Pico v. Bd. of Educ., 638 F.2d 404 (2d Cir. 1980), *rev'd*, 457 U.S. 853 (1982); Minarcini v. Strongsville City Sch. Dist., 541 F.2d 577 (6th Cir. 1976); Zykan *ex rel.* Zykan v. Warsaw Cmty. Sch. Corp., 631 F.2d 1300 (7th Cir. 1980); Pratt v. Indep. Sch. Dist. No. 831, 670 F.2d 771 (8th Cir. 1982). The Eighth Circuit's decision in *Pratt v. Independent School District No. 831* was issued on January 13, 1982—roughly six months before the Supreme Court decided *Pico*. 670 F.2d 771. But the *Pratt* court cited frequently to the various Second Circuit opinions in *Pico*. *See, e.g.*, *id.* at 775 nn.4-5 (discussing *Pico*, 638 F.2d 404). Appellate decisions issued before *Pico* remain good law because the Court has not rendered a clear holding, but those appellate decisions obviously did not engage with the analysis in the *Pico* opinions. To the extent that the circuit courts have adopted different approaches, the applicable law may differ depending on where the plaintiffs live. Potential litigants who object to targeted removals may find the availability of library materials is limited by both local political currents and regional jurisprudence.

81. Defendants in school library cases often claim that they have unlimited discretion to remove books that do not support the school's preferred messages because, they assert, the contents of library shelves are government speech. *See, e.g.*, GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *18-19 (S.D. Iowa Dec. 29, 2023) (discussing and rejecting the state's claim that a statute requiring book removals is a form of government speech), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024); Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *7-9 (N.D. Fla. Apr. 25, 2024) (declining to resolve the defendants' claim that school library curation is government speech and noting that the Supreme Court "has not articulated a precise test" (quoting Mech v. Sch. Bd. of Palm Beach Cnty., 806 F.3d 1070, 1074 (2015))); PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024) (describing the inquiry into "whether something is government speech" as "fact-intensive and generally not amenable to resolution at the motion to dismiss stage," but noting that no "reasonable person" would consider the selection of library books in this case to be the government's endorsement of the views contained in those books); Chiras v. Miller, 432 F.3d 606, 614-15, 618-20 (5th Cir. 2005) (finding that a school's selection of textbooks is government speech promoting the state's chosen message); *see also Book People*, 91 F.4th at 338 (holding that there is no government speech where the state requires private actors to rate school materials according to government guidelines). States might also argue that a school board's decision to remove material is the flip side of the decision to acquire it and is in that sense a form of government speech.

82. *See infra* notes 102-11 and accompanying text (discussing these cases and the relationship some courts have considered between government speech and school-sponsored speech under *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260, 281 (1988)).

The Eighth Circuit, which issued an opinion in a targeted removal case shortly before the Supreme Court announced the result in *Pico*,[83] heard arguments in a library book removal case this term.[84] In the meantime, its earlier decision—*Pratt v. Independent School District No. 831*—governs in the Circuit.[85] *Pratt*, like the plurality opinion in *Pico*,[86] found that the right to receive information provided the basis for the students' First Amendment claim.[87] *Pratt* requires a school board defending against a challenge to a targeted library book removal to "establish that a substantial and reasonable governmental interest exists for interfering with the students' right to receive information."[88]

Pratt's "substantial and reasonable" interest test[89] provides students less protection than *Pico*'s requirement that courts examine a school's actual motive in removing a book.[90] It is easier for schools to hide behind pretextual substantial and reasonable interests when the legal standard does not require a court to examine actual motives.

C. The Unique Jurisprudence Governing Student Speech Rights

Students are frequently among the plaintiffs in litigation challenging targeted book removals, and the level of judicial scrutiny that the state's actions receive is tied to their status as students. The expressive rights of public school students in school are not coextensive with the rights they might have outside of school or with the expressive rights adults possess.[91] In contrast to the adult or organizational plaintiffs in targeted book removal cases, student plaintiffs are not entitled to strict scrutiny when courts analyze their First Amendment claims.[92] Instead, courts analyze students' freedom of expression claims under a distinct student speech doctrine.

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83. *See supra* note 80.

84. For the district court's decision, see *L.H. v. Independence School District*, No. 22-cv-00801, 2023 WL 3132003 (W.D. Mo. Apr. 27, 2023) (dismissing the case for lack of standing), *argued*, No. 23-02326 (8th Cir. Apr. 9, 2024).

85. 670 F.2d 771; *see also GLBT Youth*, 2023 WL 9052113, at *18 (referring to *Pratt* as "binding Eighth Circuit precedent" that "the Court cannot ignore" absent a higher court's determination "that it is no longer good law").

86. *See supra* notes 65-66 and accompanying text (noting that only three Justices signed onto that part of the opinion).

87. *Pratt*, 670 F.2d at 777, 779.

88. *Id.* at 777.

89. *See supra* notes 71-73 and accompanying text.

90. *Pratt*, 670 F.2d at 776-77.

91. *See* Morse v. Frederick, 551 U.S. 393, 404-06 (2007).

92. *See* ROSS, *supra* note 4, at 33. Courts considering constitutional claims involving individual rights typically apply strict scrutiny, the most demanding of three levels of judicial scrutiny, which places a heavy burden on the government. To survive strict

footnote continued on next page

My analysis in *Lessons in Censorship* demonstrated that the taxonomy of student speech categories—each subject to different rules created by the Supreme Court—has confused school officials and lower courts alike.[93] As a district court judge in Iowa lamented in 2023, it is unclear what standard of scrutiny applies in targeted book removal cases "because the Supreme Court has never settled on a single, governing standard for First Amendment challenges in school settings."[94]

1. *Tinker* and student speakers

In a string of cases that followed the 1969 *Tinker* decision, the Supreme Court crafted what Justice Brennan presciently charged in 1988 would become a "taxonomy" of student speech rights in public schools, each with its own set of tests.[95] These cases govern what students themselves are allowed to say or write while under the school's supervision; whereas *Pico* only applies to book removals that implicate students' right to receive information from other speakers.[96]

In *Tinker*, the Court held that the Speech Clause gives students rights even in school, but that the "special characteristics of the school environment" merited a unique constitutional standard of review.[97] The test the Court crafted in *Tinker* protects student expressive rights so long as the expression does not violate two rules: It must not "materially and substantially interfere[] with the requirements of appropriate discipline in the operation of the school,"[98] and it must not collide "with the rights of other students to be secure

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scrutiny in a case involving free expression, the Government must demonstrate a compelling interest in regulating content, that the regulation will address the harm the government has identified, and that it is narrowly crafted so that it does not affect more speech than necessary. *See, e.g.*, United States v. Playboy Ent. Grp., Inc., 529 U.S. 803, 813 (2000).

93. *See* ROSS, *supra* note 4, at 3-4.

94. GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *15 (S.D. Iowa Dec. 29, 2023), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

95. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 281 (1988) (Brennan, J., dissenting).

96. The Supreme Court has not provided a clear answer regarding a school's authority over student speech that occurs off campus, or what legal standard would apply if the circumstances permitted the school to discipline a student's off-campus expression. *See Morse*, 551 U.S. at 401 (finding that school discipline extends to supervised class trips during school hours but noting that "[t]here is some uncertainty at the outer boundaries as to when courts should apply school speech precedents"); Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2045 (2021) (reserving for a future case the task of defining the parameters of off-campus speech that might be subject to school authority).

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

98. *Id.* at 509 (quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966)).

and to be let alone."[99] *Tinker* aimed to establish an equilibrium between rights and a level of order that would permit schools to fulfill their unique role in training the next generation of citizens.[100] That test governed the entire universe of student speech rights until the late 1980s.

One might ask whether—if *Tinker* still offered the only school speech doctrine—it could be applied to library book removals. Hypothetically, we can imagine a school with a high suicide rate and a pattern in which suicides appeared to inspire peers to harm themselves. In that situation, a school might silence a student who sang the Hemlock Society's praises. Similarly, publications by the Hemlock Society or science texts about asphyxiation or poisons might be deemed to pose a well-founded fear of material disruption. If the young people who committed suicide and provided a model for their peers to follow had read some of these guides, the school could reasonably anticipate that copycat suicides would sufficiently disrupt its educational mission that the materials should be sequestered. Even if *Tinker* could be applied and would uphold censoring materials that promote suicide, it is hard to imagine that it would support a wide range of targeted book removals.[101]

But *Tinker* is not the only option in the judicial decision tree today. When students assert that a school has violated their right to express themselves, a court must first determine what category of speech is involved in order to determine what standard applies. *Tinker*'s progeny include four additional Supreme Court decisions about student speech, some of which might arguably provide standards for analyzing students' right to receive information in targeted removal cases.

2. School-sponsored speech

Hazelwood School District v. Kuhlmeier, decided in 1988, arose when a high school principal excised two full pages from the student newspaper to censor two articles: one on teenage pregnancy in the school and another on the effects of parental divorce on students at the school.[102] The student newspaper at Hazelwood was part of the for-credit, graded curriculum under close faculty supervision.[103]

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99. *Id.* at 508.

100. *See id.* at 511-12.

101. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 878 n.1 (1982) (Blackmun, J., concurring in part and concurring in the judgment) (contrasting book removals with *Tinker* material disruption by contending that "library books on a shelf intrude not at all with the daily operation of a school").

102. 484 U.S. 260, 262-63 (1988).

103. *Id.* at 268.

The Court created a new category of student speech—"school-sponsored" speech—and a new highly deferential standard for evaluating censorship of that speech. *Hazelwood* defined school-sponsored speech broadly to include all student expression in activities with an educational goal under faculty supervision.[104] School sponsorship reached far beyond the control of student publications within the curriculum to govern almost every form of expression in extracurricular activities. The *Hazelwood* majority awarded school authorities almost unlimited discretion to censor school-sponsored student expression "so long as their actions are reasonably related to legitimate pedagogical concerns."[105]

One limitation could have proven significant—to be able to restrict speech, such speech must appear to "bear the imprimatur of the school."[106] Indeed, Justice Alito has described *Hazelwood* as reaching what a "reasonable observer" would regard as "the school's own speech."[107] But this is not how courts have interpreted *Hazelwood*. Instead, many lower courts have allowed schools to constrain speech that undermined the school's preferred messages so blatantly that no reasonable observer would attribute it to the school.[108]

School authorities frequently—though largely unsuccessfully—argue that *Hazelwood*'s deferential standard governs targeted book removals because library books appear to bear the school's imprimatur.[109]

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104. *Id.* at 270-73.

105. *Id.* at 273 (footnote omitted).

106. *Id.* at 271.

107. Morse v. Frederick, 551 U.S. 393, 422-23 (2007) (Alito, J., concurring); *see also* Saxe v. State Coll. Area Sch. Dist., 240 F.3d 200, 214 (3d Cir. 2001) (describing school-sponsored speech covered by *Hazelwood* as speech that "a reasonable observer would view as the school's own").

108. *See, e.g.*, Henery *ex rel.* Henery v. City of St. Charles, 200 F.3d 1128, 1133 (8th Cir. 1999) (holding that a student who distributed condoms while campaigning for class president as "The Safe Choice" was engaged in school-sponsored speech); Poling v. Murphy, 872 F.2d 757 (6th Cir. 1989) (finding school-sponsored speech subject to discipline where a student made fun of an assistant principal and accused him of "play[ing] tricks" with students' minds in a campaign speech); *see also* ROSS, *supra* note 4, at 51 (asserting that mistaken perceptions of school sponsorship suffice and need not be based on knowledge of the facts or context).

109. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1201-02 (11th Cir. 2009) (explaining that *Hazelwood* may not be on point because "this is not a school newspaper situation, and the speech at issue does not form part of a course of study in a school's curriculum"). But *Hazelwood* is not limited to activities that are commonly understood to be part of a school's curriculum. *See* ROSS, *supra* note 4, at 279-80 (discussing the legal distinctions between curricular-related clubs—which include scuba diving and frisbee, where *Hazelwood* governs student expression—and non-curricular-related clubs including student-initiated religious groups protected by federal law); *Hazelwood*, 484 U.S. at 270-271, 273 (defining school-sponsored speech as activities that are "part of the school curriculum, whether or not they occur in a

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Hazelwood only applies to speech by students. The Court did not address school libraries.[110]

However, reasonable observers should not presume that the ideas available in a high school library designed to expose students to competing views or to facilitate research bear the school's imprimatur. The library might well contain various versions of the Bible and texts holy to non-Judeo-Christian religions. It might house the writing of Karl Marx or Adolf Hitler without conveying that those materials bear the school's imprimatur. On the contrary, such books might be assumed to undermine the school's likely message that capitalism is better than socialism and democracy better than fascism.[111]

Tinker, *Hazelwood*, and their progeny only govern speech by students. Student speech doctrine does not reach the other classes of plaintiffs who have standing to challenge targeted removals.

IV. The Contemporary Landscape: Who Decides?

The lack of clear legal doctrine governing the removal of books in schools and school libraries deprives the key players in these disputes (including judges) of sufficient guidance, leaving much of the escalating conflict to be fought in the political arena. Although the vast majority of demands for targeted book removals come from the political right,[112] both sides in the culture wars have attacked educational materials that conflict with their ideals. The political right regularly targets books about race, sex, and gender identity (as discussed above). Demands for book removals from the left commonly aim to serve the goals of diversity and equity.[113] Progressive targets include books

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traditional classroom setting, so long as they are supervised by faculty members and designed to impart particular knowledge or skills").

110. Nonetheless, some school districts claim that *Hazelwood*'s deferential standard applies to targeted removals. *See, e.g.*, ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 439 F. Supp. 2d 1242, 1277-79 (S.D. Fla. 2006) (holding that the removal of books from the library is not curricular where the books are not assigned or optional reading for any class, project, or "regular scheduled course of study"), *vacated and remanded on other grounds*, 557 F.3d 1177 (11th Cir. 2009).

111. *See Hazelwood*, 484 U.S. at 279-80 (Brennan, J., dissenting) (arguing that student speech that "express[es] a message that conflicts with the school's" without interfering with instruction should be protected, as when a student in political science class says that socialism is better than capitalism).

112. *See, e.g.*, Odette Yousef, *Moms for Liberty Among Conservative Groups Named 'Extremist' by Civil Rights Watchdog*, NPR (June 7, 2023, 2:54 PM ET), https://perma.cc/BWP9-AENK (explaining that the Southern Poverty Law Center named Moms for Liberty and other "so-called 'parental rights' groups" as extremist, citing their anti-vaccination stances and efforts to ban books and to restrict the discussion of race and LGBTQ+ issues in schools).

113. Challenges based on offensive views of minorities in books are not a new phenomenon. *See, e.g.*, Rosenberg v. Bd. of Educ. of N.Y., 92 N.Y.S.2d 344, 345-46 (Sup.

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that include racial or ethnic stereotypes, as well as those deemed harmful to LGBTQ+ identities or gender fluidity presented in books that conservatives target for removal.[114]

A. Democracy in a Microcosm: Elected School Boards

The simplest answer to the question "Who decides?" after someone targets a book for removal is the elected members of the school board. In reality, of course, the answer is not simple.

Constitutional jurisprudence has long relied on the idea that a local school board is attuned to its community's values and is subject to reprimand at election time.[115] This construction underlies the *Pico* dissents. As Chief Justice Burger explained, "local control of education involves democracy in a microcosm."[116] Parents and voters are assumed to communicate their views to the board and to "influence, if not control" their children's educations by electing school board members who are closely accountable to their constituency,[117] at least in theory.

But in recent years, book removal activists have disrupted school board meetings.[118] Opponents of book removals sometimes confront activists there,

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Ct. 1949) (dismissing a petition seeking removal the of *Oliver Twist* and *The Merchant of Venice* from public school libraries and curricula because of their "derogatory" portrayals of Jewish people).

114. *See* Kiara Alfonseca, *How Conservative and Liberal Book Bans Differ amid Rise in Literary Restrictions*, ABC NEWS (Jan. 12, 2023, 2:08 AM), https://perma.cc/7X4P-53ME (reporting that liberal efforts to restrict books are far fewer in number than right wing challenges, more likely to be local than national, aim to combat racism or promote progressive ideals, and tend to target curricular assignments of books like *Adventures of Huckleberry Finn*); Elizabeth Williamson, *'My Heart Sank': In Maine, a Challenge to a Book, and to a Town's Self-Image*, N.Y. TIMES (Feb. 3, 2024), https://perma.cc/Z6KU-NG3M (reporting on a liberal effort to remove a book that critics view as harmful to transgender people); Amended Complaint, *supra* note 37, at 77-78 (alleging an Equal Protection violation based on the school board's "disproportionate[] targeting of "books authored by non-white and/or LGBTQ authors, and/or books that explore themes relating to race, gender, or sexual orientation").

115. *See, e.g.*, Little v. Llano County, 103 F.4th 1140, 1185 (5th Cir. 2024) (Duncan, J., dissenting) (asserting that the "most effective constraint" on public library officials and local governments remains accountability in local elections), *reh'g en banc granted, vacated*, 106 F.4th 426 (5th Cir. 2024).

116. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting).

117. *Id.* at 891-92; *see also id.* at 894 (Powell, J., dissenting) ("School boards are uniquely local and democratic institutions . . . responsible . . . to the parents and citizens of school districts.").

118. *See, e.g.*, Hannah Natanson, *She Challenges One School Book a Week. She Says She'll Never Stop.*, WASH. POST (updated Sept. 28, 2023, 2:24 PM EDT), https://perma.cc/V9G5-Z9UF.

making school board meetings increasingly visible and contentious.[119] These developments have arguably transformed the context in which school boards consider book removals.

It remains to be seen whether courts will take judicial notice of how organized national groups and vocal outsiders have influenced local educational decisions in the last few years. Today's fact patterns differ radically from those of the past, which may or may not amount to constitutional facts pertinent to the context of First Amendment claims.

The typical book removal case litigated before and in the decades following *Pico* did not arise on facts resembling those in *Pico*. When parents challenged library books, they typically targeted one book at a time.[120] And in general, most incidents of school censorship—whether they arose in the form of targeting educational materials for removal, demanding the school cancel a student production, or singling out a student's views expressed on clothing or in writing—came in response to a complaint by a single vociferous parent in the district.[121]

In contrast, the widespread contemporary attacks on library books arise from facts that more closely resemble those in *Pico*, amplified many times over. First, outside organizations prompt the incident: In *Pico*, a minor state-based conservative group advocated for the removal, and today, nationwide organizations pursue coordinated plans.[122] Second, in both cases the school district relies on a list of challenged books prepared by outsiders: The school

119. *See, e.g.*, Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.*, N.Y. TIMES (updated June 22, 2023), https://perma.cc/DY5M-X5LJ; *see also* Nicole Carr & Lucas Waldron, *How School Board Meetings Became Flashpoints for Anger and Chaos Across the County*, PROPUBLICA (July 19, 2023), https://perma.cc/9ADC-2MAY; Tom Schuba & Nader Issa, *Proud Boys Join Effort to Ban 'Gender Queer' Book from School Library—Rattling Students in Suburban Chicago*, CHI. SUN-TIMES (Nov. 21, 2021, 5:52 PM PDT), https://perma.cc/M4K3-Y8SE.

120. *E.g.*, Right to Read Def. Comm. of Chelsea v. Sch. Comm. of Chelsea, 454 F. Supp. 703, 704-05 (D. Mass. 1978) (describing the removal of a book after one parent complained about one selection in an anthology); Salvail v. Nashua Bd. of Educ., 469 F. Supp. 1269 (D.N.H. 1979) (describing the cancellation of a library's magazine subscription and the removal of existing issues after one board member voiced personal objections to the content). In other instances they targeted only a few books, compared to recent complaints that draw on long lists of objectionable books. *See supra* note 19 and accompanying text.

121. *See* ROSS, *supra* note 4, at 100, 157-58, 201-02, 297 (discussing patterns, incidents, and cases pertaining to these challenges).

122. *Compare Pico*, 457 U.S. at 856-57 (Parents of New York United), *with* Khaleda Rahman, *Moms for Liberty Banned Book List—The Novels They Want Taken Out of Schools*, NEWSWEEK (Nov. 3, 2022, 10:16 AM EDT), https://perma.cc/8QUS-KNCH (Moms for Liberty).

district in *Pico* removed a total of nine books, while Moms for Liberty and similar contemporary groups target long lists of titles.[123]

Individual complainants continue to demand targeted book removals, but they aren't the stereotyped outraged parent of yore. In Florida, known as a hotbed of targeted removals,[124] just two people—a father and a teacher in two different counties—filed more than half of the 1,100 complaints about books that the state's public schools received between July 2022 and August 2023.[125]

The pattern is not limited to Florida. The *Washington Post* found that only eleven people originated 60% of all the school book challenges nationally in the 2021-2022 school year.[126] These individuals stand in stark contrast to the citizens who the *Pico* dissenters envisioned—parents operating independently of larger organizations, engaging in dialogue with elected school board members or challenging those members at election time. As discussed above, however, national movements impact local school boards and elections today.

B. Politics or Litigation?

As a matter of constitutional law, it is not enough to merely tell those who disagree with a censorious school board that they should "vote the rascals out." Citizens should not have to rely on the ballot box, as the dissenters in *Pico* recommended,[127] to vindicate the liberty that the Speech Clause guarantees. In *Barnette*, Justice Jackson reminded us that "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the

123. *Compare Pico*, 457 U.S. at 857-58 (challenges to numerous titles, leading the board to remove nine), *with* Rahman, *supra* note 122 (challenge to more than 150 books, leading the board to remove five titles). *See also* Hannah Natanson, *Objection to Sexual, LGBT Content Propels Spike in Book Challenges*, WASH. POST (updated June 9, 2023, 6:15 PM EDT), https://perma.cc/6CF8-7K9S (discussing individuals who targeted "dozens—sometimes close to 100—books"). Recent challenges have also come from members of state and local governments. *See, e.g.*, *supra* note 19 and accompanying text (discussing a challenge to 850 titles).

124. *See* Meehan et al., *Mounting Pressure*, *supra* note 21 (noting that Florida was responsible for over forty percent of book removals in the 2022-2023 school year).

125. Ian Hodgson, *Florida Schools Got Hundreds of Book Complaints—Mostly from Two People*, TAMPA BAY TIMES, https://perma.cc/5XQH-NDND (updated Aug. 26, 2023) ("[A] tiny minority of activists across the state can overwhelm school districts while shaping the national conversation over what belongs on school library shelves."). The majority of Florida's sixty-seven school districts did not receive a single request to remove a library book, though some districts pruned their collections in response to new state directives. *Id.*

126. Natanson, *supra* note 123.

127. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 891 (1982) (Burger, C.J., dissenting).

courts."[128] Relying on that guidance in 2023, a federal judge in Pennsylvania opined, "The suggestion that parents must engage in politics to protect their constitutional rights is contrary to law."[129]

Justice Jackson correctly asserted that courts exist in part to vindicate individual rights. Potential plaintiffs who oppose targeted book removals may choose to fight on multiple complementary fronts: by litigating, by loudly objecting at their children's school, and by challenging the school board in meetings or at the next election. In fact, as attacks on books have escalated, many communities replaced the conservatives on their school boards in the fall of 2023.[130]

Concerned citizens who oppose targeted bans can also lobby for new laws that would protect books from targeted attacks.[131] States could codify the *Pico* plurality's standard by barring removals based on partisan, political, or discriminatory motives.[132] Narrower measures might include limiting who can challenge books to only the parents of children enrolled in the district's public schools, as well as restricting the number of complaints one parent can file at a time.[133] Jurisdictions so inclined could also give more authority to

128. W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638 (1943).

129. Tatel v. Mt. Lebanon Sch. Dist., 675 F. Supp. 3d 551, 568-69 (W.D. Pa. 2023) (denying a motion to reconsider the dismissal of a suit alleging a substantive due process violation when the school did not permit parents to opt out of instruction on gender dysphoria).

130. *See* Matt Barnum & Scott Calvert, *Conservatives Lose Steam in School Board Races as Liberals Mobilize*, WALL ST. J. (Nov. 10, 2023, 8:38 AM ET), https://perma.cc/U8AL-RMJC. This shift was in response to successful conservative campaigns in previous years. *See id.*

131. A handful of states have adopted or are considering laws that would constrain targeted removals and/or protect librarians from liability or harassment. *See* Hannah Natanson & Anumita Kaur, *Red States Threaten Librarians with Prison—As Blue States Work to Protect Them*, WASH. POST (Apr. 16, 2024, 9:00 AM EDT), https://perma.cc/VNT7-9PA9 (collecting pending and enacted legislation designed to protect library books or to make it easier to successfully challenge targeted removals).

132. *See id.* (discussing A.B. 1825, 2023-2024 Leg., Reg. Sess. (Cal. 2024), https://perma.cc/E6UU-G4JE); *see also* 75 ILL. COMP. STAT. 10/3 (2024) ("[M]aterials should not be proscribed or removed because of partisan or doctrinal disapproval . . . .").

133. In an apparent response to negative publicity and a lawsuit opposing a flood of targeted challenges to library books in the wake of a 2023 policy, Florida enacted legislation it claims will stem the tide. *See* Andrew Atterbury, *DeSantis Signs Law Limiting Florida Book Challenges*, POLITICO (Apr. 16, 2024, 2:30 PM EDT), https://perma.cc/CF98-9EC6; Act of April 16, 2024, § 15, 2024 Fla. Laws. ch. 2024-101 (to be codified at FLA. STAT. § 1006.28(2)(a) (2024)) ("A resident of the county who is not the parent or guardian of a student with access to school district materials may not object to more than one material per month."). For discussion of the lawsuit, see below at notes 189-98 and accompanying text.

professional librarians instead of elected school board members and require librarians to adhere to the ALA's code.[134]

Judges should not abandon plaintiffs who seek to enforce their First Amendment rights to the vagaries of politics, whether local or national. Judicial enforcement of civil liberties is especially crucial in the face of escalating, well-organized attacks, described in the next Subpart.

C. Parents' Rights

Concerted political attacks on public schools that promote critical thinking and support pluralism did not spring from nothing overnight. They are deeply rooted in right-wing politics, particularly in the parental rights movement led by Michael Farris, whom the *Washington Post* describes as "a conservative Christian lawyer who is the most influential leader of the modern home-schooling movement."[135] Farris spearheaded the right-wing politicization of parental rights. He then nurtured and developed an organized movement to achieve targeted book removals.[136] By considering Farris's role in the parental rights movement, we can better understand the seemingly rapid rise of ideological campaigns to constrict the materials available to students.

Before he targeted books, Farris drafted, and Republicans in Congress pursued, a series of bills and a proposed constitutional amendment enshrining parental rights as "fundamental."[137] The Supreme Court has long recognized

134. *See Professional Ethics*, AM. LIBR. ASS'N, https://perma.cc/T7AM-65DC (archived May 12, 2024) ("In a political system grounded in an informed citizenry, we are members of a profession explicitly committed to intellectual freedom and the freedom of access to information. We have a special obligation to ensure the free flow of information and ideas to present and future generations."). In 2023, Illinois incorporated the ALA's Bill of Rights into its statutory code. *See* 75 ILL. COMP. STAT. 10/3 (2024).

135. Emma Brown & Peter Jamison, *The Christian Home-Schooler Who Made 'Parental Rights' a GOP Rallying Cry*, WASH. POST (Aug. 29, 2023, 7:00 AM EDT), https://perma.cc/7NJW-73L9.

136. *Id.* (discussing Farris's career and his July 2021 teleconference with right-wing mega-donors outlining his plans for legal attacks on teaching about gender identity and race). Farris founded the Home School Legal Defense Association in 1983, and in 2007 he created Parentalrights.org. *Id.* Additionally, from 2017 to 2022, he was the president and chief executive of Alliance Defending Freedom, a leading Christian legal group that initiated many consequential state and federal lawsuits. *Id.*

137. *See, e.g.*, *Proposing an Amendment to the Constitution of the United States Relating to Parental Rights: Hearing on H.J. Res. 110 Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 112th Cong. (2012), https://perma.cc/VQ5C-ZGU8; *Proposing an Amendment to the Constitution of the United States Relating to Parental Rights: Hearing on H.J. Res. 50 Before the Subcomm. on the Const. & Civ. Just. of the H. Comm. on the Judiciary*, 113th Cong. (2014) [hereinafter *Proposing an Amendment 2014*], https://perma.cc/DHK2-TFY2. I testified in opposition to the proposal at the 2014 hearing. *See Proposing an Amendment 2014*, *supra* at 22 (testimony of Catherine J. Ross, Professor of Law, George Washington University Law School). None of Farris's proposals were reported out of committee.

that parents have the right to "make decisions concerning the care, custody, and control of their children" as one of the fundamental substantive due process rights implicit in the constitutional order.[138] According to Farris, parental rights are not just fundamental as the term is used in constitutional doctrine; they are, he declared, "right[s] which come[] from God."[139] To the extent that organized efforts to remove books from school libraries reflect Farris's influence, his views on parental rights illuminate the book removal movement's goals.

By 2014, Farris claimed that there was an urgent need for a parental rights amendment to protect parents from government incursions into what he sees as their sacred rights.[140] He argued that "threats to parental rights" required express constitutional language recognizing that the right was "fundamental" in order to guarantee that intrusions on those rights would be subject to strict scrutiny in court.[141]

The Amendment's language threatened a major rebalancing between the existing rights of parents and the state's *parens patriae* powers.[142] That realignment could have exposed children to real risks of neglect and abuse,

138. Troxel v. Granville, 530 U.S. 57, 66 (2000) (plurality opinion). My own congressional testimony analyzes the Supreme Court's parental rights jurisprudence. *See Proposing an Amendment 2014*, *supra* note 137, at 22-36 (statement of Catherine J. Ross).

139. *Parental Rights and Responsibilities Act of 1995: Hearing Before the Subcomm. on the Const. of the H. Comm. on the Judiciary*, 104th Cong. 154 (1995) (statement of Michael P. Farris, President, Home School Legal Defense Association), https://perma.cc/F9FA-D7KH; *see also* Brown & Jamison, *supra* note 135. Fundamental rights include those expressly mentioned in the Constitution, as well as important liberty interests implicit in the constitutional scheme, such as the right of parents to the care, custody, and control of their children. Most fundamental rights are so crucial that the state generally cannot limit them unless it can satisfy strict scrutiny by showing that the state has a compelling interest and that the regulation is necessary and narrowly crafted to achieve the state's goal. *See supra* note 92.

140. *Proposing an Amendment 2014*, *supra* note 137, at 16-17 (statement of Michael P. Farris, Chairman, Home School Legal Defense Association, and Chancellor, Patrick Henry College) (describing a "crisis" in which "we are rapidly . . . becom[ing] a nation where the government comes first and parents come second").

141. *Id.* at 12, 15-16, 21. My testimony refuted this argument, pointing out that the amendment was not necessary because courts generally respect parental rights. *See id.* at 24-36 (statement of Catherine J. Ross); *see also id.* at 19 (statement of Michael P. Farris) (noting the "clash" between his views and my own).

142. Common law *parens patriae* doctrine refers to the state's role in protecting those who cannot care for themselves, including children. It limits parents' rights to raise their children as they see fit by allowing the state to intervene on the child's behalf to protect them from neglect or abuse and to ensure that they receive an adequate education. *See* Naomi Cahn & Catherine J. Ross, *Parens Patriae*, *in* THE CHILD: AN ENCYCLOPEDIC COMPANION 705, 705-06 (Richard A. Shweder et al., eds., 2009).

through the denial of vaccines and medical treatment as well as the inhibition of other state regulations designed to protect children.[143]

Farris's rebalancing would have reached the daily operation of public schools as well. The proposed amendment would have given parents "the right to make reasonable choices within public schools for [their] child."[144] That seemingly innocuous language would have transformed public education by allowing each parent to tailor the curriculum for their own child, primarily by allowing parents to opt out of topics and materials that were part of the school's required curriculum. Current constitutional doctrine does not support a right to such exemptions.[145]

Different parents are likely to have different objections based on their values. Two adults parenting the same child may not even agree with each other. Allowing parental objections would make the curriculum a smorgasbord in which parents take only the components they like, with each course, each unit of each course, and each assignment subject to carve-outs based on diverse values and beliefs. "Chaos would result, significantly undermining the quality of education [for all students] . . . ."[146] Despite protestations that "reasonable" choices would only affect each parent's own child, schools facing challenges under the amendment would likely take the easy way out and offer a pared down curriculum to all.[147]

Parents who succeed in getting books removed make those titles unavailable to *everyone's* children—not just their own. The result is the opposite of a smorgasbord: varieties of herrings, smoked fish, and salads that one person does not like would be pulled off the serving table, limiting what is available for all to sample. The restricted offering may be analogized to the First Amendment heckler: The heckler's veto doctrine requires authorities to

143. *See Proposing an Amendment 2014*, *supra* note 137, at 73-74 (statement of First Focus Campaign for Children); *id.* at 57-58 (statement of Catherine J. Ross).

144. *Id.* at 4 (reproducing the proposed amendment); *see id.* at 49 (statement of Catherine J. Ross) (discussing the implications of the "reasonable choices" language given that "every parent has different views about what is appropriate and what is not appropriate for their children").

145. *See, e.g.*, Leebaert *ex rel.* Leebaert v. Harrington, 193 F. Supp. 2d 491, 501-02 (D. Conn. 2002) ("[P]arents of public school students do not have a constitutional veto over decisions of school officials concerning the contents of required courses."); Mozert v. Hawkins Cnty. Bd. of Educ., 827 F.2d 1058, 1070 (6th Cir. 1987) (concluding that there is no religious exercise right to an exemption from required reading that exposes the student to ideas offending parental beliefs).

146. *Proposing an Amendment 2014*, *supra* note 137, at 34 (statement of Catherine J. Ross).

147. *See id.* at 48-49 (explaining that on its face the "reasonableness" language would not affect what every child learns, but that parents could object to each assignment in each subject, including art history because it may involve viewing naked bodies and American history because it "doesn't put us in a good light").

remove the hecklers rather than silence the speaker whose words provoke the crowd.[148] Similarly, it would seem consistent with the normative values inherent in the Speech Clause that parents should not be able to prevent other people's children from accessing information.

Self-identified parental rights activists certainly do not speak for parents of every stripe when they target books for removal. Survey data from 2022 reveals that "large majorities" (71%) of parents regardless of political affiliation "oppose efforts to remove books from school libraries because some people find them offensive or inappropriate."[149] Only 19% of parents agree with the statement that "[w]e need to protect young people from books they might find upsetting or that reflect ideologies and lifestyles that are out of the mainstream."[150] And nearly three-quarters of parents (72%) distinguish between the rules they set for their own children and the right of "other parents [to decide] what books are available to their children."[151]

Some school districts strive for a middle ground when parents challenge library materials by moving targeted materials to a section that requires parental consent.[152] This approach arguably avoids pitting one set of parents

148. *See* Terminiello v. Chicago, 337 U.S. 1, 4-6 (1949) (stating that free speech is protected though it "invite[s] dispute" and "even stirs people to anger"); *see also* Meinecke v. City of Seattle, 99 F.4th 514, 524-26 (9th Cir. 2024) (discussing and applying the rule that "wrongful acts on the part of hecklers" cannot justify silencing the speaker (quoting Santa Monica Nativity Scenes Comm. v. Santa Monica, 784 F.3d 1286, 1292-93 (9th Cir. 2015))). *But see* L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *5 (W.D. Mo. Feb. 23, 2023) (quoting C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 918 (E.D. Mo. 2022)) (rejecting the plaintiff's claim that a book removal resembles a heckler's veto because the removal was not motivated by a fear of a violent response). Some book removal episodes raise the specter of violence, such as when the targeted challenge is accompanied by a community book burning. *See, e.g.*, Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 867-68 (D. Kan. 1995) (noting news reports that protesters demanding removal "burned copies of *Annie on My Mind* on the steps of the Kansas City School District offices").

149. Am. Libr. Ass'n, Voters Oppose Book Bans in Libraries 1 (n.d.), https://perma.cc/MB7T-DNTS (finding that 75% of Democrats, 58% of independents, and 70% Republicans oppose removals on this ground).

150. *Id.* at 4.

151. *See id.*

152. *See, e.g.*, Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 858 (plurality opinion) (recounting that a committee appointed by the school board recommended that one challenged book be returned to the school library subject to parental approval); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 997-98 (W.D. Ark. 2003) (challenging placement of books on a reserve shelf requiring parental consent); Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 190-91 (5th Cir. 1995) (observing that the school board removed *Voodoo & Hoodoo* from all school libraries without even considering the committee's recommendations that the book be made available to eighth graders with parental consent); *see also* GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *19 (S.D. Iowa Dec. 29, 2023) (explaining that students lacked any way to access the

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against another by retaining the challenged books in the collection while accommodating parents who do not want their own children exposed to literature that offends them.

However, shelving subject to parental consent has many limitations. From the censorious parents' point of view, the risk remains that their children will simply ask friends to show them the books or that the book will seem even more enticing because it is forbidden.[153] From the students' vantage point, some students in conservative settings may not want to ask for a book that some adults have labelled pornographic or subversive[154] (just as students may not want to ask to be excused from prayer or Bible reading). As a practical matter, a significant proportion of parental consent forms—whether they pertain to permission to access library books, class trips, or allowing the nurse to dispense aspirin—never make it back to school, not necessarily because parents want to withhold consent but often because parents are too busy to respond.[155]

The parents who target books for removal may succeed through political action but they lack any constitutional right to achieve their goals if their children attend public schools. For example, parents have no constitutional basis for demanding that their children be exempted from sex education class.[156] Similarly, parents have no legal ground for insisting that their

challenged books, which were not even available on restricted shelves subject to parental consent), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

153. The desires of parents and children are sometimes at odds. A teenage student may wish to access a restricted library book but cannot obtain her parent's consent. *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 224-25 (1999) (arguing that, notwithstanding the objections of parents, the state should provide information to mature minors who need the information in order to meaningfully exercise other constitutional rights, such as rights involving personal autonomy, sexuality, contraception and abortion). A teenager in this position may even be eighteen years old—a legal adult.

154. *See Counts*, 295 F. Supp. 2d at 999 (finding that requiring parental consent stigmatizes books and the students who choose to read books identified as "bad").

155. *See, e.g.*, Holly Given, Amanda Neitzel, Ahmed F. Shakarchi & Megan E. Collins, *School-level Factors and Consent Form Return Rate in a School-based Vision Program*, 8 HEALTH & BEHAV. POL'Y REV. 148, 152 (2021), https://perma.cc/QU3Z-VUPF (finding a return rate of 57.8% for forms consenting to participation in a free vision program). In one Florida district, only 3% of parents declined to consent to their children's use of challenged materials, but 40% failed to return the forms. Dana Goldstein, *In Florida, New School Laws Have an Unintended Consequence: Bureaucracy*, N.Y. TIMES (Jan. 10, 2024), https://perma.cc/DXT9-7SU6. In another county where the district would not allow students to check out any books without parental consent, about 25% of parents did not return the forms. *Id.*

156. Leebaert *ex rel.* Leebaert v. Harrington, 193 F. Supp. 2d 491, 493-94 (D. Conn. 2002; *see also* Parker v. Hurley, 514 F.3d 87, 107 (1st Cir. 2008) (holding that parents have no constitutional right to opt out of a required curriculum that exposes their children to material they find objectionable because of their religious beliefs).

children be allowed to choose an unauthorized ("never selected" or "expressly unauthorized") book as the topic for a book report[157] or be permitted to perform a potentially explosive experiment in the chemistry lab.

As Justice Alito has observed, "The theory must be that by enrolling a child in a public school, parents consent on behalf of the child to the relinquishment of some of the child's free-speech rights."[158] Applying *in loco parentis* doctrine[159] to the public schools, Justice Alito "inferred parental consent to a public school's exercise of a degree of authority that is commensurate with the task that the parents ask the school to perform."[160]

Parents who seek to constrict a school's educational program for their own child confront a high bar in court even before the merits are reached.[161] Judges may find that the parent lacks standing because, among other things, they have not suffered a "concrete, imminent, and actual injury," or that their alleged injuries are unlikely to be redressed.[162] In contrast, courts are likely to find that parents who *challenge* targeted removals have standing and cognizable claims, as discussed in the next Part.

V. Standing and Standards of Review

Litigation stemming from targeted removals is almost always brought by plaintiffs who challenge (1) a decision to temporarily or permanently remove a library book; (2) a decision to require parental permission to access a book; or

157. Settle v. Dickson Cnty. Sch. Bd., 53 F.3d 152, 156 (6th Cir. 1995) (explaining that teachers have broad authority to set parameters for assignments and students must confine their work to the requirements); *see also supra* note 34 and accompanying text.

158. Mahanoy Area Sch. Dist. v. B.L. *ex rel.* Levy, 141 S. Ct. 2038, 2051 (2021) (Alito, J., concurring).

159. *See id.* at 2045 (majority opinion) ("[S]chools at times stand *in loco parentis*, *i.e.*, in the place of parents.").

160. *Id.* at 2052 (Alito, J., concurring).

161. *See, e.g.*, Mahmoud v. McKnight, 688 F.Supp.3d 265, 274, 305-07 (D. Md. 2023) (denying preliminary injunctive relief to Muslim parents who sought a right to opt out of story books with LGBTQ+ characters and applying rational basis review to their parental rights claims), *aff'd*, 102 F.4th 191 (4th Cir. 2024).

162. *See, e.g.*, L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 3132003, at *1-4, *4 n.2 (W.D. Mo. Apr. 27, 2023) (dismissing a lawsuit challenging a book removal policy for lack of standing), *argued*, No. 23-02326 (8th Cir. Apr. 9, 2024); John & Jane Parents 1 v. Montgomery Cnty. Bd. of Educ., 78 F.4th 622, 626 (4th Cir. 2023) (finding no parental standing where the plaintiffs challenged aspects of the school board's guidelines that "permit school officials to develop gender support plans and then withhold information about a child's gender support plan from their parents" because the plaintiffs failed to allege that their children have gender support plans, identify as transgender, or struggle with their gender identity), *cert. denied sub nom.* Parents 1 v. Montgomery Cnty. Bd., No. 23-601, 2024 WL 2262333 (U.S. May 20, 2024).

(3) laws that lead those decisions. The plaintiffs are drawn from a broad spectrum of parties whose interests are affected, including students, parents, teachers, librarians, publishers, and authors. Those plaintiffs confront several threshold issues, including showing that they have legal standing[163] and establishing the correct legal standard for evaluating their claims in the absence of clear guidance from appellate courts.[164]

In 2023, a federal district held that librarians, teachers (and their statewide union), as well as certain students (whose parents sued on their behalf), all had standing to challenge a recently enacted law: Iowa Senate File 496.[165] Senate File 496 bars "promotion" of alternative gender identity or "sexual orientation" to students below the seventh grade as well as the use of materials in any grade deemed not to be "age-appropriate" as defined by the legislature.[166]

The court parsed the basis for each group's standing, beginning with what it termed the "educator plaintiffs," a group that included middle school teachers, a librarian, and the teachers' union.[167] One educator plaintiff, a seventh-grade teacher who was found to have standing, sometimes made books about gender identity available to sixth graders, which could be considered "promotion" under the statute.[168] Teachers and librarians at every grade level had standing to challenge the portion of the statute that required them to remove materials deemed "not 'age-appropriate.'"[169] Senate File 496 placed librarians at particular risk because they were responsible for deciding what was age appropriate under a statute that provided little guidance.[170] This may explain why, even before the statute became effective, educators and officials had removed more than 500 distinct titles from schools in the state.[171] The

163. The "irreducible constitutional minimum of standing" requires the plaintiff to show (1) an "injury in fact" that is (2) "fairly . . . trace[able] to the challenged action of the defendant" and (3) that a decision for the plaintiff will likely redress that injury. Lujan v. Defs. of Wildlife, 504 U.S. 555, 560-61 (1992) (alteration in original) (quoting Simon v. E. Ky. Welfare Rts. Org., 426 U.S. 26, 41-42 (1976)) (explaining that in order to satisfy these requirements, plaintiffs must identify the precise legal right they are asserting).

164. GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *12 (S.D. Iowa Dec. 29, 2023) ("[E]xisting Supreme Court and Eighth Circuit precedent provide helpful guidance in some ways but very little clarity in others."), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024).

165. *Id.* at *2, *8, *10-12.

166. Act of May 26, 2023, §§ 1-4, 16, 2023 Iowa Acts. ch. 91 (codified at IOWA CODE §§ 256.11, 279.80 (2024)); *see GLBT Youth*, 2023 WL 9052113, at *2-3 (explaining that the law applies to school curricula, classrooms, and libraries).

167. *GLBT Youth*, 2023 WL 9052113, at *8-9.

168. *Id.* at *8.

169. *Id.* at *9.

170. *Id.*

171. *See id.* at *3. The vagueness of such book removal laws is discussed in Part VI.B below.

union too had standing because each of its members would have standing to sue individually, and the organization's interests of "providing support for teachers and other licensed education professionals" were at stake.[172]

The publishers and authors could not be held liable under the statute because they were not licensed or employed by the state, but they nonetheless had standing because Senate File 496 "prohibit[ed] them from reaching their intended audience" and could diminish their profits.[173] The stigma that would likely follow book removals provided an independent ground for standing: The public could mistakenly view their work as "pornography" given the statute's aims.[174]

Students who are in the grades affected by the removals also have standing because the "age-appropriate" restrictions "directly limit the books and materials [they] can obtain from the school library."[175] Their parents routinely represent them in court as next friends,[176] or parents may serve as a representative for their minor child without joining the child as a party.[177]

The plaintiffs' identities—as students, librarians, publishers, and so forth—are inextricably linked to the precise basis for their constitutional claims, discussed below, and the resulting standard of review.[178] Generally applicable

172. *GLBT Youth*, 2023 WL 9052113, at *8.

173. *Id.* at *9-10.

174. *See id.*

175. *Id.* at *10. Other courts have imposed more stringent requirements on students who assert standing. *See, e.g.*, Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *3 (N.D. Fla. Apr. 25, 2024) (finding that a student who sought to check out a removed book and would presumably borrow it if it became available satisfies the injury-in-fact standing requirements because she alleged more than a "some day intention" (quoting Lujan v. Defs. of Wildlife, 504 U.S. 555, 564 (1992))); ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1196-97 (11th Cir. 2009) (holding that plaintiffs who "have not stated with sufficient specificity their plans for accessing the books" lack standing to challenge the school library's removal of a book).

176. *See, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *10.

177. *See* L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *3 (W.D. Mo. Feb. 23, 2023) (explaining that "guardians of the real parties in interest" may bring suit "without joining their children" (citing FED. R. CIV. P. 17(a)(1)(C))). I am not aware of any targeted book removal cases in which a parent or guardian asserts independent standing without pointing to a child whose interest the adult is pursuing. In a related context—a challenge to a school's Pledge of Allegiance ceremony—the Court found on state law grounds that a father with joint custody of (but limited legal authority over) a minor child lacked prudential standing. Elk Grove Unified Sch. Dist. v. Newdow, 542 U.S. 1, 17-18 (2004), *overruled in other part by* Lexmark Int'l, Inc. v. Static Control Components, Inc., 572 U.S. 118 (2014). Chief Justice Rehnquist, concurring in the judgment, argued that the father's "daughter is not the source" of his standing and that the father should have standing because of his "*relationship*" to his daughter and his interest in exposing her to his values. *Id.* at 23-24 (Rehnquist, C.J., concurring in the judgment).

178. *See GLBT Youth*, 2023 WL 9052113, at *14-15 (explaining that "to determine the appropriate standard for the overbreadth challenge, it is necessary to evaluate whose

footnote continued on next page

First Amendment doctrine applies to claims by plaintiffs who are outside the scope of the school's authority—for instance, authors, publishers, or public interest groups.[179] But that is not the case for plaintiffs who are subject to the school's authority.[180]

VI. Constitutional Claims

Despite substantial doctrinal hurdles, at least six potential constitutional claims remain viable to plaintiffs who are within the scope of a school's authority and challenge targeted book removals. The strongest constitutional claim for students in targeted book removal cases remains the First Amendment right to receive information.[181] Other plaintiffs, as well as students, may have Speech Clause claims based on overbreadth and vagueness as well as prior restraint. Fourteenth Amendment claims based on procedural due process and equal protection also hold some promise.

A. The Right to Receive Information

Students and their parents who challenge targeted removals continue to rely primarily on the right to receive information.[182] To the extent that lower courts seek guidance from *Pico*, they recognize that students have a constitutional right to receive information so long as they allege that the decision to remove materials from a school library was motivated by "ideological, religious, or other" animus toward the ideas in the targeted materials.[183]

First Amendment rights are at issue, and what those rights are," and distinguishing the different standards of review applicable to publishers and authors from those applicable to students).

179. *See id.* at *14 (finding it "straightforward" to determine that publishers and authors have the right to not be limited in reaching their "intended audience based on the content of their speech," and to not be "stigmatize[d]" by the implication that their books are "pornographic or otherwise unsuitable for the target audience").

180. *See id.* at *13, *15.

181. *See* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 866-69 (1982) (plurality opinion); *GLBT Youth*, 2023 WL 9052113, at *13 (determining that student plaintiffs "have a First Amendment right to receive information in school libraries"); *see also* Virgil v. Sch. Bd. of Columbia Cnty., 677 F. Supp. 1547, 1550 (M.D. Fla. 1988) (citing *Pico* for the holding that improper book removals violate students' right to receive information).

182. *See, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *13 (granting in part a motion for preliminary injunction and agreeing with the student plaintiffs that they "have the First Amendment right to receive information in school libraries free from suppression based on viewpoint, ideology, or other reasons amounting to the suppression of ideas"); C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 911 (E.D. Mo. 2022); Amended Complaint, *supra* note 37, at 76 (quoting *Pico*, 457 U.S. at 867-68, 870-71).

183. *See GLBT Youth*, 2023 WL 9052113, at*13-14.

Students may not be the ideal plaintiffs in book removal cases even though they suffer the most direct harm because of: (1) the diminished status of the *Pico* plurality's opinion;[184] (2) the resulting apparent fragility of the right to receive information in school libraries;[185] and (3) the application of a standard of review to student's expressive claims in school that is less protective than strict scrutiny.[186] As discussed below, other kinds of plaintiffs may have stronger legal arguments.

On the other hand, student plaintiffs need not rely too heavily on the *Pico* plurality opinion because the right to receive information remains part of First Amendment jurisprudence outside of the school library context.[187] Plaintiffs' chances of prevailing in pending cases likely depend on those cases' specific facts and context as well as on the judge's view of *Pico's* continued

184. *See supra* Part III.B.

185. Justice Brennan's plurality opinion in *Pico* rested on students' right to receive information in public school libraries; it was the first time that right was applied to students. When lower courts assert that *Pico* lacks precedential value, they undermine students' right to receive information in targeted book removal cases. Since 1999, courts have paid limited attention to the right to receive information beyond cases involving public school libraries. *See infra* note 187.

However, in a case decided in June 2024 (after the cut-off date signaled in note 1 above) the Fifth Circuit applied the right to receive information and the standards established in *Pico* and *Campbell v. St. Tammany Parish School Board*, 64 F.3d 184 (5th Cir. 1995), to the removal of books from the children's section of a public library. Little v. Llano Cnty., 103 F.4th 1140, 1149-51 (5th Cir. 2024) (holding that the First Amendment is violated when book removal results from the "substantial motivation to prevent access to particular points of view" and noting that the principle applies "with even greater force" outside the education context), *reh'g en banc granted, vacated*, 106 F.4th 426 (5th Cir. 2024).

186. *See supra* notes 97-99 and accompanying text.

187. *See* Parnell v. Sch. Bd. of Lake Cnty., No. 23-cv-00414, 2024 WL 2703762, at *9-10, *10 n.12 (N.D. Fla. Apr. 25, 2024) (citing Stanley v. Georgia, 394 U.S. 557, 564 (1969); and Martin v. City of Struthers, 319 U.S. 141, 143-44 (1943)) (rejecting the government's argument that there is no constitutional right to receive information); Ross, *supra* note 153, at 227-33 (analyzing the right to receive information and discussing leading cases outside of the school library context before and after *Pico*). Since 1999, only a handful of cases have mentioned the rights of listeners in any context. *See, e.g.*, Citizens United v. FEC, 558 U.S. 310, 339 (2010) ("The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."). In contrast, academic literature has paid increasing attention to the right to receive information. *See, e.g.*, Burt Neuborne, *The Status of the Hearer in Mr. Madison's Neighborhood*, 25 WM. & MARY BILL RTS. J. 897, 906-09 (2017); RonNell Andersen Jones, *Press Speakers and the First Amendment Rights of Listeners*, 90 U. COLO. L. REV. 499, 500-06 (2019); Caroline Lester, Note, *Say Gay: Why H.B. 1557 Is an Unconstitutional Infringement on Minors' First Amendment Right to Receive Information*, 25 GEO. J. GENDER & L. 141, 173 (2023); *see also* Dana R. Wagner, Note, *The First Amendment and the Right to Hear*, 108 YALE L.J. 669, 673-76 (1998).

relevance and the independent vitality of a right to receive information in school libraries.[188]

In 2023, PEN America, authors, publishers, and parents filed a wide-ranging lawsuit against the Escambia County School Board that rested in large part on the right to receive information.[189] In January 2024, a federal district court in Florida denied the school board's motion to dismiss the First Amendment claims.[190]

The amended complaint alleged that the school district removed 10 books from school libraries and restricted another 155 while it reviewed them for potential removal.[191] Two developments prompted the board's actions. First, one teacher in the district submitted numerous "Request[s] for Reconsideration of Educational Media" based on national lists of objectionable books.[192] Second, the plaintiffs alleged that the district misinterpreted Florida's Parental Rights in Education Act (known as the "Don't Say Gay" bill) to require the school to restrict access to books that so much as "recognize the *existence* of same-sex relationships or transgender persons."[193] On its face, and as the state confirmed in a different case, the Act "regulates only 'classroom instruction,' not the availability of library books."[194] The amended complaint further alleged that the push to remove books singled out works by or about persons of color, by LGBTQ+ authors, or about certain topics, and that the district removed books without following its standard procedures.[195] The basis for pleading additional counts is discussed in the Subparts that follow.

Florida—which is not a defendant in the case—filed an amicus brief supporting the school board's motion to dismiss, asserting that no First Amendment rights attached to school libraries.[196] The state argued that the

188. *See, e.g.*, C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 913-17, 920 (E.D. Mo. 2022) (calling the right to receive information in schools "amorphous," applying *Pico* after saying it is not binding, and denying relief to a student plaintiff where the district followed neutral procedures that provided mechanisms for review).

189. *See* Amended Complaint, *supra* note 37, at 4.

190. *See* PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213, at *2 (N.D. Fla. Jan. 12, 2024).

191. Amended Complaint, *supra* note 37, at 31, 36.

192. Amended Complaint, *supra* note 37, at 21-23.

193. *Id.* at 29-30.

194. *Id.* at 29-30 (quoting State Defendants' Second Motion to Dismiss and Incorporated Memorandum of Law at 8, Cousins v. Sch. Bd. of Orange Cnty., 687 F. Supp. 3d 1251 (M.D. Fla. 2023), 2022 WL 19348689, ECF No. 112).

195. *See id.* at 19-21, 45-47.

196. Brief of the State of Florida as Amicus Curiae in Support of Defendant's Motion to Dismiss at 2-3, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024), ECF No. 31-1, https://perma.cc/SXN4-7NHS.

contents of school libraries (like the curriculum) are government speech, meaning that the government "can freely select the views that it wants to express, including choosing not to speak and speaking through the removal of speech that the government disapproves."[197]

If courts were to treat library books as government speech that could be silenced or modified with changes in leadership, any distinction between school libraries and the curricular arena would be obliterated. The range of topics and viewpoints in the library could be severely restricted so that its function would no longer extend to intellectual exploration or reading for pleasure.[198]

B. Vagueness and Overbreadth

The First Amendment's analytical mainstays of vagueness and overbreadth provide potentially powerful arguments against poorly drafted regulations. Government regulation of speech may be void for vagueness even absent an independent Speech Clause claim if the law does not provide "adequate notice of proscribed behavior" that is subject to penalty.[199] If a

197. *Id.* at 3 (quoting Gundy v. City of Jacksonville, 50 F.4th 60, 71 (11th Cir. 2022) (internal quotation marks omitted)). The state correctly noted that *Pico* predates the Supreme Court's creation of government speech doctrine, *id.* at 9, which first appears in *Rust v. Sullivan*, 500 U.S. 173, 197-200 (1991).

198. Of course, the Constitution does not require schools to provide libraries at all. As a result, many schools may lack this important resource. *See, e.g.*, Hannah Dellinger, *Plans to Put Libraries in Most Michigan Schools Get Support from Educators and Parents*, CHALKBEAT DETROIT (Apr. 17, 2024, 9:17 AM PDT), https://perma.cc/9VX6-MEN2 (writing that although the exact number is "not clear," many Michigan schools have no library, and less than 10% of school libraries are staffed with full-time professional librarians).

199. GLBT Youth in Iowa Schs. Task Force v. Reynolds, No. 23-cv-00474, 2023 WL 9052113, at *19 (S.D. Iowa Dec. 29, 2023) (quoting Stephenson v. Davenport Cmty. Sch. Dist., 110 F.3d 1303, 1307 (8th Cir. 1997)), *appeal filed*, No. 24-1075 (8th Cir. Jan. 26, 2024). The risk of criminal liability for an individual's expression enhances the vagueness claims under the Fifth Amendment. *See* Smith v. Goguen, 415 U.S. 566, 574 (1974) (holding that the "statutory language [criminalizing 'contemptuous treatment' of the flag] fails to draw reasonably clear lines between the kinds of nonceremonial treatment that are criminal and those that are not," requiring closer scrutiny because of the potential to encroach on expression). Librarians in at least seven states are exposed to criminal liability for failing to remove material that could harm minors. Hannah Natanson, *School Librarians Face a New Penalty in the Banned Books Wars: Prison*, WASH. POST (May 18, 2023, 6:00 AM EDT), https://perma.cc/S93A-BUYY. It does not appear that any librarians have been charged under these laws. *See* Natanson & Kaur, *supra* note 131. Organizations representing librarians in Missouri have challenged a statute that would subject their members to up to one year in prison if they provide "explicit sexual" materials to students, no matter when or where they did so—including sharing materials with their own children. Petition for Injunctive and Declaratory Relief at 1-2, 8, Mo. Ass'n of Sch. Librs. v. Baker, No. 2316-cv-05732 (Mo. Cir. Ct. Jackson Cnty. filed Feb. 16, 2023), https://perma.cc/GD82-R9VH (challenging MO. REV. STAT. § 573.550 (2023)).

regulation inhibiting speech restricts substantially more speech than is constitutionally permissible, it is unconstitutional because of overbreadth.[200] Vagueness and overbreadth often overlap in targeted removal cases.

A number of the statutes and regulations that have led to mass targeted removals in the last few years were aimed at depictions of, reference to, or information about sex and sexuality, thus reaching far more protected speech than is necessary to achieve the asserted state interest in protecting students.[201] For example, in Iowa an "expansive definition of 'age-appropriate'" required "the wholesale removal of every book containing a description or visual depiction of a 'sex act,' regardless of context."[202] Despite the Iowa State Board of Education's attempt to flesh out the meaning of "age-appropriate," the educators who were responsible for carrying out the statute's commands remained confused, and school districts reached different conclusions about what materials needed to be removed from the library.[203] Similarly, in Texas, where the statute challenged in court requires removal of "sexually explicit" and "sexually relevant" materials, the state's Penal Code defines "sexual conduct" in a way that "seemingly encompasses any sexual-related topic."[204]

All parties in book removal cases concede that the targeted material is not obscene even under the variable obscenity standards that apply to minors.[205] If these materials met the legal definition of obscenity, they would already be illegal for minors to access—whether in school or in the community. The policies at issue often define expressly unauthorized or unsuitable material in terms that completely disregard their context or whether the material "taken as a whole" has "serious literary, artistic, political or scientific value."[206] Such

200. *See* Bd. of Airport Comm'rs of City of L.A. v. Jews for Jesus, Inc., 482 U.S. 569, 574 (1987); *see also* United States v. Stevens, 559 U.S. 460, 483-84 (2010) (Alito, J., dissenting) ("[T]he overbreadth doctrine allows a party to whom the law may constitutionally be applied to challenge the statute on the ground that it violates the First Amendment rights of others.").

201. *See, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *15.

202. *Id.* at *19.

203. *See id.* at *3.

204. *See* Book People, Inc. v. Wong, 692 F. Supp. 3d 660, 672 & n.1 (W.D. Tex. 2023), *aff'd in part, vacated in part, remanded*, 91 F.4th 318 (5th Cir. 2024).

205. Ginsberg v. New York, 390 U.S. 629, 631-35 (1968) (upholding a statute barring the sale of materials that are obscene for a person under the age of seventeen even though the materials would not be obscene for adults); *see, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *16 (noting the plaintiffs' concession that "school districts have greater freedom to remove books from school libraries and curricula than just those that meet the adult obscenity standard").

206. Miller v. California, 413 U.S. 15, 23-25 (1973) (establishing the current test for obscenity); *see, e.g.*, *GLBT Youth*, 2023 WL 9052113, at *17 (concluding that the "obscenity-light" standard from *Ginsberg* and its progeny must be considered in assessing whether book restrictions in schools comply with the First Amendment).

overbroad policies have led to patently absurd results, such as targeted removals of dictionaries.[207]

Even policies that seem at first glance to be content-neutral may not be easy to apply. For example, a school district in Missouri allows librarians to remove books that (1) are in disrepair, (2) contain unreliable information, or (3) are inappropriate because they "exceed[] age sensitivity."[208] The first basis seems relatively straightforward, but the second—a determination of what is regarded as "unreliable"—might depend on a librarian's viewpoint. Does the librarian think climate change is real? Does he believe Joe Biden was elected President in 2020? And the third basis—a determination of what "exceed[s] age sensitivity"[209] (closely akin to educational suitability)—may correlate with personal values, such as whether the adult worries more about a child's exposure to sex than to depictions of violence or the death of a parent (as in children's classics like *Bambi*).

That said, challenged books sometimes clearly fall within the intended and permissible statutory definitions. One district court judge observed, "[I]t is quite easy to see why a librarian would conclude the three books at issue should be removed based on age sensitivity given each has lascivious content."[210] Describing the books that the plaintiffs sought to restore to the school library collection, the judge quoted explicit descriptions of "multiple sexual encounters" such as, "Dougie was on his knees in front of Delaney . . . [h]is tongue was out, licking the tip of Delaney's penis."[211] Professional librarians, the judge mused, might rule either way on whether these books were suitable for older students, but he found that the plaintiffs' "sweeping and, frankly, disconcerting request" to immediately restore the removed books to the shelves could hypothetically expose third graders to their content.[212] Surely many parents would share these concerns. We should not assume that all targeted books deserve a vigorous defense.

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207. *See supra* note 16 and accompanying text; *GLBT Youth*, 2023 WL 9052113, at *20 (observing that the *Merriam-Webster Online Dictionary* is likely prohibited under the state's law because it defines sexual intercourse).

208. *See* C.K.-W. *ex rel.* T.K. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 910 (E.D. Mo. 2022) (alteration in original).

209. *Id.*

210. *Id.* at 916.

211. *Id.* at 916-17 (quoting KIESE LAYMON, HEAVY: AN AMERICAN MEMOIR 25 (2018)) (noting that the court cannot conclude absent "actual evidence" that the librarians' conclusion that the books were vulgar and "not age appropriate" was pretextual).

212. *Id.* at 917.

C. Prior Restraint

Where the government attempts to restrain speech that has not yet occurred, it generally relies on injunctions (based on the dangers posed by publication)[213] or licensing requirements (which must not be based on content or viewpoint).[214]

Several courts have considered pleadings based on prior restraint at early stages of book removal litigation—yielding mixed results. In *C.K.-W. v. Wentzville R-IV School District*, the district judge rejected the plaintiffs' argument that book removals prevented communication before it occurred.[215] Even if a targeted book removal met the definition of prior restraint, he posited, *Hazelwood* (which permitted censorship of a school newspaper) indicates that "prior restraints on speech are not always unconstitutional in a public school setting."[216]

Students' diminished First Amendment rights undermine their claims of prior restraint, but other kinds of plaintiffs on other facts may succeed. A district court in Texas issued a preliminary injunction when book vendors challenged a statute that imposed a rating system to identify books that school districts would not be allowed to purchase.[217] The statute also required vendors to issue a recall for all existing copies of those books.[218] The court determined that the statute amounted to "classic" prior restraint, which "bears a heavy presumption against its constitutional validity."[219]

That presumption was reinforced by the lack of procedural protections for the vendors.[220] At a minimum, the "settled rule" requires "at least the[se] three safeguards": (1) the burden must be on the censor to institute judicial proceedings to prove the material is unprotected; (2) a prior restraint pending judicial review can be only "for a specified brief period" to preserve the status quo; and (3) the judicial resolution must be prompt.[221] The Texas regulatory

213. *See, e.g.*, Alexander v. United States, 509 U.S. 544, 550 (1993).

214. *See, e.g.*, Freedman v Maryland, 380 U.S. 51, 56-59 (1965) (explaining that a licensing system must provide procedural safeguards, including access to prompt judicial review).

215. 619 F. Supp. 3d at 918 (explaining that there is no prior restraint where no one is forbidden from speaking).

216. *Id.* (citing Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268-69 (1988)); *see also supra* Part III.C.2 (discussing *Hazelwood*).

217. Book People, Inc. v. Wong, 692 F. Supp. 3d 660, 671-72 (W.D. Tex. 2023), *aff'd in part, vacated in part, remanded*, 91 F.4th 318 (5th Cir. 2024).

218. Act of June 6, 2023, § 3, 2023 Tex. Sess. Law Serv. ch. 808 (West) (codified at TEX. EDUC. CODE ANN. § 35.002 (2023)).

219. *Book People, Inc.*, 692 F. Supp. at 698-99.

220. *See id.* at 701.

221. *Id.* at 699 (quoting Se. Promotions, Ltd. v. Conrad, 420 U.S. 546, 559-60 (1975)).

scheme lacked all of those safeguards. It required the vendors themselves to rate the books but allowed the state to overturn the rating in order to place a given book in the forbidden group without providing any process to challenge the reclassification.[222] The state bore no burden at all.

Again, the identity of the party seeking to assert that its First Amendment rights have been violated proves critical. For example, in the Texas case discussed immediately above, the administrative scheme prevented authors, publishers, and vendors from communicating with their intended audience. Accordingly, publishers, authors, and vendors may succeed with claims on which students and parents cannot prevail.[223]

D. Procedural Due Process

Plaintiffs are not entitled to procedural protections unless they first establish that the state deprived them of a "life, liberty, or property" interest.[224] Plaintiffs in school library book removal cases would need to convince a court that the book removal deprived them of a constitutional right before they could seek vindication under the Fourteenth Amendment's Due Process Clause.[225]

Claims that book removals constitute a deprivation of due process can arise in two ways: They may be tied to allegations of prior restraint, or they may allege that a school district circumvented its own policies when it reviewed and removed targeted books.

As discussed in the preceding Subpart, resolution of prior restraint disputes must be rapid and conclude within a definite time frame.[226] That may be impossible in library book removal cases because serious reviews are so

222. *See id.* at 674-75, 701.

223. On August 29, 2024 (after the cut-off date signaled in note 1 above), six of the nation's largest publishers, joined by authors and students, sued officials of the Florida State Board of Education and others alleging, among other things, that the Florida statute requiring school libraries to remove books that describe sexual conduct violates the publishers' and authors' First Amendment rights by interfering with their ability to make their constitutionally protected works available to readers. Complaint at 1-6, Penguin Random House LLC v. Gibson, No. 24-cv-01573 (M.D. Fla. filed Aug. 29, 2024), ECF No. 1, https://perma.cc/KFX3-FU5P.

224. *See* L.H. v. Independence Sch. Dist., No. 22-cv-00801, 2023 WL 2192234, at *6 (W.D. Mo. Feb. 23, 2023) (explaining that the plaintiffs failed to show that the district's automatic book removal deprived them of "some 'life, liberty, or property' interest," so they cannot claim a violation of procedural due process (quoting Krentz v. Robertson Fire Prot. Dist., 228 F.3d 897, 902 (8th Cir. 2000)).

225. *See id.* at *2, *6 (concluding that the automatic removal of a book from the school library's shelves does not deprive students and parents of a liberty or property interest).

226. Freedman v. Maryland, 380 U.S. 51, 59 (1965).

labor intensive.[227] Where a district has removed hundreds of volumes for targeted review, the process may not be completed during the school year, or even before a student plaintiff graduates.

Another set of due process claims arises when districts disregard their own established procedures, a concern noted in *Pico*.[228] In every reported case on this issue, the school district had clear policies governing library book removals.[229] The policies may begin with who can complain and where, often providing a form for complaints.[230] They then indicate where the books should be kept and whether they can circulate during the review process.[231] Typically, a committee is appointed to review the challenged material; it includes a range of interested parties such as parents, teachers, and community members, as well as librarians.[232] The committee's determination is not dispositive—it is subject to

227. *See, e.g.*, *Book People, Inc.*, 692 F. Supp. 3d at 675 (citing Shannon Ryan, *More Than $30K of Taxpayers' Money, 220 Hours Spent on Single Spring Branch ISD Book Ban, Docs Show*, ABC13 (Mar. 28, 2023), https://perma.cc/A2AV-6NHC).

228. Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 857-58 (1982) (plurality opinion) (explaining that board members initially reviewed the books on their own instead of following the written policy which required appointing a committee). *But see* Amended Complaint, *supra* note 37, at 24-26 (noting that before the statute was revised, the board implemented an immediate removal policy which the plaintiffs argued "short-circuit[ed]" procedures to "cater to the political objections" of those advocating for removal); *id.* at 17 (observing that the person targeting library books "borrowed heavily from . . . a national campaign to remove books from public school libraries" that address "themes related to race and/or LGBTQ identity").

229. *See, e.g.*, Complaint at 4-8, *L.H.*, No. 22-cv-00801, 2023 WL 2192234, ECF No. 1, https://perma.cc/U82A-UWYZ (describing the school district's policies regarding "the selection, retention, and reconsideration of materials" in school libraries and attaching those policies as exhibits); Amended Complaint Exhibit 1, PEN Am. Ctr., Inc. v. Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213 (N.D. Fla. Jan. 12, 2024), ECF No. 27 at 83 [hereinafter *Escambia* Policy], https://perma.cc/Z6BX-FMYM.

230. *See, e.g.*, Complaint Exhibit 1 at 3, *L.H.*, No. 22-cv-00801, 2023 WL 2192234, ECF No. 1-2, https://perma.cc/3C5Q-DMT6 ("Students or parents/guardians who find materials in the library objectionable in any manner may make a formal complaint by obtaining from the Superintendent's office Form 6241—Review of Instructional Materials."); *Escambia* Policy, *supra* note 229, at 12 ("Any parent/guardian or resident of the county of the school district may raise objections to resources used in the educational program . . . .").

231. *See, e.g.*, Complaint Exhibit 4 at 1, *L.H.*, No. 22-cv-00801, 2023 WL 2192234, ECF No. 1-5 [hereinafter *Independence* Policy], https://perma.cc/G23K-YWAD ("Media being questioned will be removed from use, pending committee study and final action by the Board of Education, unless the material questioned is a basic text."); *Escambia* Policy, *supra* note 229, at 12 (restricting access to material challenged as "pornographic" but maintaining "[a]ll other challenged material . . . in circulation during the pendency of the review process").

232. *See, e.g.*, *Independence* Policy, *supra* note 231, at 1 ("The committee shall consist of the administrator of the building involved, three teachers [including a librarian], a member of the Board of Education, and four lay persons [two of which must be parents]."); *Escambia* Policy, *supra* note 229, at 13 ("The District Materials Review Committee shall

footnote continued on next page

review and reversal by the elected board of education, and perhaps by intermediaries (like administrators) prior to that point.[233]

Some districts immediately remove all challenged materials from circulation without any screening pending formal review.[234] That approach provides a defense against accusations that the district is discriminating based on content or viewpoint, at least at the initial stages. However, it cedes enormous power to the censorious, who can achieve removal of material to which they object for a period that may last through the school year or longer by merely filling out a form.[235]

One recurrent question arises: Is there a presumption of procedural irregularity if the school board or a higher official reverses a committee's recommendation? Litigants often frame their disagreement with a librarian's or committee's conclusions about a targeted volume as indicative of procedural irregularities.[236] But where successive levels of review or paths for appeal exist, they are arguably designed to allow reconsideration.[237]

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be comprised of five or more members to include community members, school administrators, teachers, parents/guardians, and media specialists [librarians] . . . .").

233. *See, e.g.*, *Independence* Policy, *supra* note 231, at 2 ("The Superintendent shall . . . report the recommendations of the Review Committee to the Board of Education. The decision of the Board will be final."); *Escambia* Policy, *supra* note 229, at 13 (allowing the superintendent to remove a book "without review by the District Materials Review Committee or the Board" if there is sufficient evidence that it is "pornographic"); *id.* at 14-15 (outlining procedures to appeal the decisions of the review committee to the school board).

234. Florida law requires schools to remove books describing or depicting "sexual conduct" from classrooms or school libraries within five days of a challenge and to keep those books unavailable until the challenge is fully resolved. FLA. STAT. § 1006.28(b) (2023); *see also Escambia* Policy, *supra* note 229, at 12.

235. For example a school board in Beaufort County, South Carolina, pulled ninety-seven books for review in October 2022 and did not complete its review until December 2023. Scott Pelley, Aliza Chasan, Henry Schuster & Sarah Turcotte, *See the Full List of 97 Books Parents Tried to Ban from Beaufort, South Carolina School Library Shelves*, CBS NEWS (Mar. 3, 2024, 7:00 PM EST), https://perma.cc/P7FR-JK9Q. Of the ninety-seven books reviewed, only five—*Beautiful* by Amy Reed, *Forever for a Year* by B.T. Gottfried, *It Ends With Us* by Colleen Hoover, *Nineteen Minutes* by Jodi Picoult, and *The Haters* by Jesse Andrews—were permanently removed from circulation. *See School Library Materials Reconsideration Information*, BEAUFORT CNTY. SCH. DIST., https://perma.cc/3NV7-ZSXL (archived July 5, 2024). Many of the others were only available to grades 9-12. *See id.*

236. *See, e.g.*, Amended Complaint, *supra* note 37, at 31-38.

237. *See* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1184 (11th Cir. 2009) (describing the levels of review and appeal in the school district); *see also* Bd. of Educ. v. Pico *ex rel.* Pico, 457 U.S. 853, 894 n.1 (1982) (Powell, J., dissenting) ("[T]he board . . . simply did not agree with the recommendations of a committee it had appointed. Would the plurality require—as a constitutional matter—that the board delegate unreviewable authority to such a committee?").

The best way to assess whether overturning a recommendation about keeping or removing a book has legal significance is to examine the decisionmaker's motive—just as the *Pico* plurality instructed. That may be difficult, but it is not impossible. Defendant school officials and school board members often unwittingly reveal a great deal about their thought processes.

It is hard to predict whether and to what extent courts will (or should) attribute the motives of organized book removal activists to local decisionmakers. As a matter of common sense, it is tempting to do so. In litigation, plaintiffs would need evidence that the decisionmakers (presumably the members of the school board) were influenced by the outside pressure and either (1) capitulated to it or (2) adopted premises the outsiders promulgated and that violated expressive rights. Massive organized political pressure from outside the community should at a minimum suggest the need to scrutinize whether partisan goals overwhelmed educational considerations.

E. Equal Protection.

Dating back to *Pico*, a large proportion of materials targeted for removal was authored by or about people of color.[238] This pattern has been well documented in contemporary book removal incidents.[239] Justice Brennan did not delve into equal protection in *Pico* but used its premises as an example of school board actions that would be "narrowly partisan or political" and therefore unlawful.[240] "[F]ew would doubt," he wrote, that students' rights would be violated "if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration."[241]

Reliance on equal protection doctrine in targeted removal cases is in the most nascent stages. Equal protection violations might be found under federal law or under the Fourteenth Amendment and applied to bias aimed at gender-

238. *See, e.g.*, *Pico*, 457 U.S. at 856 n.3 (plurality opinion) (listing the books that were removed).

239. *See, e.g.*, *Book Ban Data*, *supra* note 14 ("Titles representing the voices and lived experiences of LGBTQIA+ and BIPOC individuals made up 47% of those targeted in censorship attempts."); FEINGOLD & WEISHART, *supra* note 12, at 7 (asserting that an organized and "well-funded . . . assault on inclusive classrooms and curricula" in Florida was intended to "thwart the anti-racist aspirations that animated 2020's global uprising for racial justice").

240. *Pico*, 457 U.S. at 870-71 (plurality opinion).

241. *Id.* at 871. The hypothetical of removing "all books authored by blacks" implicitly conflates authors' personal characteristics (identity) with their viewpoints or life experience—as frequently happens. We should not assume, however, that all persons of color, or all LGBTQ+ persons, or all women, or for that matter, all men share similar experiences or will express the same views on any number of topics.

nonconformity.[242] Efforts to counteract targeted book removals that aim to suppress racial groups or gender-nonconformity may be more successful within federal agencies than in courtrooms, as I shall explain.

The complaint in PEN America's lawsuit against the Escambia County School District asserted, among other things, a Fourteenth Amendment Equal Protection Clause violation, alleging that the county targeted books "disproportionately authored by non-white and/LGBTQ authors, and/or books that explore themes relating to race, gender, or sexual orientation," acting with "clear intent" to exclude speech and "discriminatory animus."[243] In January 2024 the district court dismissed the equal protection count, while allowing the First Amendment claims to proceed to trial.[244]

Despite that setback in court, the promise of equal protection claims in targeted removal cases is apparent in a recent enforcement action by the Department of Education's Office for Civil Rights. In May 2023, the Office settled its investigation into school library book removals in Forsyth County, Georgia.[245] Following a familiar pattern, the school district had removed the books after some parents complained that the library housed "sexually explicit" books and books with LGBTQ+ content.[246] The removals garnered attention.[247] Catherine E. Lhamon, Assistant Secretary for Civil Rights, explained, "[T]here was a lot of discussion in the school community about which books would be removed, and it looked like the books being removed were by and about LGBTQI+ people, and by and about people of color. . . .

242. *See, e.g.*, Education Amendments of 1972, tit. IX, Pub. L. No. 92-318, 86 Stat. 235, 373-75 (codified as amended at 28 U.S.C. §§ 1681-1689); Brief Overview of Key Provisions of the Department of Education's 2024 Title IX Final Rule 1 (n.d.), https://perma.cc/M2JN-SPKX (explaining that under 34 C.F.R. § 106.10 (2024), "sex discrimination includes discrimination based on sex stereotypes, sex characteristics . . . sexual orientation, and gender identity," while under 34 C.F.R. § 106.2 (2024), "sex-based harassment includes harassment on these bases"); *see also* Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020) (extending Title VII employment discrimination protections to sexual orientation).

243. Amended Complaint, *supra* note 37, at 77-78.

244. *See* PEN Am. Ctr., Inc. v Escambia Cnty. Sch. Bd., No. 23cv10385, 2024 WL 133213, at *2-3 (N.D. Fla. Jan. 12, 2024).

245. *See* Press Release, U.S. Dep't of Educ., U.S. Department of Education's Office for Civil Rights Resolves Investigation of the Removal of Library Books in Forsyth County Schools in Georgia (May 19, 2023), https://perma.cc/Z5LN-MQQY; Resolution Agreement: Forsyth County Schools: Complaint No. 04-22-1281 (2023), https://perma.cc/6898-ZEQY.

246. Press Release, *supra* note 245; *see also* Elizabeth A. Harris & Alexandra Alter, *Book Removals May Have Violated Students' Rights, Education Department Says*, N.Y. TIMES (May 22, 2023), https://perma.cc/C8CC-WS9U.

247. *See, e.g.*, Lauren Hunter, *8 Book Titles Removed from Forsyth County School Shelves*, ACCESSWDUN (Feb. 10, 2022, 4:00 PM), https://perma.cc/DBN4-QGGF.

Students heard that message and felt unsafe in response."[248] From the limited public information available,[249] it appears that students filed a complaint with Department of Education under Title IX of the Educations Amendments of 1972 and Title VI of the Civil Rights Act of 1964, alleging that the removals from the library created a hostile environment.[250] The district submitted to federal oversight moving forward, although it claimed that it had only removed "sexually explicit" material and denied "remov[ing] any book based on the sex, gender, gender identity, sexual orientation, race, national origin or color of the book's author or characters."[251] This result suggests that regulatory oversight may provide another avenue for responding to targeted removals, depending on the administration in power.

Conclusion

Everything that is wrong is not illegal. The mass targeted book removals we are witnessing today as part of politically-driven culture wars seem patently wrong when viewed in light of the values embedded in the First Amendment. And yet, contemporary constitutional doctrine does not offer an obvious remedy. Targeted book removals may violate constitutional norms—they may even smack of authoritarianism—but they may not prove to be unconstitutional.

Choosing the best plaintiff—the one with the strongest constitutional claim—may be critical to impact litigation in targeted removal cases, as it is in other areas of public interest law. Contrary to initial instincts about who is harmed when school libraries remove books, the best plaintiff may not be a student. Preliminary opinions in pending cases suggest that sometimes the best plaintiff may instead be an author or publisher.

Numerous potential routes for challenging targeted book removals exist, but they may bring even the best-positioned litigants through rocky territory. Given the surge in challenges to library books, I anticipate that more appellate courts will weigh in soon. Perhaps they will clarify the doctrine. We can only hope that judicial guidance—whenever it comes—will provide a clear constitutional path to keeping books available to students no matter where they live.

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248. Harris & Alter, *supra* note 246.

249. The only public materials are the resolution agreement, a press release, and a letter. *See sources cited supra* note 245; Letter from Jana L. Erickson, Program Manager, U.S. Dep't of Educ., Off. for C.R., to Jeff Bearden, Superintendent, Forsyth County Schools (May 19, 2023), https://perma.cc/KC98-QB5R.

250. *See* Letter, *supra* note 249, at 1.

251. *See* Resolution Agreement, *supra* note 246, at 1. The settlement agreement included reporting requirements and a requirement that the district administer a "school climate survey." *Id.* at 2-3.