

# How to Ban a Book and Get Away With It: Educational Suitability and School Board Motivations in Public School Library Book Removals

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*ABSTRACT: When public school officials remove books from their school libraries, they run the risk of violating students' First Amendment rights. The Supreme Court held in Board of Education, Island Trees Union Free School District No. 26 v. Pico that it is unconstitutional for a school board to remove a book based on the school board's disagreement with the ideas expressed in that book. However, the Court maintained that a book could properly be removed based on its "educational suitability." Although this standard has influenced most of the subsequent book removal cases, it has not consistently been applied. Recently, school boards have attempted to justify their removal decisions based on "educational suitability," despite substantial evidence that those removals were politically motivated. At least one school board has argued successfully on educational suitability grounds, in part, because the Eleventh Circuit failed to critically analyze the record for evidence of viewpoint-based motivations. This trend is likely to continue. Thus, this Note argues that courts should abandon the Pico test and replace it with a more objective standard, based on the principles set forth in Tinker v. Des Moines Independent Community School District.*

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## I. INTRODUCTION

Every year, major national news outlets report stories about school administrators removing books<sup>1</sup> from public school libraries.<sup>2</sup> This coverage is not surprising; book removals embody some of the most controversial issues in education and constitutional law.<sup>3</sup> Even so, these news stories consist of only a fraction of the book removals that actually occur.<sup>4</sup> This discrepancy may in part be the result of school boards becoming more adept at removing books in ways that courts would find constitutionally permissible, and thus, legal

1. The phrases “book removals” and “banning books” are often used interchangeably. However, each phrase carries certain political connotations. Book removal advocates generally use the term “remove,” whereas book removal opponents use “banned.” See Bruce S. Rogow, *Two Years of the First Amendment in the United States Court of Appeals: The 2007 and 2008 Yin and Yang Over Speech and Punishment*, 63 U. MIAMI L. REV. 813, 831–32 (2009) (noting how the actors in book removal cases use either “banned” or “removed” depending on which side of the controversy they are on); *Banned Books Week: Banned v. Challenged*, SYRACUSE UNIV. LIBRS. (Oct. 29, 2020, 7:34 AM), <https://researchguides.library.syr.edu/c.php?g=258307&p=1724645> [<https://perma.cc/XPE6-3J2V>]. “Removal” is a less politically loaded term, and thus, this Note generally will use the term “book removal” for the sake of neutrality and consistency. It is also worth noting that the phrase “challenged books” is not synonymous with the phrases “book removal” or “banning books.” “Challenged books [are] [m]aterials that someone has attempted to remove or restrict from a curriculum or library collection.” See *id.*

2. See Warren Richey, *Supreme Court: Miami School Can Ban Book on Cuba*, CHRISTIAN SCI. MONITOR (Nov. 16, 2009), <https://www.csmonitor.com/USA/Justice/2009/1116/p02s16-usju.html> [<https://perma.cc/T6LQ-SBQT>]; Evan Osnos, *Doubters Mad About Harry—in a Bad Way*, CHI. TRIB. (June 20, 2003), <https://www.chicagotribune.com/news/ct-xpm-2003-06-20-0306200163-story.html> [<https://perma.cc/NP5C-DB2F>]; Colin Campbell, *Book Banning in America*, N.Y. TIMES (Dec. 20, 1981), <https://www.nytimes.com/1981/12/20/books/book-banning-in-america.html> [<https://perma.cc/4L8K-82QC>].

3. See Marielle Elisabet Dirx, *Big Brother Is Reading: An Examination of the Texas Textbook Controversy and the Legacy of Pico*, 17 U.C. DAVIS J. JUV. L. & POL’Y 29, 33 (2013) (“School boards’ power and control over school curriculum and libraries sits at a controversial juxtaposition between First Amendment law and the need to provide a meaningful education to students.”).

4. See *infra* note 146 and accompanying text.

challenges to many removal decisions are never initiated.<sup>5</sup> However, it equally results from a dearth of clear precedents governing book removals, leaving school boards with a set of easily manipulatable legal standards.<sup>6</sup>

For example, the only U.S. Supreme Court case to address book removals was *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,<sup>7</sup> in which a plurality of the Court held that books may not be removed “simply because [school officials] dislike[d] the ideas contained in those books and [sought] by their removal to ‘prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.’”<sup>8</sup> Although the Court’s opinion was not binding precedent, it has guided nearly all of the lower court decisions that have taken up the issue.<sup>9</sup> In aggregate, the opinions from these subsequent courts have developed a book removal test that probes a school board’s motivations for its book removal decision: If a book is removed for content-based reasons—specifically, for its “educational suitability”—the removal does not offend students’ First Amendment rights.<sup>10</sup> If a book is removed for viewpoint-based reasons, however, the removal is unconstitutional.<sup>11</sup>

The rationale for this motivation test is grounded in uncertainties about the constitutional status of school libraries. In non-curricular matters, the Supreme Court has found that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate[,]”<sup>12</sup> and thus, students’ First Amendment rights cannot be infringed upon absent a “material[] and substantial[] disrupt[ion]” of the school environment.<sup>13</sup> In curricular matters, however, a school board can infringe upon those rights as long as doing so is “reasonably related to legitimate pedagogical concerns.”<sup>14</sup> This distinction recognizes that schools have a legitimate interest in inculcating community values via their curriculum, but that interest holds less weight in non-curricular matters.<sup>15</sup> The *Pico* motivation test recognized the

5. *See id.* Challenged book removals that do reach the courts share some common features. Generally, a book is removed from a public school library by a local school board or school administrator, usually at the request of a parent. Students, parents, teachers or librarians challenge the removal, claiming it violates students’ First Amendment rights. The local school officials counter by claiming they have the discretion to modify the materials in their school libraries, and that doing so does not offend students’ rights. *See infra* Part II.

6. *See infra* Part III.

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

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

9. *See infra* Part II.

10. *See infra* Section III.A.

11. *See infra* Section III.A.

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

13. *Id.* at 513.

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

15. *See id.* at 283 (Brennan, J., dissenting).

library as somewhere in the middle of curricular and non-curricular, and thus, the plurality created a new legal test for book removals.<sup>16</sup>

This Note argues that the *Pico* motivation test is an unnecessary and impractical legal standard. Although *Pico* is a pro-student-speech case, Part II and Part III examine how subsequent book removal cases have failed to critically examine the motivations behind school boards' removal decisions. Part III then explains how school boards can mask their true motivations by arguing that books were removed based on "educational suitability," even despite substantial evidence to the contrary. Finally, in Part IV, this Note proposes that courts should abandon and replace the *Pico* test. School libraries are sufficiently non-curricular such that they should be governed primarily by *Tinker*, albeit with the recognition that books may also need to be removed for practical reasons, such as space limitations.

## II. BACKGROUND

Comprehending the legal standards governing book removals requires an understanding of the evolution of students' First Amendment rights. Section II.A begins by exploring how recognition of students' First Amendment rights conflict with schools' interests in transmitting community values. With that conflict in mind, Section II.B outlines the major legal developments that led to the recognition of students' rights. Then, Sections II.C and II.D examine how those rights have been interpreted in the few cases that directly address book removals. Finally, Section II.E briefly offers commentary on why book removals matter and why the legal landscape needs to change.

### A. INCULTURATION VERSUS STUDENT EXPRESSION

Book removals from public school libraries necessarily involve the underlying goal of public education.<sup>17</sup> The U.S. Supreme Court has recognized that public schools are "the primary vehicle for transmitting 'the values on which our society rests'"<sup>18</sup> and that this value-transmission process starts at the local level.<sup>19</sup> Thus, courts accept the inherent limit on their power to interfere with a local school board's decision-making process.<sup>20</sup> However, a

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16. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869–71 (1982).

17. See Seth J. Chandler, *The Supreme Court, 1981 Term—Removing Books from School Libraries*, 96 HARV. L. REV. 151, 151 (1982) (arguing that for society to function, it must pass on its values to future generations via education, but in pursuit of that end, it also cannot tell students "what to think").

18. *Plyler v. Doe*, 457 U.S. 202, 221 (1982) (holding that a state could not exclude illegal aliens from the public schools) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76 (1979)).

19. See generally *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (acknowledging that state and local governments have primary control over the educational missions of their public schools).

20. *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1305–06 (7th Cir. 1980) ("[C]omplaints filed by secondary school students to contest the educational decisions of local authorities are

school board's discretion to socialize students is offset by students' First Amendment rights.<sup>21</sup>

School officials' attempts to compel or suppress student speech directly implicate these rights.<sup>22</sup> The rationale is straightforward: Free and voluntary expression facilitates the discovery of truth, and that process is a necessary condition of successful education, and later, citizenship.<sup>23</sup> Although a state can place certain restrictions on "the time, place, or manner of" expression, those restrictions cannot be motivated by disagreement with the content of that expression.<sup>24</sup> As a result, student free speech cases often involve a conflict between two competing goals in public education: inculturation and free expression.<sup>25</sup>

When school officials remove a book from a school's library, the officials generally cite inculturation and "educational suitability" as justifications.<sup>26</sup> However, some scholarship suggests that a book removal does not necessarily inhibit student expression, nor does it compel it, and thus, the propriety of these justifications remains suspect.<sup>27</sup> Nonetheless, courts have found that certain book removals violate students' First Amendment rights.<sup>28</sup> Because the link between book removals and the First Amendment is murky,<sup>29</sup> this Note next considers how students' rights have evolved, and the limits those rights have on school officials' discretion.

sometimes cognizable but generally must cross a relatively high threshold before entering upon the field of a constitutional claim suitable for federal court litigation.").

21. See *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923).

22. See, e.g., *Tinker*, 393 U.S. at 505–06 (recognizing the existence of students' First Amendment rights, and the violation of such rights when school officials attempt to suppress student expression); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (holding that school officials cannot force students to stand and salute the flag).

23. See *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting) ("[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

24. *Linmark Assocs., Inc. v. Twp. of Willingboro*, 431 U.S. 85, 93–94 (1977).

25. See William B. Senhauser, Note, *Education and the Court: The Supreme Court's Educational Ideology*, 40 VAND. L. REV. 939, 941 (1987).

26. See *infra* Section III.A.

27. Martin D. Muncie, Case Comment, *Education or Indoctrination—Removal of Books from Public School Libraries*: Board of Education, Island Trees Union Free School District No. 26 v. Pico, 68 MINN. L. REV. 213, 219–20 (1983).

28. See, e.g., *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 582 (6th Cir. 1976) (finding a book removal unconstitutional when no viewpoint-neutral reason for the removal was offered by the school board); *Right To Read Def. Comm. v. Sch. Comm. of Chelsea*, 454 F. Supp. 703, 711–12 (D. Mass. 1978) (finding that a school board's content-based reasons for removing a book were pretextual, and that the board unconstitutionally removed the book based on the book's views).

29. See Muncie, *supra* note 27.

B. THE EVOLUTION OF STUDENTS' RIGHTS

To transmit societal values via public education, state and local officials possess authority over students in a manner that has no equivalent among adults.<sup>30</sup> Some judges even argue that students have no rights while in school.<sup>31</sup> However, two Supreme Court cases provide the framework by which courts recognize limits on the inculturation function of public education.<sup>32</sup> In *Meyer v. Nebraska*,<sup>33</sup> the Court held that a state law requiring that school subjects be taught only in English was unconstitutional.<sup>34</sup> The Court said that although inculturation was a proper end, especially in matters of curriculum,<sup>35</sup> the law by which the school sought to achieve that end infringed upon the rights of “modern language teachers . . . and [upon] the power of parents to control the education of their own [children].”<sup>36</sup> Thus, the Court recognized a fine distinction between inculturation and creating a homogenous student body by suppressing certain ideas.<sup>37</sup> According to the Court, the latter is unconstitutional, but primarily because teachers and parents have a certain amount of discretion to educate students.<sup>38</sup> Shortly after *Meyer*, the Supreme Court in *Pierce v. Society of Sisters*<sup>39</sup> struck down a state law that made public school attendance mandatory, again citing parents’ liberty interest in educating their children.<sup>40</sup> *Pierce* demonstrated that the Court will curtail state authority if the purpose of the state law is to “standardize its children.”<sup>41</sup> Importantly, these two cases did not directly address students’ First Amendment rights, nor students’ rights in general.

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30. Schall v. Martin, 467 U.S. 253, 265 (1984) (“[J]uveniles, unlike adults, are always in some form of custody.”).

31. See generally Mark Walsh, *Justice Thomas Holds Firm Views on Youths’ Rights*, EDUC. WEEK (Oct. 17, 2011), [https://www.edweek.org/ew/articles/2011/10/19/o8justice\\_ep.h31.html](https://www.edweek.org/ew/articles/2011/10/19/o8justice_ep.h31.html) [<https://perma.cc/E3MM-XqJ9>] (exploring Justice Thomas’s view that *Tinker* was decided incorrectly, because according to Thomas, the history surrounding the First Amendment “does not protect student speech in public schools”).

32. See Senhauser, *supra* note 25, at 949–52. These cases also demonstrate the tension between the First Amendment and the inculturation goal of education. The state has a legitimate interest in inculturation, yet students also have an interest in the maintenance of their First Amendment rights. When the state increases its attempts at inculturation, students’ exposure to First Amendment values are correspondingly decreased, because they are sheltered from “controversial subjects.” On the other hand, when students’ First Amendment rights are increased, the ability of the state to transmit its values is obstructed. See *id.*

33. *Meyer v. Nebraska*, 262 U.S. 390, 390 (1923).

34. *Id.* at 402.

35. *Id.* at 402–03 (recognizing a state’s legitimate “power to prescribe a curriculum”).

36. *Id.* at 401.

37. *Id.* at 402.

38. *Id.*

39. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 510 (1925).

40. *Id.* at 534–35.

41. *Id.* at 535 (“The child is not the mere creature of the state . . .”).

The next major decision to address these issues came nearly twenty years later, where the Court in *West Virginia State Board of Education v. Barnette*<sup>42</sup> struck down a school policy requiring students to stand and salute the flag during the pledge of allegiance.<sup>43</sup> Unlike *Meyer* and *Pierce*, the Court explicitly relied on the First Amendment in its decision.<sup>44</sup> Writing for the majority, Justice Jackson reasoned that school officials may indeed foster “[n]ational unity . . . by persuasion and example,”<sup>45</sup> but students’ constitutional rights nonetheless require “scrupulous protection.”<sup>46</sup> Thus, the Court concluded that “[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters . . . .”<sup>47</sup> Accordingly, forcing a student to salute the flag violated students’ First Amendment rights.<sup>48</sup> Additionally, the Court recognized that protecting the First Amendment in public schools in fact furthered the inculturation goal, because it exposed children to a democracy-like environment.<sup>49</sup> Indeed, in subsequent decisions the Court continued to find that creating national unity via inculturation necessitates exposure to First Amendment values.<sup>50</sup>

Although the cases up to and through *Barnette* hinted at students’ rights, they were primarily concerned with the proper means by which schools could foster community values; students’ rights were an ancillary concern. In 1969, however, the Supreme Court in *Tinker v. Des Moines Independent Community School District*<sup>51</sup> for the first time unambiguously recognized students’ First Amendment rights, holding that students do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>52</sup> Specifically, the Court ruled that students’ First Amendment rights may only be curtailed when a student’s exercise of their rights “materially and

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

43. *Id.* at 642.

44. *Id.* (“We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control.”).

45. *Id.* at 640.

46. *Id.* at 637. According to Justice Jackson, this protection is necessary, in part, because students need to learn about the “important principles” upon which the government and Constitution rely. In his view, if we constrain students’ freedoms, they will begin to think those principles are “mere platitudes.” *Id.*

47. *Id.* at 642.

48. *Id.*

49. *See id.* at 641–42.

50. *See, e.g., Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 683 (1967) (holding that community values are perpetuated by “wide exposure to [the] robust exchange of ideas which discovers truth”).

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

52. *Id.* at 506.

substantially disrupt[s] the work and discipline of the school.”<sup>53</sup> Thus, the Court found that a student’s decision to wear a black armband in protest of the Vietnam War did not violate that standard.<sup>54</sup>

*Tinker* was the first case to question the inculcative role of public schools by suggesting that the free exchange of ideas between the state and its students can overwhelm the inculcative principle.<sup>55</sup> In the Court’s view, mere disagreement with a student’s expression could not justify the school’s interference with that expression absent substantial disruption in the school’s ability to function<sup>56</sup>—i.e., even if the free exchange of ideas may “cause trouble,” that possibility alone would be insufficient to curtail students’ rights, and in fact was a necessary component of nurturing future citizens.<sup>57</sup> The Court’s holding required an objective inquiry into whether substantial disruption would occur, and unlike previous cases, the motivations behind the school’s decision were largely irrelevant.<sup>58</sup>

### C. EARLY BOOK REMOVAL CASES

Although *Tinker* was the first time the Court established that school officials’ authority is not absolute, *Tinker* and the cases leading up to it mostly involved limits on student expression. Book removal cases do not fall neatly within this recognized category.<sup>59</sup> Thus, using the principles from these foundational cases, later courts had to explore whether the authority of school officials to remove books in the name of inculturation necessitated similar limitations.<sup>60</sup>

53. *Id.* at 513.

54. *Id.* at 505–06. This was despite the fact that outside of the Court’s “sanitized” record, there was substantial evidence that disruptions in the school environment had occurred as a result of the armbands. *See generally* JUSTIN DRIVER, *THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND* (2018) (pointing out the various conflicts and disruptions that occurred in the school due to controversy surrounding the armbands). This provides at least some evidence that the *Tinker* Court felt a very high bar must be reached before students’ First Amendment rights may be infringed upon.

55. *Tinker*, 393 U.S. at 506–07.

56. *Id.* at 511.

57. *Id.* at 508–09 (“Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another may start an argument or cause a disturbance. But our Constitution says we must take this risk, and our history says that it is this kind of hazardous freedom—this kind of openness—that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.” (citation omitted)).

58. *Id.* at 513.

59. *See supra* Section II.A.

60. *See generally* Norman B. Lichtenstein, *Children, the Schools, and the Right to Know: Some Thoughts at the Schoolhouse Gate*, 19 U.S.F. L. REV. 91 (1985) (discussing the evolution of students’ “right to know” and its implications for students’ rights in public schools).



The earliest cases to directly address book removals did not adopt *Tinker's* expansive protection of student rights.<sup>61</sup> In 1972, the Second Circuit in *Presidents Council, District 25 v. Community School Board No. 25*<sup>62</sup> upheld a school board's book removal decision.<sup>63</sup> The conflict arose over the removal of *Down These Mean Streets* by Piri Thomas.<sup>64</sup> The school board removed the book after "some parents objected . . . [claiming it] would have an adverse moral and psychological effect" on students because it contained "obscenities and explicit sexual interludes."<sup>65</sup> The student-plaintiffs countered by compiling statements from various "psychologists, teachers, and even children who" argued that the book was not psychologically damaging and that it had literary merit.<sup>66</sup>

In rejecting the plaintiffs' claims, the court justified its decision by relying on three main principles. First, the court determined that local school boards had great discretion in determining the materials that would appear in their school libraries, and it was not the court's place to interfere with that discretion.<sup>67</sup> Second, it reasoned that the decision to remove a book generally did not infringe upon students' constitutional rights, which further supported a limit on judicial intervention.<sup>68</sup> Finally, the court found that the principles from *Tinker* were inapplicable, because removing a book was not "a curtailment of freedom of speech or thought."<sup>69</sup>

On appeal, the Supreme Court denied certiorari, but Justice Douglas penned a dissent that cited *Tinker* and argued for a total right of students' access to information, barring any "disciplinary" disruptions.<sup>70</sup> In the dissent's view, students' First Amendment rights were indeed infringed because "[t]he First Amendment involves not only the right to speak and publish but also the right to hear, to learn, to know."<sup>71</sup> Further, the dissent recognized that school boards have wide discretion in selecting "instructional materials," but that discretion does not hold as much sway in the context of "secondary school book collections."<sup>72</sup> Finally, the dissent found it nonsensical that in the

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61. For a discussion of these early cases, see Munic, *supra* note 27, at 227–30.

62. *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 457 F.2d 289, 289 (2d Cir. 1972).

63. *Id.* at 294.

64. *Id.* at 290.

65. *Id.* at 291.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.* at 293.

70. *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 409 U.S. 998, 999–1000 (1972) (Douglas, J., dissenting) ("What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems?").

71. *Id.* at 999.

72. *Id.* at 1000.

majority's view, the students would be allowed to converse about the book and the topics it involved, but the students could not actually read it.<sup>73</sup>

The motivation for a school board's book removal soon took on greater importance. In *Minarcini v. Strongsville City School District*,<sup>74</sup> the Sixth Circuit held that the school board had to articulate a viewpoint-neutral justification for its removal of a number of books written by Kurt Vonnegut.<sup>75</sup> Because there was an "absence of any explanation of the Board's action which [was] neutral," the removal was violative.<sup>76</sup> *Minarcini* was also the first case to recognize the distinction between book selection and book removal.<sup>77</sup> The court characterized the school library as a "privilege," and reasoned that the school had no affirmative duty to provide library books.<sup>78</sup> However, once the school placed books on its shelves, it could not remove them based on "the social or political tastes of school board members."<sup>79</sup> The court justified this distinction by noting that students would surely have the right to discuss the contents of the books at issue.<sup>80</sup> However, that discussion would necessarily be "hindered by the fact that the book sought had been removed from the school library."<sup>81</sup> Thus, the court argued that the removal of a book from a school library constituted an even greater infringement on students' rights than the limitations in *Tinker*.<sup>82</sup>

Two years after *Minarcini*, the case of *Right to Read Defense Committee v. School Committee of Chelsea*<sup>83</sup> clarified the distinction between book removals and book acquisition. The book at issue was *Male & Female*<sup>84</sup>—a book which board members considered "disgusting."<sup>85</sup> After other similar comments about the book were made,<sup>86</sup> the board resolved that the theme and language in the book were the grounds for its removal.<sup>87</sup> The district court considered this resolution to be pretextual and unsatisfactory.<sup>88</sup> The court required the

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73. *Id.* at 999.

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

75. *Id.* at 580–82.

76. *Id.* at 582 (emphasis added).

77. *See id.* at 579–80.

78. *Id.* at 581–82.

79. *Id.* at 582.

80. *Id.*

81. *Id.*

82. *Id.* at 582–83 ("A library is a mighty resource in the free marketplace of ideas. . . . It is a forum for silent speech.")

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

84. The court described the book as "an anthology of prose and poetry written by students aged 8 to 18." *Id.* at 706.

85. *Id.* at 711.

86. For example, one board member argued that the book "was 'low down dirty rotten filth, garbage, fit only for the sewer.'" *Id.* at 708.

87. *Id.* at 712.

88. *Id.*

school board to return the removed book to the library stacks, explicitly holding “that the reasons underlying the actions of school officials may determine their constitutionality.”<sup>89</sup> Like the Sixth Circuit in *Minarcini*, the court favorably cited *Tinker*, claiming that for a removal to be proper, the school board “must demonstrate some substantial and legitimate government interest.”<sup>90</sup> That interest must be comparable to the school function interest from *Tinker*.<sup>91</sup> This meant that disagreement with the ideas in the book would be insufficient to justify removal.<sup>92</sup> However, the court suggested that removals based on library capacity limits and financial concerns would be appropriate.<sup>93</sup>

#### D. PICO AND BEYOND

The foregoing case law paved the way for the Supreme Court’s first and only decision specifically addressing book removals in public school libraries. Instead of deferring to *Tinker*, the Court created a new standard. In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*,<sup>94</sup> a school board removed a number of books from the school library, based on a list put out by a conservative organization.<sup>95</sup> The board justified its action by claiming that the books were “anti-American, anti-Christian, anti-Semitic, and just plain filthy.”<sup>96</sup> A handful of students brought suit against the board, claiming that the removal violated their First Amendment rights.<sup>97</sup> Writing for the plurality, Justice Brennan concluded that if the board acted as the students claimed, that action infringed on students’ First Amendment rights:

[W]e hold that local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.” Such purposes stand inescapably condemned by our precedents.<sup>98</sup>

Nonetheless, Justice Brennan still referenced the need for deference to elected school boards and maintained that they had at least some control over

89. *Id.*

90. *Id.* at 713.

91. *Id.*

92. *Id.*

93. *Id.*

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

95. HERBERT N. FOERSTEL, BANNED IN THE U.S.A.: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES 88 (2002); see also Margaret L. Weeks, *Island Trees Board Returns Nine Banned Books to Shelves*, EDUC. WEEK (Aug. 25, 1982), <https://www.edweek.org/ew/articles/1982/08/25/02330026.ho1.html> [<https://perma.cc/LQ9P-Q0Y6>].

96. *Pico*, 457 U.S. at 857.

97. *Id.* at 856.

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

school library content.<sup>99</sup> Rather than relying on *Tinker's* disruption standard, the plurality focused extensively on the board's motivation for the ban, which it found impermissible provided that the board members' personal viewpoints were a "substantial factor" in the removal.<sup>100</sup> A removal would be upheld, however, if the board's decision was based on a book's "educational suitability" —i.e., its content.<sup>101</sup>

Like the Sixth Circuit in *Minarcini*, the plurality required a legitimate interest to justify removal.<sup>102</sup> But that interest was based on the school board's motivations, and not more objective factors, such as space restraints.<sup>103</sup> Further, the plurality urged that "in matters of curriculum" and even the acquisition of books, school boards might possess something closer to the *Presidents Council* "absolute discretion" standard, because the classroom was the proper place for "inculcat[ing] community values."<sup>104</sup>

Additionally, Justice Brennan concluded that despite the board's discretion in choosing the means of fostering community values, the students also had a "right to receive information and ideas," which in his view, was a necessary condition of their First Amendment rights.<sup>105</sup> That right to information ensured that students would be able to meaningfully participate in a democratic society upon leaving school.<sup>106</sup> Justice Brennan maintained that the "special characteristics of the school *library*" made that space a well-suited place for students to explore their First Amendment rights.<sup>107</sup>

The *Pico* dissenters explicitly rejected the notion of a student's right to receive information and also argued that the plurality was overstepping its judicial power by interfering with the local board's decision-making.<sup>108</sup> In particular, Justice Burger reasoned that the extent of schools' inculcation goal

99. See *id.* at 863 ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); *id.* at 869 ("In rejecting petitioners' claim of absolute discretion to remove books from their school libraries, we do not deny that local school boards have a substantial legitimate role to play in the determination of school library content."); *id.* at 866 ("[C]ourts should not 'intervene in the resolution of conflicts which arise in the daily operation of school systems' unless 'basic constitutional values' are 'directly and sharply implicate[d]' in those conflicts." (alteration in original) (quoting *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968))).

100. *Id.* at 870 (quoting *Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977)).

101. *Id.* at 871 (quoting Transcript of Oral Argument at 53, *Bd. of Educ., Island Tree Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982) (No. 80-2043)).

102. *Id.* at 864.

103. *Id.* at 871.

104. *Id.* at 869.

105. *Id.* at 867 (quoting *Stanley v. Georgia*, 394 U.S. 557, 564 (1969)); see also Lichtenstein, *supra* note 60, at 122 ("Listeners are as necessary as speakers if freedom of speech is to have any meaning.").

106. *Pico*, 457 U.S. at 864.

107. *Id.* at 868.

108. *Id.* at 909 (Rehnquist, J., dissenting).

of schools rightly included the ability to transmit values, even if those values were motivated by “social, moral, or political” concerns.<sup>109</sup> Thus, according to Justice Burger, there was a presumption against the judiciary interfering with local school board decision-making, and because students had no right to receive information, interference to protect students’ First Amendment rights was only justified if the school board had attempted to create a “pall of orthodoxy.”<sup>110</sup>

The precedential value of *Pico* remains suspect,<sup>111</sup> and, thus, more recent cases have questioned its merit. For example, six years after *Pico*, the Supreme Court held in *Hazelwood School District v. Kuhlmeier*<sup>112</sup> that educators could censor student speech in curricular activities if the censorship methods were “reasonably related to legitimate pedagogical concerns.”<sup>113</sup> The case centered around a high school principal’s decision to prohibit the publication of two articles in the school newspaper.<sup>114</sup> The student-written articles discussed divorce and teen pregnancy—subjects the principal deemed to be too mature for students.<sup>115</sup> Recognizing the wide discretion school officials have in the curricular setting, as well the need to inculcate values, the Court concluded that the principal’s removal of the articles was constitutional.<sup>116</sup>

While *Hazelwood* was not a book removal case, lower courts used it as guidance in such cases, particularly since *Pico*’s fractured opinion was not binding.<sup>117</sup> For most lower court decisions that directly address book removals in public schools, however, courts ultimately adopt the plurality holding from *Pico*.<sup>118</sup> That said, some argue that while *Hazelwood* generally was not decisive in book removal cases, the case has nonetheless had a “chilling” effect on the book selection process,<sup>119</sup> and the case certainly has permitted courts to erode the *Pico* standard.<sup>120</sup> On this point, looking at a trio of post-*Hazelwood* cases sheds light on the sort of books that are challenged/removed.

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109. *Id.* at 889 (Burger, C.J., dissenting).

110. *Id.* at 892.

111. See Katherine Fiore, Note, *ACLU v. Miami-Dade County School Board: Reading Pico Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students’ First Amendment Right Violations*, 56 VILL. L. REV. 97, 106–07 (2011) (“[A]s a plurality decision, *Pico* is not binding precedent, but still maintains significant influence as persuasive authority. This has caused uncertainty as to whether lower courts should apply *Pico* in public school library book removal cases. Although the *Pico* plurality is commonly applied in these cases, whether to apply another standard instead is currently contested.” (footnotes omitted)).

112. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 260 (1988).

113. *Id.* at 273.

114. *Id.* at 263–64.

115. *Id.*

116. *Id.* at 272–73.

117. See FOERSTEL, *supra* note 95, at 97–103.

118. See Fiore, *supra* note 111, at 108–13.

119. See FOERSTEL, *supra* note 95, at 97–103.

120. See *infra* Section III.A.

First, in *Campbell v. St. Tammany Parish School Board*,<sup>121</sup> the Fifth Circuit held that there was not enough evidence of any improper motivation behind a school board's removal of the book *Voodoo & Hoodoo*.<sup>122</sup> The court claimed it was applying *Pico* but adopted language more consistent with *Hazelwood*, ultimately allowing the court to find that the removal was lawful.<sup>123</sup> Second, in *Case v. United School District No. 233*,<sup>124</sup> a school board removed two books that concerned LGBTQ issues.<sup>125</sup> Upon overwhelming evidence of the board's disdain for the ideas expressed in the books,<sup>126</sup> the U.S. Court for the District of Kansas held in favor of the student-plaintiffs, again applying *Pico*'s motivation standard but citing "irregular" procedures as the main evidence of improper motivation.<sup>127</sup> Although never citing *Hazelwood* directly, the court's exploration of "educational suitability" mirrored *Hazelwood*'s "legitimate pedagogical concerns" reasoning.<sup>128</sup> Finally, in *Counts v. Cedarville School District*,<sup>129</sup> the court held that a school board's attempt to limit access to a Harry Potter book was unconstitutional.<sup>130</sup> Again, ample evidence of viewpoint-based motivations was available, but the court's reasoning left open the possibility that a book could be removed if proper motivations were shown, even if the book would not disrupt the school environment.<sup>131</sup>

Although most of these recent cases reached conclusions that were facially favorable to student-plaintiffs, they paved the way for a 2011 Eleventh Circuit decision that ruled against students. In *ACLU v. Miami-Dade County School Board*,<sup>132</sup> the court acknowledged the confusion regarding whether *Pico* or *Hazelwood* should guide its analysis, but, like the other courts before it, defaulted to the *Pico* rule.<sup>133</sup> The case centered around the book *¡Vamos a*

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

122. *Id.* at 190. The court came to this conclusion despite evidence that advocates of the removal thought the book was "potentially dangerous" because of its exploration of the supernatural, and despite the fact that the board offered no explanation for its removal decision. *Id.* at 185–87.

123. *See id.* at 191; *see infra* Section III.A.

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

125. *Id.* at 866–67.

126. *See Dirx*, *supra* note 3, at 43 ("One school board member informed the court that he voted to remove the book because he was offended by the book's 'glorification of the gay lifestyle.' Another board member supported the removal of the book because it promoted a 'lifestyle that is sinful in the eyes of God.'" (footnote omitted)).

127. *Case*, 908 F. Supp. at 876.

128. *See id.* at 876–77; *see also Dirx*, *supra* note 3, at 44 ("[T]he court held, in accordance with *Pico*, that the board's motivations were *narrowly political* and violated students' First Amendment rights . . ." (emphasis added)).

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

130. *Id.* at 1004.

131. *See id.*

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

133. *Id.* at 1202.

*Cuba!*, which explored “what life is like for [children]” in Cuba.<sup>134</sup> A parent, who was formerly a prisoner in Cuba, objected to the book because it contained inaccuracies about Cuban life.<sup>135</sup> The court found permissible the school board’s book removal, arguing that it was not the result of the board’s personal disdain for the book’s content.<sup>136</sup> Instead, the court determined that the book removal was motivated by the book’s inaccuracies.<sup>137</sup> Additionally, the court noted that “[t]he Board removed from its own school libraries a book that the Board had purchased for those libraries with Board funds. It did not prohibit anyone else from owning, possessing, or reading the book.”<sup>138</sup> The court forcefully concluded that the board had not engaged in any kind of censorship: “The overwrought rhetoric about book banning has no place here.”<sup>139</sup> On the other hand, the dissent found just the opposite, concluding that “the School board engaged in viewpoint discrimination, and that . . . was the decisive factor in its motivation.”<sup>140</sup>

#### E. WHY IT MATTERS

An educated and informed citizenry is essential to a functioning democracy, and public schools are where the majority of youths in the United States acquire the necessary education for effective citizenship.<sup>141</sup> Given the importance of this developmental process, courts continue to grant local officials vast decision-making powers in all areas of education.<sup>142</sup> When school officials exercise that power to remove books from their school libraries, some argue that doing so undermines the goal of creating successful citizens.<sup>143</sup> These critics contend that giving local officials absolute authority to remove books makes students “closed-circuit recipients of only that which the State chooses to communicate.”<sup>144</sup> On the other hand, some argue that students’ rights have expanded far beyond what our founders originally considered, and therefore, book removals are entirely permissible.<sup>145</sup>

Book challenges and removals are increasingly common, and other than the handful of cases that reach litigation or attract public outcry, most go

134. *Id.* at 1183.

135. *Id.* at 1182.

136. *Id.* at 1207–11.

137. *Id.*

138. *Id.* at 1218.

139. *Id.*

140. *Id.* at 1234 (Wilson, C.J., dissenting).

141. *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 278 (1988) (Brennan, J., dissenting).

142. *See Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982).

143. *See generally* Kristin Huston, Note, “*Silent Censorship*”: *The School Library and the Insidious Book Selection Censor*, 72 UMKC L. REV. 241 (2003) (arguing that removing books from public school libraries is harmful to students).

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

145. *See, e.g., Walsh, supra* note 31.

unreported.<sup>146</sup> Thus, it is nearly impossible to determine which standards are being followed, and whether those standards are adequately protecting the interests of students, parents, teachers, librarians, and other school actors that seek meaningful exposure to a variety of ideas. The vastly divergent views regarding students' rights and local discretion require clear legal precedents to guide schools and their students. Currently, no such clarity exists.

### III. EXPLOITING *PICO*'S MOTIVATION TEST

The various book removal cases after *Pico* show that those courts generally referred to or adopted the motivation test from *Pico*. However, Section III.A of this Note argues that despite purportedly relying on that test, the post-*Pico* courts have failed to investigate school boards' motivations with sufficient depth. As a result, Section III.B suggests that the *Pico* test has been effectively modified to the point where it now appears to grant school boards the same amount of discretion that they possess in making curricular decisions.

#### A. POST-PICO TRENDS

Since *Pico* provided little guidance for federal courts, "circuit-specific standards, created on shaky and politically charged rationales" have emerged.<sup>147</sup> Part of this problem arises from Justice Brennan's conclusion that a book could be properly removed based on its "educational suitability."<sup>148</sup> Whether a book was removed based on its educational suitability rests on the distinction between whether a board was motivated to remove a book for content-based reasons or politically-motivated reasons.<sup>149</sup> But as Justice Rehnquist alluded to in his dissent, the political stance of a book and the book's content are often inextricably linked, making it nearly impossible to parse a school board's decision-making process for a clear motivation behind their removal decision.<sup>150</sup> Further, Justice Brennan's holding provided little instruction for how to make that distinction.<sup>151</sup>

Unsurprisingly, nearly every school board since *Pico* has attempted to rely on this distinction, in some cases by exploiting *Hazelwood*'s vagueness.<sup>152</sup> The *Hazelwood* test articulated that school officials may curtail students' First

146. See ALA Releases List of Top 100 Most Banned and Challenged Books of the Decade, AM. LIBR. ASS'N (Sept. 27, 2020), <http://www.ala.org/news/press-releases/2020/09/ala-releases-list-top-100-most-banned-and-challenged-books-decade> [https://perma.cc/NL89-26NC].

147. Lindsay M. Saxe, Case Comment, *Politics Versus Precision: Did the Miami-Dade School Board Violate the First Amendment When It Voted to Remove ¡Vamos a Cuba! from Its District Libraries?*, 61 FLA. L. REV. 921, 931 (2009).

148. See Joelle C. Achtman, Note, *Pico Takes a Visit to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?*, 63 U. MIAMI L. REV. 943, 988 (2009) (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 871 (1982)).

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

150. Achtman, *supra* note 148, at 988.

151. See Chandler, *supra* note 17, at 152-54.

152. See *infra* notes 187-91 and accompanying text.



Amendment rights if doing so is “reasonably related to legitimate pedagogical concerns.”<sup>153</sup> This standard clearly echoed the “educational suitability” standard from *Pico*, but it did not require substantial investigations into the motivations of the school officials’ decision. Thus, by emphasizing *Hazelwood* and downplaying *Pico*, school officials have attempted to expand their discretion in the name of pedagogy.<sup>154</sup> This strategy, however, yielded little initial success. *Hazelwood* was not a book removal case, and the Court’s holding was limited to curricular matters;<sup>155</sup> the courts have consistently held that the school library is non-curricular.<sup>156</sup>

Nonetheless, the school officials in *Miami-Dade* won their case in part due to the court’s focus on “pedagogical concerns.”<sup>157</sup> Although the court suggested that it was not deciding whether the *Pico* or *Hazelwood* standard should apply, its reasoning substantially mirrored the principles from *Hazelwood*.<sup>158</sup> For example, in *Pico*, the plurality contemplated that a content-based removal might be justified by “vulgar[ity]” or “educational suitability.”<sup>159</sup> The Eleventh Circuit in *Miami-Dade*, however, held that the book removal was proper because the book contained “factual inaccuracies,”<sup>160</sup> which was never directly considered in *Pico*.<sup>161</sup> Further, although substantial evidence suggested that the book was removed for political reasons,<sup>162</sup> the court largely overlooked those concerns, instead finding that “[t]here [wa]s no constitutional right to have books containing misstatements of objective facts shelved in a school library.”<sup>163</sup>

Looking back at the post-*Pico* book removal cases shows that the vagueness of the *Pico* test allowed lower courts to gradually undermine its

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

154. See *infra* note 187 and accompanying text.

155. *Hazelwood*, 484 U.S. at 273.

156. See *supra* Section II.D.

157. *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1201, 1234 (11th Cir. 2009) (quoting *Hazelwood*, 484 U.S. at 273).

158. See generally Saxe, *supra* note 147 (identifying the *Miami-Dade* court’s reluctance to thoroughly investigate the school board’s motives, despite claiming to apply the *Pico* test).

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

160. *Miami-Dade*, 557 F.3d at 1227.

161. *Pico*, 457 U.S. at 871.

162. Rogow, *supra* note 1, at 832 (“That there were inaccuracies in *Vamos a Cuba* is probably true, but every book in every school library has inaccuracies, especially when the test for inaccuracy can be colored by subjective views of history, past and present. Thus, if inaccuracy were the test, our school library bookshelves would likely be barren. . . . Judge Carnes did a masterful job using a record that provided him with the means to uphold the school board . . . . The school board and its counsel did a masterful job in making a record that provided a means to avoid *Pico*. Everyone was brilliant. But the First Amendment was sacrificed on the altar of all that legal brilliance.”).

163. *Miami-Dade*, 557 F.3d at 1202.

supposed protections.<sup>164</sup> For example, in *Tammany*, the Fifth Circuit's analysis began by reiterating multiple times a school board's "broad discretion" concerning "pedagogical matters."<sup>165</sup> Subsequently, the court walked through the rules established by the *Pico* case but emphasized that the motivation-based standard from the case provided only "guidance" for the court's decision.<sup>166</sup> Ultimately, the court found that there was not sufficient evidence to discern whether the school board acted on the basis of improper motives, reversing the lower court's grant of summary judgment for the parents.<sup>167</sup>

For two reasons, the *Tammany* case is instructive in seeing how *Pico* is an easily manipulated standard given its vagueness and lack of precedential value. First, although the Fifth Circuit acknowledged that *Pico* held that courts should determine whether a board was "substantially motivated" by their disagreement with the views of a book, the *Tammany* court ended the decision by noting that it was "unable at this juncture to identify . . . the *single decisive* motivation behind the School Board's removal decision."<sup>168</sup> This language, while purportedly inspired by *Pico*, implied a more deferential standard than *Pico* contemplated.<sup>169</sup> By subtly requiring a greater evidentiary standard to find that a board was improperly motivated, the *Tammany* court claimed to be guided by *Pico*'s pro-speech holding, while it in fact adopted a standard that required substantially more evidence before finding improper motives.<sup>170</sup> Second, the court repeatedly maintained that school boards have substantial "control over pedagogical matters."<sup>171</sup> This language was more reminiscent of *Hazelwood* than of *Pico*'s "educational suitability" language. The distinction was consequential, because under the *Pico* standard, it seemed evident that the book at issue in *Tammany* was not removed for the content-based reasons contemplated by *Pico*.<sup>172</sup> Like the Eleventh Circuit in *Miami-Dade*, the Fifth Circuit contended that it was adopting a higher standard of review because of the non-curricular nature of book removals. Its allusions to "pedagogical matters," however, belied those contentions,<sup>173</sup> and both courts seemed to look the other way despite substantial evidence that would suggest the removals were not content-based.

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164. See Dirx, *supra* note 3, at 41–46 (explaining the gradual modifications to *Pico* in *Tammany*, *Case*, and *Cedarville*).

165. *Campbell v. St. Tammany Par. Sch. Bd.*, 64 F.3d 184, 187–88 (5th Cir. 1995).

166. *Id.* at 189.

167. *Id.* at 189–91.

168. *Id.* at 191 (emphasis added).

169. See Dirx, *supra* note 3, at 42.

170. See *id.*

171. *Campbell*, 64 F.3d at 188.

172. The school board failed to even make an "educational suitability" argument. Instead, the decision seemed to be based on parental complaints claiming the book could make "children[] infatuat[ed] with the supernatural," and for that reason, the parents believed the books were "dangerous." See *id.* at 185–86.

173. See *id.* at 188.

*Case* represented another narrowing of the *Pico* test, even despite its ruling in favor of students. In its decision, the District Court for the District of Kansas cited *Tammany* and argued that similar to the court in that case, it was tasked with “determin[ing] the ‘actual motivation’ of the school board,” contending that the removal would be improper if the ideas in the book were the “decisive factor.”<sup>174</sup> Again, despite looking to *Pico* for guidance, this strong language suggested that the court was looking for improper motivations that were unambiguously clear. The evidence of viewpoint-based motives was strong,<sup>175</sup> forcing the court to hold that “the overwhelming evidence of viewpoint discrimination” undermined the board’s contention that the removal was grounded in “educational suitability.”<sup>176</sup>

Despite the considerable evidence of viewpoint-based statements by the board, the court grounded its decision in the “irregular and erratic” procedures the board adopted in making its removal decision and its failure to consider “less restrictive alternatives” than blanket removal, suggesting that these failures indicated improper motivation.<sup>177</sup> It is unclear, given the abundance of evidence that the board disagreed with the views espoused by the books, why the court would need to resort to evidence of suspect procedures. Regardless, its decision to do so was consistent with the federal courts’ general reluctance to critically examine boards’ motivations despite those courts purportedly relying on *Pico*.

As a final point, the District Court for the Western District of Arkansas’s decision in *Cedarville* further demonstrated how *Pico*’s motivation test only really works when there is substantial evidence that a removal decision was content-based. In that case, the board members unambiguously made clear that the removal was based on “their shared belief that the books promote a particular religion.”<sup>178</sup> The board made little effort to argue that the books were educationally unsuitable.<sup>179</sup> Thus, the court had no issue applying *Pico*, and found that the board’s removal was an improper attempt to remove the books because “of the ideas expressed therein.”<sup>180</sup> The court went on to bolster its arguments by turning to *Tinker*, finding that the books would not “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.”<sup>181</sup> Although this argument was

174. *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875 (D. Kan. 1995).

175. *Id.* at 870–72. Some of the statements by the school board members included the following: “[E]ngaging in a gay lifestyle can lead to death, destruction, disease, emotional problems”; “[Homosexuality] . . . is sinful in the eyes of God”; and “[The book glorifies] . . . the gay lifestyle.” *Id.*

176. *Id.* at 875.

177. *Id.* at 876.

178. *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996, 1001, 1004 (W.D. Ark. 2003).

179. *See id.* at 1002.

180. *Id.* at 1005.

181. *Id.* at 1004 (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

likely made in direct response to the board's suggestion that the books would cause such disruptions, it is telling that despite clearly improper motivations, the court still found it necessary to address this issue.

### B. PROBLEMS WITH THE PICO TEST

The main problem with the *Pico* test is that courts do not use it consistently, which causes confusion and arbitrary modifications. This is understandable given *Pico*'s lack of precedential value.<sup>182</sup> Nonetheless, even if courts were to begin strictly applying the motivations test, it would remain an unworkable standard, because *Pico* and its progeny provide a "road map" for school boards to improperly remove books.<sup>183</sup> On this point, it is worth returning to the *Miami-Dade* case.

As previously noted, the school board in *Miami-Dade* was almost certainly politically motivated, yet the Eleventh Circuit ruled against the students.<sup>184</sup> The board's success, in large part, was the result of good lawyering.<sup>185</sup> The board's emphasis on "factual inaccuracies" in the book was sufficient for the court to find that the board was motivated by the "educational suitability" of the book.<sup>186</sup> However, the court likely was able to support its decision because the board was advised to make sure that their public comments focused on these inaccuracies and not the other viewpoint-based motivations that influenced its removal.<sup>187</sup>

The *Miami-Dade* decision demonstrates how the *Pico* motivation test can be easily manipulated due to its vagueness. Given courts' halfhearted efforts

182. See *supra* note 111 and accompanying text.

183. Stanley Ingber, *Socialization, Indoctrination, or the 'Pall of Orthodoxy': Value Training in the Public Schools*, 1987 U. ILL. L. REV 15, 62.

184. See *supra* note 163 and accompanying text.

185. See *supra* note 163 and accompanying text.

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

187. See *supra* note 163 and accompanying text. The political climate underlying the *Miami-Dade* case makes it almost certain that the board's "factual inaccuracies" argument was mere pretext. The government in the Miami-Dade community has a long history of disdain for anything that represents Cuba in a positive light. See Rogow, *supra* note 1, at 830–33. As the dissent pointed out, the record was full of evidence of political motives:

[One board member] argued that the book was rife with distortion because it omitted negative political information about the Castro regime, including omissions regarding political subjects such as civil liberties, due process, freedom of speech, government indoctrination, food rationing, and religious freedom. While [the board member's] viewpoints may be correct, I find no support in the law for the state requiring a book to carry a political viewpoint.

*Miami-Dade*, 557 F.3d at 1239 (Wilson, C.J., dissenting). The combination of good lawyering and Judge Carnes's willingness to modify *Pico* made the clear evidence of viewpoint-based motivations highly manipulatable. See *supra* note 163 and accompanying text. Absent a definitive ruling on these issues, this trend will almost surely continue. See also Michael Brenyo, Note, *[Censored]: Book Banning in the US Education System*, 40 J.L. & EDUC. 541, 546 (2011) (noting that the book removal in Miami-Dade probably was motivated by a "personal grudge").

in investigating school boards' motivations, as long as some evidence exists that the school board had concerns about the educational suitability of the book (manufactured or otherwise), the court will give great weight to that evidence. Additionally, because *Pico* provides little clarity for distinguishing between content-motivated removals and viewpoint-motivated removals, courts will be able to continue to sneak in more justifications into the content-motivated category.<sup>188</sup>

These problematic modifications of *Pico* have the potential to infringe upon students' First Amendment rights much more than *Pico* contemplated. The *Pico* standard was grounded in the justification that school libraries are non-curricular and thus implied that students should be afforded greater freedoms than expected by the curricular standard set out in *Hazelwood*.<sup>189</sup> While school officials have wide latitude to inculcate community values in the classroom, *Pico* suggested that latitude is more limited outside of the classroom.<sup>190</sup> The motivation search is necessary—so the argument goes—to ensure that school officials do not create an “orthodoxy” in the school by imposing their viewpoints on students, which is improper outside of the classroom.<sup>191</sup> But without a legitimate and discerning search into the motivations behind school board decision-making, the *Pico* standard simply becomes the *Hazelwood* standard,<sup>192</sup> and as demonstrated, the scope of “pedagogical concerns” that courts are willing to recognize is ever-broadening.<sup>193</sup> Thus, whether courts explicitly say so or not, they have treated the library as curricular, rather than non-curricular, potentially leaving students with no more freedom in the library than in the classroom.<sup>194</sup>

#### IV. A POTENTIAL SOLUTION

Section IV.A of this Note argues that the *Pico* motivation test should be abandoned. The courts have failed to apply it faithfully, and, as a result, school

188. See Saxe, *supra* note 147, at 931 (“The lack of clarity about the applicable First Amendment standard in school board book removal cases, as well as the importance of speech protections in the school context, demonstrates that the United States Supreme Court should revisit *Pico* and provide federal courts with greater guidance in this area.”).

189. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. *Pico*, 457 U.S. 853, 862–63 (1982).

190. *Id.* at 863–65.

191. *Id.* at 871.

192. Looking into the motivations behind a school board's removal decision distinguishes *Pico* from *Hazelwood*. When a court simply looks into whether there is some legitimate concern about the educational value of a book without searching the record for the board's motivations, the court provides boards with curriculum-level deference, which is improper in the context of the school library.

193. See, e.g., *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1227 (11th Cir. 2009) (recognizing “factual inaccuracies” as a legitimate rationale for removing a book).

194. See Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 103, 106 (“If the school library exists only to enhance the school curriculum, then students in the library are as tightly regulated there as they are in the classroom, where they may be told that only a certain topic is fit for inquiry.”).

boards have avoided liability by creating pretextual justifications for their book removal decisions. Instead, school boards should be incentivized to engage in more thoughtful book selection practices, because exercising their discretion during the selection phase is constitutionally sound and furthers the goal of transmitting community values. To accomplish this end, Section IV.B proposes a new test for evaluating book removal decisions by returning to the basic student-speech principles announced in *Tinker*.

#### A. WHY THE MOTIVATION TEST SHOULD BE ABANDONED

The First Amendment doctrine governing book removal is at a crossroads: Future cases can either affirm the curricular versus non-curricular distinction with greater force, or completely erase the distinction, in which case book removal cases will be subsumed by the *Hazelwood* standard.<sup>195</sup> Neither option, however, is entirely satisfactory. The latter option is problematic because book removals probably are not an *entirely* non-curricular issue in the way that the speech in *Tinker* was non-curricular.<sup>196</sup> The former option is equally problematic because the school library involves “voluntary inquiry” by the student, and thus, the books therein should also not be deemed entirely curricular.<sup>197</sup> To remedy this issue, the *Pico* plurality attempted to create a middle ground between *Tinker* and *Hazelwood*. It defined the school library as non-curricular but then limited the *Tinker* standard by adding an offramp option for school boards: If school boards can argue that the removal was motivated by a book’s content, rather than the board’s viewpoint about that content, it will be upheld.<sup>198</sup>

*Pico* added this offramp because the nebulous status of the school library required the court to recognize that the community still had some legitimate interest in inculcating values.<sup>199</sup> But those interests are sufficiently protected by the school’s wide *Hazelwood*-type discretion to select the books in the first place.<sup>200</sup> Schools certainly require substantial discretion to consider which

195. If the school library is found to be curricular, school boards will have near absolute discretion to cull the stacks however they please, even if their motivation is to promote or discourage a particular viewpoint. *See id.*

196. *See generally* Peter J. Jenkins, Comment, *Morality and Public School Speech: Balancing the Rights of Students, Parents, and Communities*, 2008 BYU L. REV. 593 (equating a school’s decisions regarding library materials with a school’s decisions regarding curricular matters).

197. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 869 (1982) (“Petitioners might well defend their claim of absolute discretion in matters of *curriculum* . . . . But we think that petitioners’ reliance upon that duty is misplaced where . . . they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”).

198. *Id.* at 871–72.

199. *See id.* at 864.

200. *See id.* at 871–72 (“[N]othing in our decision today affects in any way the discretion of a local school board to choose books to *add* to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to *remove* books.”).

books end up on their shelves,<sup>201</sup> but once they end up there, students should be afforded protection of their rights that is more consistent with *Tinker*. This is the case for a number of reasons. To start, the “educational suitability” offramp, as noted, invites pretextual justifications, and due to the courts’ limited search into a school board’s motivations, boards can easily mask their motives.<sup>202</sup> If the offramp is justified at least in part on the idea that schools should retain some discretion to inculcate values, this standard undermines that justification. Where a school board attempts to remove a book because it disagrees with its content but justifies the removal based on neutral “education suitability” justifications, the board necessarily undercuts its own attempts at value inculturation. Although the book is removed, which tacitly advances the inculturation goal, the board’s public pretextual statements will imply that it is not disapproving of the book’s ideas, paradoxically suggesting that it approves of the ideas, or at the very least, does not disagree with them. Additionally, even if a school is not well-versed in the *Pico* doctrine, the case provides such a vague and unworkable standard that many boards can likely get away with a viewpoint-based removal.<sup>203</sup> The line between content-based removal and viewpoint-based removal is so fine that in most cases a court could find evidence that supports either position.<sup>204</sup> Thus, rather than safeguarding the goal of inculcating community values, the *Pico* standard leaves the decision to the whims of a court.

The most sensible place for schools to exercise their discretion is at the selection phase,<sup>205</sup> but the current standard incentivizes bad selection practices. If a school knows that it can easily remove a book without issue,<sup>206</sup> it has little reason to engage in thoughtful selection practices with its librarians and educators. This front-end policing is more desirable for three reasons. First, it encourages school officials to interact with the teachers and

201. *Id.* at 869 (“[W]e do not deny that local school boards have a substantial legitimate role to play in the determination of school library content.”).

202. *See supra* Section III.B.

203. *See, e.g.,* ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1227 (11th Cir. 2009) (finding no viewpoint-based motivations for a school board’s book removal despite substantial evidence to the contrary); *see also supra* note 188 and accompanying text.

204. *See Pico*, 457 U.S. at 917–18 (Rehnquist, J., dissenting) (“It is difficult to tell from JUSTICE BRENNAN’s opinion just what motives he would consider constitutionally impermissible.”).

205. This is because the plurality in *Pico* supports this sort of discretion during the selection phase, and subsequent courts have reiterated that view. *See supra* note 201 and accompanying text.

206. Most data suggest that schools rarely face any substantial pushback when they attempt to remove a book from their stacks. For example, in 2016, the American Library Association’s Office for Intellectual Freedom found that 323 challenges to school library material had been reported. ROBERT P. DOYLE, BANNED BOOKS: DEFENDING OUR FREEDOM TO READ 14 (Colleen Frankhart ed., 2017). However, that organization also found “that between 82 percent and 97 percent of all challenges are never reported—meaning that nearly 11,000 challenges and/or bannings could be happening nationwide each year.” *Id.*

librarians who run the selection process.<sup>207</sup> This is a more democratic means of ensuring that the books are “educationally suitable” than manufacturing educational suitability on the back end.<sup>208</sup> It also takes into account the views of the “experts” before officials are forced into the awkward position of defending a book against removal.<sup>209</sup> Second, it does more to further the inculturation goal than the current standards. Culling the stacks at the outset ensures that community-held values are established in the library, and the schoolboard does not have to couch those values in educational suitability arguments, which undermines that very goal.<sup>210</sup> Finally, it reduces litigation. Some commentators argue that the current standards increase districts’ susceptibility to lawsuits.<sup>211</sup> But those susceptibilities likely arise because book removals are more contentious than selections, especially when a board is clearly attempting to impose its values via the removal. The library is a privilege to students, and if the threat of litigation is constant, schools might simply remove their libraries entirely. Thus, it is wise to adopt a standard that incentivizes value-laden decisions where such decisions are proper: at the selection phase.<sup>212</sup>

B. A TINKER TEST THAT RECOGNIZES THE PRACTICAL REASONS  
FOR REMOVING A BOOK

To accomplish these goals, the Supreme Court should definitively adopt a *Tinker*-like standard for book removals and expressly reject *Hazelwood*’s applicability to book removal cases. This Note proposes a new book removal test that maintains local control at the selection phase but narrows school boards’ discretion in the removal process. Because the majority of case law

207. See generally Huston, *supra* note 143 (explaining how the selection process generally is delegated to the library staff, who due to the current book removal standards often engage in “self-censorship”).

208. Because of the current standards, school librarians often have to predict which books their community or school officials will find objectionable. Thus, these librarians end up self-censoring—i.e., they fail to acquire certain books out of a fear that they will be challenged. See *id.* at 246–48. Encouraging school officials and community members to participate in the selection process ensures that librarians do not self-censor based on a misinterpretation of the community’s values.

209. See generally Sheryl H. Swindler, Note, *Censorship in the Public Schools: Why the Expert Testimony of Teachers Should Be Considered in Book-Banning Cases*, 6 U. FLA. J.L. & PUB. POL’Y 99 (1993) (noting the importance of educators’ expertise in the book selection and removal process).

210. See *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1227 (11th Cir. 2009) (finding that a pro-Cuba book was removed based on the board’s “factual inaccuracies” argument, despite the fact that the community clearly held anti-Castro sentiments, which influenced the removal).

211. See Jenkins, *supra* note 196, at 613–14.

212. See *supra* note 201 and accompanying text.



supports the contention that school libraries are non-curricular,<sup>213</sup> book removals should be understood as properly within the *Tinker* realm.<sup>214</sup> For that reason, *Pico*'s addition of a viewpoint-based standard is unnecessary, and, as shown, unworkable. An objective standard is needed. Thus, for a school board's challenged book removal to be proper, the board should have to prove that inclusion of the book would "materially and substantially disrupt the work and discipline of the school"<sup>215</sup> or that the book needs to be removed for practical reasons, such as shelf space limitations, damage, or obsolescence.<sup>216</sup>

This test rests on more constitutionally sound principles.<sup>217</sup> Although there are questions as to whether the school library is *entirely* non-curricular, it is substantially more in line with the non-curricular nature of *Tinker* than with the curricular nature of *Hazelwood*.<sup>218</sup> A student engages in expression by voluntarily choosing to engage with a book from a school's library. The fact that the school provides the means for that expression is of less consequence than *Pico* and the subsequent cases recognize. In essence, *Pico* gives two chances at furthering the inculturation goals—once at the acquisition phase, and again at the removal phase. However, the inculturation goal is only relevant to the school at the acquisition phase.<sup>219</sup>

A hypothetical is helpful for showing the similarities between book removals and the conduct at issue in *Tinker*.<sup>220</sup> School libraries are a privilege provided by the school<sup>221</sup> in the same way that various other areas in the school are a privilege. For instance, a school would be under no constitutional duty to provide five hallways in a school instead of four. However, imagine a school that did provide five hallways, only one of which had windows that allowed the sun to shine through. In that hallway, a student uses the sunlight to create a rainbow using a pocket-sized prism twice a week during a five-minute passing period. The student creates the rainbow to express support

213. See, e.g., Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868–69 (1982); Campbell v. St. Tammany Par. Sch. Bd., 64 F.3d 184, 189–90 (5th Cir. 1995); Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 875 (D. Kan. 1995).

214. See Peltz, *supra* note 194, at 134.

215. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969).

216. See *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577, 581 (6th Cir. 1976) ("Of course, a copy of a book may wear out. Some books may become obsolete. Shelf space alone may at some point require some selection of books to be retained and books to be disposed of.").

217. See *id.* at 582 ("The removal of books from a school library is a much more serious burden upon freedom of classroom discussion than the action found unconstitutional in *Tinker v. Des Moines Independent Community School District.*").

218. See Peltz, *supra* note 194, at 134.

219. See Munc, *supra* note 27, at 239–45.

220. Students wore black armbands in protest of the Vietnam War. *Tinker*, 393 U.S. at 504.

221. *Minarcini*, 541 F.2d at 581 ("When created for a public school [the library] is an important privilege created by the state for the benefit of the students in the school. That privilege is not subject to being withdrawn by succeeding school boards whose members might desire to 'winnow' the library for books the content of which occasioned their displeasure or disapproval.").

for LGBTQ issues. If the school were to block off the hallway in order to hinder the student's expression, the school's actions would almost certainly violate *Tinker*, provided the expression was not disruptive. However, if the school did not obstruct the hallway, it would not necessarily follow that the school was endorsing the student's speech.

In the same way, a school board is not approving of a book if it fails to remove it from its shelves.<sup>222</sup> When a school decides to grant its students the privilege of a school library and the books within, any subsequent use of the library is—in most cases—entirely voluntary.<sup>223</sup> Thus, although the school is providing the students a means for expression, the expression itself—i.e., reading a book—properly constitutes student expression and should fall within *Tinker's* reach. A student's voluntary decision to read a book from the library is much closer to the pure, non-curricular student expression contemplated in *Tinker*, and since a school's failure to remove a book should not be construed as an endorsement of the book's viewpoint, *Pico's* motivation test was an unnecessary supplement to a more objective inquiry.<sup>224</sup>

Finally, the various goals that the motivation test seeks to protect can all be addressed by placing greater emphasis on the selection process. Given the wide discretion afforded to schools during the selection phase, assessing a book's educational suitability at that step in the process allows for a more robust and honest analysis of a book's merits, because the decision-makers will have little reason to fear that litigation will occur.<sup>225</sup> The current approach, however, incentivizes school boards to create pretextual justifications for removals based on educational suitability, when that sort of analysis should have already taken place.<sup>226</sup> Any discretion taken away from school boards by this standard will simply incentivize those officials and the community to participate more in the selection process.<sup>227</sup> This approach does more to foster community values and further the inculturation goal,

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222. See *Munic*, *supra* note 27, at 240 (arguing that a book's presence in the library does not indicate state endorsement of the ideas within the book). Additionally, many schools release publications expressing that they do not necessarily endorse the ideas that appear in their library materials. *Id.* at 241 n.161.

223. Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 869 (1982).

224. See *Peltz*, *supra* note 194, at 134 (noting the contradiction between *Pico's* finding that school libraries are non-curricular and the plurality's addition of the motivation test).

225. See Arlen W. Langvardt, Comment, *Not on Our Shelves: A First Amendment Analysis of Library Censorship in the Public Schools*, 61 NEB. L. REV. 98, 135–36 (1982) (explaining that, because courts grant wide discretion to school boards during the selection process, the chances of a student successfully bringing suit are slim). This is confirmed by the fact that there have been no notable book selection lawsuits.

226. See *supra* Section III.B.

227. Book challenges and removals occur frequently. See *supra* note 206 and accompanying text. It is unlikely these challenges will cease. Instead, it is reasonable to assume that decreasing the likelihood that a school board will be successful in its removal will increase the amount of community input during the selection phase.

because the officials can be honest about their motivations.<sup>228</sup> Thus, if school officials choose to not acquire a text because they think it is not consistent with the community's values, they can openly say as much.

#### V. CONCLUSION

The current framework for analyzing the constitutionality of book removals can be easily manipulated and abused. The courts since *Pico* have incentivized school boards to create pretextual justifications for their removal decisions by failing to thoroughly investigate the record for evidence of viewpoint-based motivations. Thus, school boards are free to remove books, even if the removals are politically motivated. All school boards must do is say the magic words: "educational suitability." These problems can be avoided if the courts abandon the motivation test and adopt an objective standard reminiscent of *Tinker*. This standard will force schools to engage in better selection practices and also allow schools to be more intellectually honest with their communities, which will in turn help to transmit community values.

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228. See *supra* Section IV.A.