

**GENDER QUEER? MORE LIKE GENDER-OUTTA-HERE!:  
PRESERVING *PICO*'S PROTECTIONS FOR LGBTQ  
STUDENTS**

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INTRODUCTION

Based on a true story, *And Tango Makes Three* is a children’s picture book about two penguins at the New York City Zoo.<sup>1</sup> In the book, Roy and Silo have an almost-perfect relationship: they swim together, they sing together, and they’ve built a nest together. Sadly, the two penguins were unable to have a chick of their own. After the zookeeper notices Roy and Silo taking turns sitting on a rock, thinking they were sheltering an unhatched egg, he brings them a real egg. Roy and Silo took diligent care of that egg, and soon, a chick named Tango hatched! Together, the three penguins lived happily ever after. This adorable tale of family is also one of the most

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1. See JUSTIN RICHARDSON & PETER PARNELL, *AND TANGO MAKES THREE* (2005).

controversial banned books of the 21st Century.<sup>2</sup> What is the reason for this uproar? Both Roy and Silo were male penguins. The controversy around *And Tango Makes Three* continues almost two decades after it was published. Earlier this year, the school boards of Escambia County, Florida, and Lake County, Florida, both voted to remove the book.<sup>3</sup>

However, *And Tango Makes Three* has been eclipsed as a target for would-be book censors.<sup>4</sup> Nowadays, the honor of the “Most Challenged” title belongs to *Gender Queer*, an autobiographical graphic novel by Maia Kobabe about being nonbinary and asexual.<sup>5</sup> *Lawn Boy*, by Jonathan Evison, and *All Boys Aren’t Blue*, by George M. Johnson, are the second and third most-challenged books, respectively.<sup>6</sup> All these titles discuss LGBTQ identity in some way. In fact, five out of the top ten most-challenged books discuss LGBTQ identity.<sup>7</sup> This trend extends beyond the top-ten list, as 41% of targeted titles include LGBTQ themes or main characters.<sup>8</sup> Further, the recent spike in book challenges coincides with a renewed campaign against the LGBTQ—specifically the transgender—

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2. *And Tango Makes Three* was the fourth-most frequently challenged book of the 2000’s. Additionally, *And Tango Makes Three* was the sixth-most frequently challenged book of the 2010’s. See Barbara Jones, “*And Tango Makes Three*” Waddles Its Way Back to the Number One Slot as America’s Most Frequently Challenged Book, AM. LIBR. ASS’N (Apr. 11, 2011), <https://www.ala.org/news/press-releases/2011/04/and-tango-makes-three-waddles-its-way-back-number-one-slot-america’s-most>.

3. Brooke Leigh Howard, *Florida School District Bans a Book on . . . Penguins*, DAILY BEAST (Feb. 22, 2023), <https://www.thedailybeast.com/and-tango-makes-three-florida-school-district-bans-a-book-on-penguins> (Escambia County); Donald Padgett, *Florida School District Bans Book on Penguin Couple*, ADVOCATE (Jan. 10, 2023), <https://www.advocate.com/news/2023/1/10/florida-school-district-bans-book-penguin-couple-dont-say-gay> (Lake County).

4. See Title IX, Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681(a)). The language here can be tricky. Some disagree with the use of terms like “book ban” or “censorship,” claiming they are inaccurate. See, e.g., C.K.-W. v. Wentzville R-IV Sch. Dist., 619 F. Supp. 3d 906, 909 (E.D. Mo. 2022) (arguing that removing books from a school library “simply does not ban the books”). For clarity, this Article generally refers to such policies as “removing” books. However, I want to note up front that these removals are designed and intended to censor (i.e., restrict, suppress, or withhold) the books.

5. AM. LIBR. ASS’N, STATE OF AMERICA’S LIBRARIES: SPECIAL REPORT 10 (2022).

6. *Id.*

7. *Id.*

8. Hannah Natanson, *School Book Bans and Challenges, at Record Highs, Are Rising Again*, WASH. POST (Sept. 19, 2022), <https://www.washingtonpost.com/education/2022/09/19/school-book-bans-challenges-record-highs-are-rising-again>.

community.<sup>9</sup> These book-censorship efforts are an extension of the broader campaign to erase LGBTQ identities from the public sphere.<sup>10</sup>

This Article proposes that the Secretary of Education promulgate a regulation under Title IX of the 1972 Education Amendment to establish a procedure governing the removal of books from public school libraries.<sup>11</sup> Part I examines the recent spike in book censorship and looks at various legislative proposals. It also breaks down the relevant legal background and jurisprudence involving the legal interests of parents, students, and the school board.<sup>12</sup> Further, Part I discusses the implications of both the government speech doctrine and the public forum doctrine under the First Amendment.<sup>13</sup> Part II discusses why regulations are needed to strengthen the protections outlined in *Board of Education v. Pico*. Next, Part II discusses legitimate and illegitimate reasons to remove a book. Part III outlines a proposed framework to evaluate whether the motivation underlying a book removal was proper. Part III introduces the *McDonnell Douglas* burden-shifting framework, and

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9. See, e.g., Shaylee Ragar & Acacia Squires, *Montana House Votes to Formally Punish Transgender Lawmaker*, Rep. Zoey Zephyr, NPR, <https://www.npr.org/2023/04/26/1172158461/montana-gop-transgender-zoey-zephyr-punishment-banned-speaking-lgbtq> (last updated Apr. 26, 2023) (discussing the Montana legislature barring Rep. Zephyr, who is trans, from attending or speaking in floor sessions); Jo Yurcaba, *Florida Becomes Eighth State to Restrict Transgender Care for Minors*, NBC NEWS (Mar. 16, 2023), <https://www.nbcnews.com/nbc-out/out-politics-and-policy/florida-becomes-eighth-state-restrict-transgender-care-minors-rcna75337> (discussing the wave of state laws prohibiting gender-affirming care for minors); see also Roby Chavez, *As LGBTQ Book Challenges Rise, Some Louisiana Librarians Are Scared to Go to Work*, PBS (Feb. 27, 2023), <https://www.pbs.org/newshour/nation/as-lgbtq-book-challenges-rise-some-louisiana-librarians-are-scared-to-go-to-work>.

10. See, e.g., Scott McFetridge et al., *School Library Book Bans Are Seen as Targeting LGBTQ Content*, AP NEWS (Mar. 20, 2023), <https://apnews.com/article/lgbtq-book-bans-91b2d4c086eb082cbeefdda2800ef29a> (discussing how school library book bans are targeting LGBTQ content); Sabrina Baêta, *Frequently Banned Books Featuring Transgender Stories*, PEN AM. (Mar. 30, 2023), <https://pen.org/banned-books-transgender-stories> (noting that stories featuring transgender individuals and characters make up roughly 9% of banned books, despite their underrepresentation); Chavez, *supra* note 9 (“The majority of the book challenges across Louisiana last year focused on titles for children and young adults with LGBTQ themes . . .”).

11. This Article focuses specifically on public school libraries. The analysis for non-school public libraries is likely different. See *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 548 (N.D. Tex. 2000) (“The principles set forth in *Pico* . . . have even greater force when applied to public libraries.”). Regardless, that question is outside the scope of this Article. Further, this Article is concerned solely with the removal of existing materials. The analysis for adding materials to a public-school library may be different and is outside this Article’s scope.

12. See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982) (discussing the “broad discretion” enjoyed by local school boards with regards to the inculcation of community values); see also *id.* at 866 (holding students’ First Amendment rights were violated when a school removed books from the library); see *ACLU v. Miami-Dade*, 557 F.3d 1177, 1195 (11th Cir. 2009) (finding a parent had standing over a school library book removal).

13. See *infra* Part I.G.

then expounds on the proposed modifications and rationale behind the changes.

### I. LEGAL AND FACTUAL BACKGROUND

There has been an “unprecedented uptick” in book censorship.<sup>14</sup> Nearly 1,900 unique titles were affected by censorship attempts in 2021.<sup>15</sup> Most of these challenges occurred in either school libraries (44%) or public libraries (37%) and were initiated by either parents (39%) or patrons (24%).<sup>16</sup> 2022 shattered 2021’s record: nearly 2,600 unique titles were challenged.<sup>17</sup> The scope of this problem is thrown into sharp relief when these numbers are compared with the number of books challenged from 2018–2020 which ranged from 273 to 566 a year.<sup>18</sup> Further, 90% of these challenges targeted multiple titles.<sup>19</sup>

It is also worth noting how this wave of book bans differs substantively from similar past efforts. For example, prior efforts against Mark Twain’s *Adventures of Huckleberry Finn* and John Steinbeck’s *Of Mice and Men* focused on restricting access through class curriculum and which books were required reading.<sup>20</sup> Nowadays, the efforts center around removing books from school libraries.<sup>21</sup> This change stems from the newly organized nature of these challenges, through groups like the conservative Moms for Liberty.<sup>22</sup>

On the other hand, removal efforts for books validating queer existence are not new.<sup>23</sup> While these challenges are justified by smearing the materials

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14. Susanna Granieri, *An Unprecedented Uptick in Book Bans Brings First Amendment Scrutiny*, FIRST AMEND. WATCH (Sept. 14, 2022), <https://firstamendmentwatch.org/an-unprecedented-uptick-in-book-bans-brings-first-amendment-scrutiny>.

15. 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).

16. AM. LIBR. ASS’N, *supra* note 5.

17. Press Release, Am. Libr. Ass’n, *supra* note 15.

18. *Top 10 Most Challenged Books Lists*, BANNED & CHALLENGED BOOKS, <https://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10/archive> (last visited Dec. 15, 2023).

19. Press Release, Am. Libr. Ass’n, *supra* note 15.

20. Kiara Alfonseca, *How Conservative and Liberal Book Bans Differ Amid Rise in Literary Restrictions*, ABCNEWS (Jan. 12, 2023), <https://abcnews.go.com/US/conservative-liberal-book-bans-differ-amid-rise-literary/story?id=96267846>.

21. *Id.*

22. Hillel Italie, *Book Ban Attempts Reach Record High in 2022, American Library Association Report Says*, PBS (Mar. 23, 2023), <https://www.pbs.org/newshour/arts/book-ban-attempts-reach-record-high-in-2022-american-library-association-report-says>.

23. For example, one of the Nazi’s first targets was the Institute of Sexology in Berlin. In addition to researching gender and sexuality, the Institute provided healthcare—including the first documented gender-affirming surgery. See Brandy Schillace, *The Forgotten History of the World’s First Trans Clinic*, SCI. AM. (May 10, 2021), <https://www.scientificamerican.com/article/the-forgotten-history-of-the->

as obscene or inappropriate, these claims are often entirely without merit.<sup>24</sup> Instead, the differential treatment against materials with a pro-LGBTQ lean constitutes a viewpoint-based regulation on speech, prohibited by the First Amendment.<sup>25</sup>

Before discussing removal, it is worth explaining the typical selection process. Public school library books are not chosen haphazardly.<sup>26</sup> Librarians typically have master's degrees, are experts on age-appropriate reading, and have a "traditional role in identifying suitable and worthwhile material."<sup>27</sup> It just is not true that librarians are filling elementary school libraries with smut.

Regardless, as part of this moral panic, legislatures across the country are considering legislation that limits access to disfavored material.<sup>28</sup> No matter how imagined the danger that children are exposed to pornography at school may be, the surge in challenges and legislation is very real.<sup>29</sup> A brief

worlds-first-trans-clinic. On May 6, 1933, the Institute was looted. Several days later, what remained of the Institute's library was burned in the city square. See *6 May 1933: Looting of the Institute of Sexology*, HOLOCAUST MEM'L DAY TR., <https://www.hmd.org.uk/resource/6-may-1933-looting-of-the-institute-of-sexology> (last visited Dec. 15, 2023).

24. See Kasey Meehan & Jonathan Friedman, *Banned in the USA: State Laws Supercharge Book Suppression in Schools*, PEN AM. (Apr. 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools>.

25. See Elizabeth M. Glazer, *When Obscenity Discriminates*, 102 NW. U. L. REV. 1379, 1426–27 (arguing that in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), "homosexuality [was] transform[ed], for First Amendment purposes, from subject matter to viewpoint"); see also *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995);

When the government targets . . . particular views . . . , the violation of the First Amendment is all the more blatant. Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

*Id.* (citations omitted).

26. See Jennifer Palmer, *How Books Wind Up on School Library Shelves*, OKLA. WATCH (Sept. 29, 2022), <https://oklahomawatch.org/2022/09/29/how-books-wind-up-on-school-library-shelves>.

27. *Parents, Families, & Friends of Lesbians and Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 900–01 (W.D. Mo. 2012); see also Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU Educ. & L.J. 103, 108–27 (2005) (discussing the role of librarians throughout history); *Guidelines for Choosing a Master's Program in Library and Information Studies*, AM. LIBR. ASS'N, <https://www.ala.org/educationcareers/accreditedprograms/guidelines-choosing-masters-program-library-and-information-studies> (last visited Dec. 15, 2023) ("The vast majority of employers require an ALA-accredited master's degree for professional positions in the field of library and information science . . .").

28. See Jeremy C. Young & Jonathan Friedman, *Today's Book Bans Echo a Panic Against Comic Books in the 1950s*, WASH. POST (Oct. 17, 2022), <https://www.washingtonpost.com/made-by-history/2022/10/17/book-ban-comic-books-panic> (comparing today's book bans to the 1950s panic against comic books).

29. AM. LIBR. ASS'N, *THE STATE OF AMERICA'S LIBRARIES* 2, 8 (2023) (noting that there were 223 unique titles challenged in 2020, 1,858 unique titles challenged in 2021, and 2,571 unique titles challenged in 2022).

survey of proposed and enacted censorship legislation demonstrates the urgency of the matter.

### A. State & Local Legislation

Georgia passed a law in 2022 allowing parents to report school material they believe is “harmful to minors,” thus initiating a review process to potentially remove the material.<sup>30</sup> This law also allows parents to appeal the review board’s decision to the local school board if they disagree with the board’s conclusion.<sup>31</sup> Arizona requires districts to provide parents with a list of books their children have checked out and requires districts to publish the titles of all library materials purchased.<sup>32</sup> Florida passed legislation that allows parents to join committees for “ranking, eliminating, or selecting instructional materials” and requires every elementary school to post all library materials in a “searchable format.”<sup>33</sup>

In addition to state-level attempts, local school boards have adopted similar policies. For example, in Central Bucks County, Pennsylvania, librarians must receive approval before purchasing books.<sup>34</sup> This approval process includes school district administrators, parents, and community members.<sup>35</sup> Central Bucks’ “policy prohibits any materials that contain ‘sexual acts’ (or ‘nudity’ at the elementary and middle-school levels); requires libraries to publish inventories; makes it easier for parents to remove books;” and allows parents to “receive a list of books their children have checked out.”<sup>36</sup>

In addition to successful legislation, there has been a barrage of attempted book-banning legislation.<sup>37</sup> For example, Oklahoma introduced

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30. S. 226, 156th Gen. Assemb., Reg. Sess. (Ga. 2022).

31. *Id.*

32. ARIZ. REV. STAT. ANN. § 15-189.07.

33. 2022 Fla. Laws 3–4.

34. See Howard Monroe & Kerri Corrado, *Central Bucks School Board Passes Controversial Policy Change that Could Lead to Book Bans*, CBS NEWS PHILA. (July 27, 2022), <https://www.cbsnews.com/philadelphia/news/central-bucks-school-district-policy-books-bans>.

35. *Id.*

36. Hannah Natanson & Lori Rozsa, *Students Lose Access to Books Amid ‘State-Sponsored Purging of Ideas’*, WASH. POST (Aug. 17, 2022), <https://www.washingtonpost.com/education/2022/08/17/book-ban-restriction-access-lgbtq>.

37. Some of these bills have been abandoned for similar, successful proposals. Often, multiple competing bills are introduced in a single state. Just because a state bill is listed here does not mean that state does not have a similar law in place. See, e.g., HB. 3092, 58th Leg., Reg. Sess. (Okla. 2022), S. 1142, 58th Leg., Reg. Sess. (Okla. 2022). Additionally, some of these proposals passed the legislature and were vetoed by the Governor. See Joel Crane, *Burgum Vetoes One Book Ban Bill, Signs Another*, KYFRTV (Apr. 26, 2023), <https://www.kfyrtv.com/2023/04/26/burgum-vetoes-one-book-ban-bill-signs-another>. Finally, some of these proposals were killed in committee or failed on the floor. Dan Carden, *Book Ban*

legislation that would have prevented public school libraries from stocking books that address, among other things, sexual identity and gender identity.<sup>38</sup> Tennessee introduced legislation that would have prohibited schools from making obscene materials, or materials harmful to minors, available to minors in school libraries.<sup>39</sup> Virginia introduced legislation adding new procedures to school libraries' book selection policies.<sup>40</sup> These include a public comment period and direct parental review of all materials.<sup>41</sup> The legislation introduced in Virginia would also mandate parental consent to check out materials considered by a parent to be pornographic or "grooming."<sup>42</sup> Florida introduced legislation that would have required a media specialist at every school to review all books to ensure they are "age-appropriate" and would have required elementary schools to post a list of their teaching materials online.<sup>43</sup>

As shown by the legislation, the methods employed to remove books from school libraries are varied. To summarize, the library advocacy organization, EveryLibrary, has helpfully identified several common trends running through these proposals.<sup>44</sup> Among these trends are:

- (1) "strict requirements regarding materials that are allowed in class or in school libraries";
- (2) requirements that "school districts . . . post instructional materials online";
- (3) "[c]laims that library databases contain materials that are harmful to minors";
- (4) restrictions on materials discussing "race and sex"; and,

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*Plan Fails to Advance Out of Indiana House Committee*, NWI.COM, [https://www.nwitimes.com/news/local/education/book-ban-plan-fails-to-advance-out-of-indiana-house-committee/article\\_d459c099-f055-5d32-8de9-e4ed2d8243a3.html](https://www.nwitimes.com/news/local/education/book-ban-plan-fails-to-advance-out-of-indiana-house-committee/article_d459c099-f055-5d32-8de9-e4ed2d8243a3.html) (last updated July 5, 2023).

38. S. 1142, 58th Leg., Reg. Sess. (Okla. 2022).

39. H.R. 1944, 112th Gen. Assemb., 2d Reg. Sess. (Tenn. 2022).

40. S. 275, 2022 Leg., Reg. Sess. (Va. 2022).

41. *Id.*

42. *Id.*

43. S. 1300, 2022 Leg., 124th Sess. (Fla. 2022).

44. *Legislation of Concern*, EVERYLIBRARY (Apr. 3, 2022), [https://www.everylibrary.org/2022\\_legislative\\_attacks](https://www.everylibrary.org/2022_legislative_attacks).

(5) threats to defund schools or criminally prosecute librarians, if the school allows “access to so-called ‘harmful materials.’”<sup>45</sup>

With the scope of the problem established, this Article now turns to the interests of three relevant parties: parents, students, and the school board.<sup>46</sup>

### B. Parents

Parents have an interest in how they raise their kids. The Supreme Court has long recognized that the Fourteenth Amendment’s Due Process Clause protects parents’ right to “establish a home and bring up children.”<sup>47</sup> This liberty interest was first articulated in *Meyer v. Nebraska*, where the Court struck down a state law prohibiting students from being taught German.<sup>48</sup> The Court reasoned that the liberty guaranteed by the Fourteenth Amendment included the “right of parents” to procure foreign language instruction for their children.<sup>49</sup> Two years later, in *Pierce v. Society of Sisters*, the Court struck down a state law precluding attendance at parochial schools on the basis that it “unreasonably interfere[d] with the liberty of parents . . . to direct the upbringing and education of children under their control.”<sup>50</sup> Thus, in *Meyer* and *Pierce*, the Supreme Court has recognized that “the custody, care and nurture of the child reside first in the parents.”<sup>51</sup>

However, there are important limits to the control a parent may exercise over their child’s education.<sup>52</sup> “[P]arents simply do not have a constitutional right to control each and every aspect of their children’s education and oust the state’s authority over that subject.”<sup>53</sup> Even in the realm of homeschooling,

45. *Id.*

46. While this Article focuses on parents, students, and the school board, there are other parties whose rights may be implicated by book removal. *See, e.g.*, *Salvail v. Nashua Bd. of Educ.*, 469 F. Supp. 1269, 1276 (D.N.H. 1979) (members of faculty had standing); *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703, 705 (D. Mass. 1978) (plaintiffs included librarian and teacher); *but see Bicknell v. Vergennes Union High Sch. Bd. of Dirs.*, 638 F.2d 438, 442 (2d Cir. 1980) (finding that librarian did not have standing).

47. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

48. *Id.* at 400.

49. *Id.*

50. *Pierce v. Soc’y of Sisters*, 268 U.S. 510, 534–35 (1925).

51. *Prince v. Massachusetts*, 321 U.S. 158, 166 (1944).

52. *See, e.g.*, *Runyon v. McCrary*, 427 U.S. 160, 175–77 (1976) (holding a parent’s right to control their child’s education did not include having your child educated in a private racially segregated school); *see also Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 291 (5th Cir. 2001) (discussing other cases that have limited parental oversight).

53. *Swanson v. Guthrie Indep. Sch. Dist. No. I-L*, 135 F.3d 694, 699 (10th Cir. 1998) (citations omitted).



the state's police powers allow for reasonable regulations.<sup>54</sup> Most importantly, a parent's right to control their child's upbringing does not "encompass[] a fundamental constitutional right to dictate the curriculum at the public school to which they have chosen to send their children."<sup>55</sup>

As the First Circuit noted in *Brown v. Hot, Sexy and Safer Productions*, "[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."<sup>56</sup> Refusing to read the Constitution as imposing such a burden, the court held "that the rights of parents as described by *Meyer* and *Pierce* do not encompass a broad-based right to restrict the flow of information in the public schools."<sup>57</sup> Therefore, the parental rights articulated in *Meyer* and *Pierce* do not include restricting which books a library may provide.<sup>58</sup>

### C. Students

Next, this Part turns to the students' rights. It is well established that students do not "shed their constitutional rights . . . at the schoolhouse gate."<sup>59</sup> Even though schools have "important, delicate, and highly discretionary functions," those functions must comport with the Bill of Rights.<sup>60</sup> On the other hand, "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings."<sup>61</sup> Generally, however, students maintain their free speech rights, unless there is a "specific showing of constitutionally valid reasons to regulate their [freedom of expression]."<sup>62</sup>

In *Tinker v. Des Moines Independent City School District*, the Court focused on the classroom environment and the role schools play in

54. See, e.g., *Murphy v. Arkansas*, 852 F.2d 1039, 1041, 1043 (8th Cir. 1988) (holding homeschooled children may be subjected to standardized tests, even over parental objection); see also *State v. DeLaBruere*, 577 A.2d 254, 263, 266 (Vt. 1990) (arguing reasonable state regulations do not infringe on right to home school or enroll children in private school).

55. *Brown v. Hot, Sexy & Safer Prods.*, 68 F.3d 525, 533 (1st Cir. 1995) (citations omitted).

56. *Id.* at 534.

57. *Id.*

58. *Id.* at 533.

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

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

61. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 682 (1986) (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340–42 (1985)); see also *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043, 1057 (2d Cir. 1979) (Newman, J., concurring) ("[T]he First Amendment gives a high school student the classroom right to wear Tinker's armband, but not Cohen's jacket.").

62. *Tinker*, 393 U.S. at 511.

developing the nation's youth.<sup>63</sup> The majority noted, however, that this "principle . . . is not confined to the supervised and ordained discussion which takes place in the classroom."<sup>64</sup> Rather, the question turns on whether the speech would "materially and substantially interfere" with the "work of the school."<sup>65</sup> In short, under *Tinker*, students are free to exercise their First Amendment rights so long as that exercise does not disrupt school.

#### D. School

Finally, the Supreme Court granted school administrators broad discretion over curriculum.<sup>66</sup> Curriculum is defined as activities that are "supervised by faculty members and designed to impart particular knowledge or skills to student participants and audiences" and "might reasonably [be] perceive[d] to bear the imprimatur of the school."<sup>67</sup> This broad discretion acknowledges the role of schools as "a principal instrument in awakening the child to cultural values."<sup>68</sup> Further, it recognizes that public schools are vitally important "'in the preparation of individuals for participation as citizens,' and as vehicles for 'inculcating fundamental values necessary to the maintenance of a democratic political system.'"<sup>69</sup> As such, schools may restrict the content of speech, which bears the imprimatur of the school, so long as that restriction is reasonable and related to legitimate pedagogical concerns.<sup>70</sup>

In *Bethel School District v. Fraser*, the Court upheld a student's suspension after he delivered a speech laced with sexual innuendos.<sup>71</sup> The majority distinguished *Fraser* from *Tinker* in two ways. First, *Fraser's* speech was "vulgar and lewd," as opposed to political speech.<sup>72</sup> Second, allowing *Fraser's* speech would "undermine the school's basic educational mission."<sup>73</sup> For these reasons, the *Fraser* Court held that the school could censor "vulgar speech and lewd conduct" that was "wholly inconsistent with the

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63. *Id.* at 512; *see also* *Shelton v. Tucker*, 364 U.S. 479, 487 (1960) ("The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.").

64. *Tinker*, 393 U.S. at 512.

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

66. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

67. *Id.*

68. *Brown v. Bd. of Educ. of Topeka, Shawnee Cnty., Kan.*, 347 U.S. 483, 493 (1954).

69. *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) (quoting *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979)).

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

71. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 678 (1986).

72. *Id.* at 685.

73. *Id.*

‘fundamental values’ of public school education.”<sup>74</sup> *Hazelwood School District v. Kuhlmeier* affirmed and strengthened this reasoning, holding that a school could censor a student-run journal.<sup>75</sup> Under *Hazelwood*, schools may censor curricular speech so long as that censorship is “reasonably related to legitimate pedagogical concerns.”<sup>76</sup> Expressive activity is considered part of the curriculum when (1) “members of the public might reasonably perceive [the speech] to bear the imprimatur of the school”; (2) the activity is “supervised by faculty members”; and, (3) the activity is “designed to impart particular knowledge.”<sup>77</sup> Accordingly, the judicial landscape is thus: schools may restrict curricular material so long as the restriction is related to legitimate pedagogical concerns. That discretion is limited, however, when analyzing non-curricular speech.

#### *E. Free Island Board of Education v. Pico*

Keeping in mind the balance between a student’s constitutional rights and school administrators’ discretion, this Article now turns to the sole Supreme Court decision on point—*Board of Education v. Pico*.<sup>78</sup> In *Pico*, the Supreme Court held that school authorities could not remove books from school libraries merely because those authorities did not like the ideas the books contained.<sup>79</sup> Justice Brennan wrote the plurality, joined in full by Justices Marshall and Stevens, and joined in part by Justice Blackmun.<sup>80</sup> Brennan’s decision rested on students’ First Amendment right to receive information.<sup>81</sup> The “unique role of the school library” was a dominant factor in the Court’s reasoning.<sup>82</sup> Because libraries provide students “an opportunity at self-education and individual enrichment that is wholly optional,” they are an “environment especially appropriate for the recognition of the First Amendment rights of students.”<sup>83</sup> It is improper to “extend . . . absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.”<sup>84</sup>

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74. *Id.* at 685–86 (internal quotations omitted).

75. *Hazelwood*, 484 U.S. at 262, 273.

76. *Id.* at 273.

77. *Id.* at 271.

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

79. *Id.* at 872 (plurality opinion).

80. *See id.* at 855–75.

81. *Id.* at 866–68.

82. *Id.* at 869.

83. *Id.* at 868–69.

84. *Id.* at 869.

Justice Blackmun wrote an opinion concurring in part and concurring in the judgment.<sup>85</sup> He agreed with the plurality that the First Amendment prohibited the school from removing a library book because the school disagreed with the ideas the book contained.<sup>86</sup> However, Blackmun based his decision on the students' First Amendment right not to be denied access to information.<sup>87</sup> While it predates the Supreme Court's articulation of the public forum doctrine, Blackmun's reasoning closely aligned with the doctrine.<sup>88</sup>

Finally, Justice White concurred in the judgment—providing the crucial fifth vote.<sup>89</sup> White's concurrence was a bit of a judicial dodge, focusing on what he considered an “unresolved factual issue.”<sup>90</sup> Based on the record before the Court, Justice White was unsure of the “reason or reasons underlying the school board's removal of the books.”<sup>91</sup> By voting to remand, however, White agreed that the reason motivating a book's removal was a relevant consideration.<sup>92</sup>

The majority's decision inflamed the Court's conservative wing, with Chief Justice Burger, Justice Powell, Justice Rehnquist, and Justice O'Connor each penning a dissent.<sup>93</sup> Chief Justice Burger described Brennan's opinion as a “lavish expansion going beyond any prior holding under the First Amendment.”<sup>94</sup> Justice Powell lambasted what he perceived as contradictions in the Court's reasoning, before highlighting language he found offensive in the challenged material.<sup>95</sup> Justice Rehnquist's dissent called Brennan's opinion “analytically unsound and internally inconsistent.”<sup>96</sup> Finally, Justice O'Connor wrote that, while she did not agree with all of the school board's decisions, she felt the decisions were within its prerogative.<sup>97</sup>

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85. *See id.* at 875–82 (Blackmun, J., concurring).

86. *Id.* at 875–77.

87. *Id.* at 878–79.

88. Peltz, *supra* note 27, at 136.

89. *See Pico*, 457 U.S. at 883 (White, J., concurring).

90. *Id.* (noting the District Court found that the books were removed because the school board believed them “to be, in essence, vulgar,” while the 2nd Circuit concluded that a “material issue of fact . . . precluded summary judgment”).

91. *Id.*

92. *See id.* at 883–84 (White, J., concurring); Joelle C. Achtman, Note, *Pico Takes a Visit to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?*, 63 U. MIAMI L. REV. 943, 982 (2009).

93. *Pico*, 457 U.S. at 885–93 (Burger, C.J., dissenting); *id.* at 893–903 (Powell, J., dissenting); *id.* at 904–20 (Rehnquist, J., dissenting); *id.* at 921 (O'Connor, J., dissenting).

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

95. *Id.* at 896, 897–903 (Powell, J., dissenting).

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

97. *Id.* at 921 (O'Connor, J., dissenting).

Under *Pico*, the motivation behind book removal is critical. Even Rehnquist, in his dissent, “cheerfully concede[d]” that a school board controlled by one political party could not remove all books written by the opposition.<sup>98</sup> *Pico* involved a “flagrant attempt by school authorities to . . . control the ideas to which students have access.”<sup>99</sup> According to the Court, “[o]ur Constitution does not permit the official suppression of ideas.”<sup>100</sup> School authorities may remove books if they have a legitimate motivation—like the “educational suitability” or “pervasive[] vulgar[ity]” of the material.<sup>101</sup> However, school officials may not remove books if their motivation is to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>102</sup>

Some have questioned whether *Pico* remains good law after decisions like *Hazelwood*.<sup>103</sup> The Supreme Court has not resolved whether *Hazelwood*’s “reasonable pedagogical concerns” test undermined *Pico*.<sup>104</sup> However, *Pico* is both consistent with and distinguishable from *Hazelwood*.<sup>105</sup> While *Hazelwood* stands for the principle that school officials have relatively broad authority to regulate curriculum and curricular speech in consideration of their duty to transmit community values,<sup>106</sup> *Pico* recognizes that not every aspect of school is curricular.<sup>107</sup> “[L]ibraries afford [students] an opportunity at self-education and individual enrichment that is wholly optional.”<sup>108</sup> Because libraries fall outside the curricular sphere, *Hazelwood*’s broad discretion does not apply.

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

99. RONNA GREFF SCHNEIDER, EDUCATION LAW: FIRST AMENDMENT, DUE PROCESS AND DISCRIMINATION LITIGATION § 2:9 (2023).

100. *Pico*, 457 U.S. at 871 (emphasis in original).

101. *Id.*

102. *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943).

103. See *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1200 (11th Cir. 2009) (discussing *Pico*’s limited precedential value); see also *C.K.-W. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 913 (E.D. Mo. 2022) (“Indeed, it is not clear what, if anything, from *Pico* is binding on the case here.”); see also SCHNEIDER, *supra* note 99, § 2:9 (“Whether the *Pico* decision was in any way undermined by the subsequent *Hazelwood* ‘reasonable pedagogical concerns’ test has arguably not been clearly and directly resolved by the Supreme Court.”).

104. SCHNEIDER, *supra* note 99, § 2:9.

105. See *id.*

106. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 266–67, 272 (1988); see also *id.* at 282–83 (Brennan, J., dissenting).

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

108. *Id.*

### F. Government Speech Doctrine

The stocking and removal of books from the shelves of a public school library implicates the government speech doctrine.<sup>109</sup> Under this doctrine, the “government *may* engage in viewpoint discrimination in choosing what positions to favor . . . in the exercise of its own speech.”<sup>110</sup> Thus, government speech is immune from challenge under the First Amendment.<sup>111</sup> This principle has previously been applied to the public school context: part of the reasoning underlying *Hazelwood* and *Fraser* is the idea that the state, through the school, could not be forced to *speak*.<sup>112</sup>

The government speech doctrine works in harmony with the *Tinker-Hazelwood-Pico* framework articulated above. “[S]peech that is otherwise private does not become speech of the government merely because the government provides a forum for the speech or in some way allows or facilitates it.”<sup>113</sup> A book on the library shelf is not automatically government speech. Rather, its nature turns on the distinction between curricular and extracurricular speech.

In the context of schools and the curricular-extracurricular distinction, curricular material covered by *Hazelwood* is reasonably understood as analogous to government speech.<sup>114</sup> When a parent is participating in curricular activities, educators retain an ability to limit the parent’s speech.<sup>115</sup> After all, the parent’s classroom speech is both curricular and school-sponsored. Further sharpening this comparison, lower courts have allowed pedagogically based restrictions on what teachers may say in the classroom.<sup>116</sup>

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109. See, e.g., *Pico*, 457 U.S. at 908–09 (Rehnquist, J., dissenting); see also *Hazelwood*, 484 U.S. at 270–71 (holding that school officials have greater authority over “expressive activities that . . . might reasonably [be] perceive[d] to bear the imprimatur of the school”).

110. 1 RODNEY A. SMOLLA, SMOLLA & NIMMER ON FREEDOM OF SPEECH § 8:1:50 (2023) (emphasis in original); see also *Rust v. Sullivan*, 500 U.S. 173, 193 (1991).

111. See *Pleasant Grove City v. Summum*, 555 U.S. 460, 464 (2009).

112. See SCHNEIDER, *supra* note 99, § 2:8 n.36.

113. *Wandering Dago, Inc. v. Destito*, 879 F.3d 20, 34 (2d Cir. 2018).

114. See SCHNEIDER, *supra* note 99, § 2:8 (“The school’s curriculum may be viewed as the speech of the school itself.”).

115. *Busch v. Marple Newtown Sch. Dist.*, 567 F.3d 89, 97 (3d Cir. 2009), *cert. denied*, 558 U.S. 1158 (2010).

116. See *Kirkland v. Northside Indep. Sch. Dist.*, 890 F.2d 794, 795 (5th Cir. 1989) (“The first amendment has never required school districts to abdicate control over public school curricula to the unfettered discretion of individual teachers.”); *Evans-Marshall v. Bd. of Educ. of Tipp City Exempted Vill. Sch. Dist.*, 624 F.3d 332, 342 (6th Cir. 2010), *cert. denied*, 564 U.S. 1038 (2011) (“A teacher’s curricular and pedagogical choices are categorically unprotected, whether under *Connick* or *Garcetti*.”). *But see Meriwether v. Hartop*, 992 F.3d 492, 504–11 (6th Cir. 2021) (concluding that a university could not, under the First Amendment, terminate a professor who insisted on misgendering their students in

The student expression at issue in *Tinker* and the non-curricular material discussed in *Pico* are properly understood as non-government speech; thus, First Amendment challenges are appropriate. At the margins, the distinction between curricular and non-curricular materials is not always clear.<sup>117</sup> Curricular activities are not limited to the classroom.<sup>118</sup> Optional reading materials may be considered part of the curriculum, depending on the circumstances.<sup>119</sup> In *Silano v. Sag Harbor Union Free School District*, the Second Circuit held that non-curricular materials “are something that students voluntarily may view at their leisure, whereas curriculum is required material for students.”<sup>120</sup> On the other hand, in *Virgil v. School Board of Columbia County*, the Eleventh Circuit held that *Hazelwood*’s curricular standard applied to the textbook of an elective course, even though the removed readings were optional.<sup>121</sup>

Generally, library books are considered to be outside of the curriculum.<sup>122</sup> After all, in *Hazelwood*, curricular activities are not merely activities which “might reasonably . . . bear the imprimatur of the school.”<sup>123</sup> Such activities are only part of the curriculum when they are supervised by faculty and designed to impart particular knowledge.<sup>124</sup> A “regime of voluntary inquiry . . . holds sway” over the school library.<sup>125</sup> Optional “self-education and individual enrichment” allows students to explore the unknown and discover interests beyond the prescribed curriculum.<sup>126</sup> Public school library books, then, fall outside the “absolute discretion [exercised over the] compulsory environment of the classroom.”<sup>127</sup> Unlike government-speech-adjacent curricular decisions, speech restrictions in public school libraries should be evaluated under the public forum doctrine.

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class). The court held that while the professor had made statements pursuant to their official duties, *Garcetti* did not apply because of an academic exception to the public employee speech doctrine. *Id.* at 504–05. Further, the court held that the mandatory use of preferred pronouns in the classroom was a matter of public concern under the *Pickering-Connick* test. *Id.* at 511. Because of this, and the importance of academic freedom in a state university, the court held that the professor’s speech was protected. *Id.* at 503.

117. See SCHNEIDER, *supra* note 99, § 2:8.

118. *Id.*

119. *Id.*

120. *Silano v. Sag Harbor Union Free Sch. Dist. Bd.*, 42 F.3d 719, 723 (2d Cir. 1994).

121. *Virgil v. Sch. Bd. of Columbia Cnty.*, 862 F.2d 1517, 1522 (11th Cir. 1989).

122. See SCHNEIDER, *supra* note 99, § 2:8.

123. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

124. *Id.*

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

126. *Id.*

127. *Id.*

*G. Public Forum Doctrine*

Because students' access to library books is based on their First Amendment rights and public school libraries are government property, the public forum doctrine is implicated.<sup>128</sup> Further, "[a]n important interplay exists between [the] public forum doctrine[] and [the] government speech doctrine[]." <sup>129</sup> The public forum doctrine describes types of public property and the varying levels of government power to regulate private speech on each type.<sup>130</sup> As first articulated by Justice White's majority opinion in *Perry Education Association v. Perry Local Educator's Association*, these categories of government property are: (1) traditional public forums; (2) nonpublic forums; and, (3) nonpublic forums that the state has chosen to open.<sup>131</sup>

First, a traditional public forum is government property "which by long tradition . . . ha[s] been devoted to assembly and debate . . . ." <sup>132</sup> This includes streets, parks, and other public spaces which "have immemorially been held in trust for the use of the public and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." <sup>133</sup> Content-neutral restrictions in a public forum are subject to a reasonable "time, place, manner" test.<sup>134</sup> Content- and viewpoint-based restrictions in a public forum, however, are subject to strict scrutiny.<sup>135</sup>

The next category of public forum is the nonpublic forum. Nonpublic forums are government properties that are not "by tradition or designation [fora] for public communication" like military bases, prisons, or schools.<sup>136</sup> Here, the government may impose time, place, and manner regulations. Additionally, "the State may reserve the forum for its intended purposes, communicative or otherwise, as long as the regulation on speech is

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128. See 1 SMOLLA, *supra* note 110, § 8:1.10.

129. *Id.* § 8:1.50.

130. There is a significant amount of confusion over the contours of these categories. See generally Marc Rohr, *First Amendment Fora Revisited: How Many Categories Are There?*, 41 NOVA L. REV. 221, 221–23 (2017) (discussing uncertainty surrounding the public forum doctrine; analyzing the different, often overlapping, ways the Supreme Court and lower courts have defined and applied the public forum categories; and questioning the usefulness of the doctrine).

131. *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 45–46 (1983).

132. *Id.* at 45.

133. *Id.* (quoting *Hague v. CIO*, 307 U.S. 496, 515 (1939)).

134. *Christian Legal Soc'y v. Martinez*, 561 U.S. 661, 692 (2010).

135. *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829 (1995).

136. *Perry*, 460 U.S. at 46.



reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view."<sup>137</sup>

Finally, a designated public forum exists "when 'government property that has not traditionally been regarded as a public forum is intentionally opened up . . .'"<sup>138</sup> The premise here is that the First Amendment prevents states from creating exclusions to a forum "generally open to the public even if it was not required to create the forum in the first place."<sup>139</sup> Since the *Perry* Court first articulated the public forum doctrine, the jurisprudence surrounding this final category has been "at times confusing, and the parameters of the doctrine are not entirely clear."<sup>140</sup>

Specifically, scholars have questioned the relationship between a designated public forum and a limited public forum.<sup>141</sup> In a footnote, Justice White wrote that "[a] public forum may be created for a limited purpose such as use by certain groups, or for the discussion of certain subjects."<sup>142</sup> Under White's original articulation, a limited public forum seems to be a subset of the broader designated public forum classification. Here, a designated public forum would be public property that the government generally has made accessible to all speakers.<sup>143</sup> Designated public forums are subject to the same speech restrictions as traditional public forums: content- and viewpoint-based restrictions must pass strict scrutiny.<sup>144</sup> A limited public forum, on the other hand, would be created when the government opens a forum for "expression dedicated to specific groups or discussion of specified topics."<sup>145</sup> Here, reasonable, content-based restrictions are allowed; viewpoint-based restrictions are not.<sup>146</sup> The distinction, if one exists, between a designated public forum and a limited public forum does not change the analysis of this Article, however, because both prohibit viewpoint-based restrictions on speech.

The dichotomy between *Tinker* and *Hazelwood* mirrors the relationship between public forums and nonpublic forums.<sup>147</sup> *Hazelwood* concerns the

137. *Id.*

138. *Martinez*, 561 U.S. at 680 n.11 (quoting *Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469–70 (2009)).

139. *Perry*, 460 U.S. at 45.

140. 1 SMOLLA, *supra* note 110, § 8:8.50.

141. *See, e.g.*, Marc Rohr, *The Ongoing Mystery of the Limited Public Forum*, 33 NOVA L. REV. 299, 302 (2009).

142. *See Perry*, 460 U.S. at 46 n.7 (citations omitted).

143. *Child Evangelism Fellowship v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 382 (4th Cir. 2006).

144. *See, e.g.*, *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 802–03 (1985).

145. 1 SMOLLA, *supra* note 110, § 8:8.50.

146. *See Pleasant Grove City v. Sumnum*, 555 U.S. 460, 469 (2009).

147. Peltz, *supra* note 27, at 135–36.

curricular environment, an area over which the school board has broad power.<sup>148</sup> As such, censorship is subject to a fairly permissive test: legitimate pedagogical concerns.<sup>149</sup> Similarly, nonpublic forums are areas where the government has traditionally had broad authority.<sup>150</sup> Restrictions on speech in nonpublic forums must be “reasonable” and viewpoint neutral.<sup>151</sup> The legitimate pedagogical concerns test employed in *Hazelwood* is the reasonable test for nonpublic forums by another name.<sup>152</sup>

*Tinker*, on the other hand, looks at students’ rights outside of that structured environment. For non-curricular activities, the protections provided to speech are greater.<sup>153</sup> These differing protections—between student speech in school curricular activities versus non-curricular activities—mirrors how traditional public forums differ from nonpublic forums. Public school libraries, then, are analogous to limited public forums—requiring any restriction of speech to be viewpoint neutral. Once a school affirmatively provides a space (like a library), it cannot then discriminate based on viewpoints.<sup>154</sup>

This affirmative obligation is one of several ways *Pico* is distinguishable from another Supreme Court opinion on libraries, *United States v. American Library Association (ALA)*.<sup>155</sup> There, a plurality of the Court upheld the Children’s Internet Protection Act’s internet filter requirements in a decision authored by Chief Justice Rehnquist.<sup>156</sup> The Court reasoned that, when analyzing an internet filter, public libraries were a nonpublic forum.<sup>157</sup> As such, any restriction on speech must be reasonable and viewpoint neutral.

*ALA* is distinguishable from *Pico* on several grounds, each of which reinforces *Pico*’s prohibition on viewpoint-motivated book removals. First, the internet filters at issue in *ALA* were viewpoint neutral.<sup>158</sup> On the other hand, *Pico* prohibits viewpoint-motivated decisions.<sup>159</sup> Second, *ALA* and

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148. See *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

149. *Id.* at 272–73.

150. See *Perry Educ. Ass’n v. Perry Loc. Educators’ Ass’n*, 460 U.S. 37, 46 (1983).

151. See *Cornelius v. NAACP Legal Def. & Educ. Fund*, 473 U.S. 788, 799–800, 806 (1985).

152. Peltz, *supra* note 27, at 135–36.

153. See, e.g., SCHNEIDER, *supra* note 99, § 2:8.

154. See *Rosenberger v. Rector of Univ. of Va.*, 515 U.S. 819, 829–30 (1995); see also *Minarcini v. Strongville City Sch. Dist.*, 541 F.2d 577, 581 (6th Cir. 1976) (“When created for a public school[,] [a 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 . . . [based on school board members’] displeasure or disapproval.”).

155. *United States v. Am. Libr. Ass’n*, 539 U.S. 194 (2003).

156. *Id.* at 199.

157. *Id.* at 205–06.

158. *Id.* at 199.

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

*Pico* dealt with different types of libraries. *ALA* involved a public library, accessible by the community.<sup>160</sup> *Pico* involved a public school library.<sup>161</sup>

Third, *ALA* centered on adding material to the library;<sup>162</sup> *Pico* centered on removal.<sup>163</sup> This difference is crucial when considering the public forum doctrine. Once the government opens a nonpublic forum to certain categories of speech, it cannot discriminate within that category based on viewpoint.<sup>164</sup> The government is under no constitutional obligation to fund libraries, at schools or otherwise.<sup>165</sup> If the government is going to fund a library, however, it must do so in a manner that is reasonable and viewpoint neutral.<sup>166</sup>

Similarly, a school board could remove every library book with sexual content.<sup>167</sup> A school board cannot, on the other hand, remove every library book with same-sex sexual content.<sup>168</sup> That sort of targeted censorship constitutes viewpoint discrimination under the First Amendment.<sup>169</sup>

Despite the fact that *Pico* remains good law—and the ease with which the *Hazelwood-Pico-Tinker* framework can be harmonized with judicial considerations, such as the government speech doctrine and the public forum doctrine—the protections established against arbitrary, discriminatory, or improperly motivated book removals have been undermined on several grounds. First, *Pico* was a fractious decision—the nine Justices penned seven different opinions.<sup>170</sup> Some lower courts have relied on the lack of a controlling opinion to ignore the principles articulated.<sup>171</sup> Further, scholars have also disputed the efficacy of *Pico*'s motivation test, arguing that its concepts such as educational suitability are too malleable.<sup>172</sup> Next, schools

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160. See *United States v. Am. Libr. Ass'n*, 539 U.S. 194, 206 (2003).

161. See *Pico*, 457 U.S. at 856.

162. *United States v. Am. Libr. Ass'n*, 539 U.S. at 206–08.

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

164. See, e.g., *Child Evangelism Fellowship of MD, Inc. v. Montgomery Cnty. Pub. Schs.*, 457 F.3d 376, 382 (4th Cir. 2006).

165. *Kreimer v. Bureau of Police 958 F.2d 1242*, 1255–56 (3d Cir. 1992).

166. *Id.*

167. See *Parents, Families, and Friends of Lesbians and Gays, Inc. v. Camdenton R-III Sch. Dist.*, 853 F. Supp. 2d 888, 899 (W.D. Mo. 2012).

168. *Id.* at 901 (differentiating a decision to exclude all resources on the subject of LGBTQ issues from a decision to exclude resources “expressing a *viewpoint* that is positive towards LGBT[Q] individuals”). The court reasoned that *ALA* would govern in the former and *Pico* in the latter. *Id.*

169. See Glazer, *supra* note 25, at 1426–27 (arguing that in light of *Lawrence v. Texas*, 539 U.S. 558 (2003), “homosexuality [was] transform[ed], for First Amendment purposes, from subject matter to viewpoint”).

170. See *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 855–921 (1982).

171. *C.K.-W. v. Wentzville R-IV Sch. Dist.*, 619 F. Supp. 3d 906, 913–14 (E.D. Mo. 2022).

172. Ryan L. Schroeder, *How to Ban a Book and Get Away with It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 366 (2021).

frequently “disappear” books off their shelves.<sup>173</sup> School administrators simply remove the title without notice or process.<sup>174</sup> The clandestine nature of their removal makes it difficult to challenge.

## II. PROTECTING LGBTQ STUDENTS BY STRENGTHENING *PICO*

In order to prevent discrimination against LGBTQ students and protect the rights articulated in *Pico*, the Secretary of Education should promulgate a regulation under Title IX of the 1972 Education Amendments that employs a modified burden-shifting test to distinguish legitimate book removals from illegitimate ones. First, this Part examines Title IX and why it is an appropriate vehicle for this proposal. Next, this Part discusses the legitimate and illegitimate reasons for removal that have been articulated in case law. Finally, this Part proposes a modified *McDonnell Douglas* burden-shifting test to distinguish a legitimate reason from an illegitimate one.

### A. Title IX

In order to fall under Title IX’s mandate, the action in question must constitute discrimination “on the basis of sex.”<sup>175</sup> Signed into law in 1972, Title IX prohibits sex-based discrimination in schools that receive federal funds.<sup>176</sup> Title IX’s anti-discrimination prohibition also extends to discrimination on the basis of sexual orientation or gender identity. Thus, this Part examines how the removal of LGBTQ-centric books constitutes discrimination against the LGBTQ community.

It should be clear why it would be discriminatory for a school to cull its library of books with a Black protagonist. Such censorship would erase Black stories and send a message of inferiority. The same principle applies to the removal of books with queer protagonists. Implicit in the removal of LGBTQ books is the message that LGBTQ individuals do not belong. Further, it limits the access LGBTQ students have to information and resources essential to learn about themselves and their communities.<sup>177</sup>

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173. Hannah Natanson, *Schools Nationwide Are Quietly Removing Books from Their Libraries*, WASH. POST (Mar. 22, 2022), <https://www.washingtonpost.com/education/2022/03/22/school-librarian-book-bans-challenges>.

174. *Id.*

175. Title IX, Education Amendments of 1972, Pub. L. No. 92-318, § 901(a), 86 Stat. 373 (codified as amended at 20 U.S.C. § 1681(a)).

176. *Id.*

177. See, e.g., Jacob Colling, *Approaching LGBTQ Students’ Ability to Access LGBTQ Websites in Public Schools from a First Amendment and Public Policy Perspective*, 28 WES. J.L. GENDER & SOC’Y 347, 349 (2013).

It is vital that children are able to see school as a place for people like themselves. Reading stories about families and never seeing a family that looks like yours sends the message that your family is wrong.<sup>178</sup> Further, removing books written by LGBTQ authors prevents kids from having role models like themselves.<sup>179</sup> How can a kid hope to grow up to be an author if they are not exposed to stories written by people like them? As the Eighth Circuit wrote:

The symbolic effect of remov[al] . . . is more significant than the resulting limitation . . . . The board has used its official power to perform an act clearly indicating that the ideas . . . are unacceptable and should not be discussed or considered. This message is not lost on students . . . and its chilling effect is obvious.<sup>180</sup>

Supreme Court precedent agrees with this commonsense reading of Title IX.<sup>181</sup> In *Bostock v. Clayton County*, the Court recognized that discrimination based on sexual orientation is—by definition—discrimination based on sex.<sup>182</sup> While *Bostock* was a Title VII decision, the reasoning is equally applicable here under Title IX. First, Title VII and Title IX have traditionally been considered analogous.<sup>183</sup> There is no reason that link would be severed here. Additionally, President Biden issued an Executive Order in March 2021 directing the Secretary of Education to update Title IX policies in light of *Bostock* to include gender identity.<sup>184</sup> The Department of Education accordingly issued a Notice of Interpretation in June 2021,

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178. See *Obergefell v. Hodges*, 576 U.S. 644, 668 (2015) (“[Marriage equality] allows children ‘to understand the integrity and closeness of their own family and its concord with other families in their communit[ies].’” (quoting *United States v. Windsor*, 570 U.S. 744, 772 (2013))).

179. Madeleine Carlisle, ‘Gender Queer’ Author ‘Relieved’ After Court Rules Book’s Sale Can’t Be Restricted in Virginia, TIME (Aug. 31, 2022), <https://time.com/6210087/gender-queer-book-ban-maia-kobabe>.

180. *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 779 (8th Cir. 1982).

181. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).

182. *Id.* at 1741 (2020) (“[I]t is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”).

183. See *Brown v. Hot, Sexy, & Safer Prods.*, 68 F.3d 525, 540 (1st Cir. 1995) (“Because the relevant caselaw under Title IX is relatively sparse, we apply Title VII caselaw by analogy.”) (citing *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 73–75 (1990)); see also *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1315–16 n.8 (10th Cir. 2017) (“Title VII is ‘the most appropriate analogue when defining Title IX’s substantive standards.’” (quoting *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993))).

184. Exec. Order No. 14021, 86 Fed. Reg. 13803 (Mar. 11, 2021).

explaining that it will include sexual orientation and gender identity under Title IX's protection.<sup>185</sup>

Finally, and most importantly, this is the proper interpretation of “on the basis of sex.” “It is impossible to discriminate against” someone on the basis of their sexual identity “without discriminating against that individual based on sex.”<sup>186</sup> Say an employer has two employees, one man and one woman. Both employees are married to a man. If the employer fired the man, but not the woman, over their marriage, that would be discrimination on the basis of sex. The sex of the employee is the determinative factor.

### *B. Legitimate & Illegitimate Motives for Removal*

With Title IX established as an appropriate vehicle, this Part turns to legitimate and illegitimate reasons for removing a book from a public school library. Obscenity is a legitimate reason for removing a book.<sup>187</sup> This is consistent with how the Court has treated obscenity—speech with such little value that it deserves no First Amendment protection.<sup>188</sup> However, the material must fit into the definition of obscenity articulated in *Miller v. California*.<sup>189</sup> Specifically, the material must: (1) “appeal[] to the prurient interest,” when taken as a whole and considered by the average person applying contemporary community standards; (2) depict, “in a patently offensive way, sexual conduct specifically defined by . . . law”; and, (3) lack “serious literary, artistic, political, or scientific value,” when taken as a whole.<sup>190</sup> While the Court has further tailored the obscenity doctrine to allow for minor-specific analysis, the basic outline remains.<sup>191</sup> Obscenity is limited to materials depicting sexual conduct in an excessively deviant fashion without any serious value.<sup>192</sup> Obscenity does not mean material that school officials or individuals in the community find inappropriate.<sup>193</sup>

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185. Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity, 86 Fed. Reg. 32637 (Jun. 22, 2021).

186. See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1741 (2020).

187. *Roth v. United States*, 354 U.S. 476, 485 (1957) (“We hold that obscenity is not within the area of constitutionally protected speech or press.”); see also *Miller v. California*, 413 U.S. 15, 21, 36 (1973) (“[Legally] obscene material is not protected [under] the First Amendment.”).

188. *Miller*, 413 U.S. at 23.

189. *Id.* at 24.

190. *Id.*

191. See, e.g., *Ginsberg v. New York*, 390 U.S. 629, 638 (1968) (holding non-obscene material may nonetheless be harmful to children, and the marketing of such material may be regulated).

192. *Miller*, 413 U.S. at 24.

193. See *id.*

The educational suitability of the material is another potentially legitimate reason for removing a book.<sup>194</sup> In *Pico*, Justice Brennan wrote that the students had conceded that removing books based on their “educational suitability” would be “perfectly permissible.”<sup>195</sup> The question then becomes what does educational suitability look like. While the *Pico* Court was silent here,<sup>196</sup> lower court decisions provide some guidance. For example, a book may be unsuitable for education if it contains factual inaccuracies.<sup>197</sup>

In *ACLU v. Miami-Dade*, the Eleventh Circuit upheld the removal of *Vamos a Cuba!* from the public school library.<sup>198</sup> The court held that the positive depiction of life in Cuba under Fidel Castro was factually inaccurate and, therefore, removable.<sup>199</sup> This decision has been questioned as to whether the removal was actually over the factual inaccuracies or if the removal was merely pretext for removing a politically unpopular message.<sup>200</sup>

On the other hand, in *Case v. Unified School District*, the court found the removal of a novel depicting a romantic relationship between two teenage girls to be unconstitutional viewpoint discrimination despite a stated concern over educational suitability.<sup>201</sup> There, the court found that the removal was substantially motivated by the school board’s disagreement with the ideas presented in the novel.<sup>202</sup> The concern over educational suitability was pretext for impermissible viewpoint discrimination.<sup>203</sup> School boards may constitutionally remove educationally unsuitable materials from public school libraries, so long as that motivation is not pretextual viewpoint discrimination.<sup>204</sup>

Pervasive vulgarity or indecent language is also a potentially legitimate reason for removing a book.<sup>205</sup> This language comes from, but is not limited to, *Pico*.<sup>206</sup> In a pre-*Pico* decision, a school committee’s removal of materials on the basis that the themes and language might have a damaging impact on

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

195. *Id.*

196. *See id.*

197. *ACLU v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1236 (11th Cir. 2009), *cert. denied*, 558 U.S. 1023 (2009).

198. *Id.* at 1230.

199. *Id.*

200. There is a question as to whether this description of *Vamos a Cuba!* is accurate. While there were inaccuracies and omissions, *Vamos a Cuba!* is a children’s book that necessarily simplified and flattened complex ideas. *See* Achtman, *supra* note 92, at 979–80, 990.

201. *See Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 875–76 (D. Kan. 1995).

202. *Id.* at 875–76.

203. *Id.*

204. *Case v. Unified Sch. Dist. No. 233*, 895 F. Supp. 1463, 1468–70 (D. Kan. 1995).

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

206. *Id.*

students was deemed to violate the First Amendment.<sup>207</sup> Importantly, the material was not alleged to be obscene or improperly selected.<sup>208</sup> The court noted that its analysis would be different if that were the case.<sup>209</sup> In *Pico*, Brennan wrote that the students had conceded that removing books because they were pervasively vulgar would be a constitutionally permissible motivation.<sup>210</sup>

On the other hand, in the post-*Pico* decision *Bicknell*, the court held that the removal of two books from the school library on the grounds that the books contained vulgar and indecent language did not violate the First Amendment when there was “no suggestion” that the books were removed because of their ideas.<sup>211</sup> Current jurisprudence, then, allows for the removal of books for vulgar language but the vulgarity cannot be a pretense for removal. Further, *Fraser* was distinguished from *Tinker*, in part, because the speech at issue was “vulgar and lewd” as opposed to political in nature.<sup>212</sup> Such a dichotomy implies that pervasively vulgar speech is subject to the same redeeming-qualities-prong analysis for obscenity under *Miller*. Pervasive vulgarity, then, is limited to works without political, scientific, or cultural value.

While a school may legitimately remove a book from its library for any of the reasons listed above, a school may not remove a book in an effort to “prescribe what shall be orthodox.”<sup>213</sup> Such a removal would constitute viewpoint discrimination under the First Amendment. As shown above, without oversight, the line between legitimate and illegitimate motivations can be manipulated in violation of the First Amendment. Still, whether a removal was legitimate turns on the question of motive.<sup>214</sup> *Pico* emphasized that the motive behind the school’s decision is pivotal.<sup>215</sup> Facially legitimate reasons become illegitimate if the legitimate reason is merely pretext designed to disguise an illegitimate underlying motive.<sup>216</sup>

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207. Right to Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 713–14 (D. Mass. 1978).

208. *Id.* at 711.

209. *Id.*

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

211. *Bicknell v. Vergennes Union High Sch. Bd. of Dirs.*, 638 F.2d 438, 441 (2d Cir. 1980).

212. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 685 (1986).

213. See *Pico*, 457 U.S. at 872 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

214. *Id.* at 871.

215. *Id.*

216. *Id.* (“[W]hether petitioners’ removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind the petitioners’ actions.”).



For example, a school may remove a book as educationally unsuitable if the book contains factual inaccuracies.<sup>217</sup> In *ACLU v. Miami-Dade*, as mentioned above, the Eleventh Circuit confronted the question of whether a book portraying life in Castro’s communist Cuba was properly removed.<sup>218</sup> The court held that the book contained factual inaccuracies and was, therefore, properly removed under *Pico*.<sup>219</sup> However, this decision has been criticized as allowing for censorship of politically unpopular messages under the guise of factual inaccuracies.<sup>220</sup> Moreover, schools are unlikely to openly advocate censorship, as almost all efforts to remove books are cloaked in rhetoric suggesting the removal is acceptable.<sup>221</sup> Censorship advocates throw around the word “obscene” colloquially, hiding discriminatory intentions beneath a misused legal concept.<sup>222</sup> Analyzing the motivations behind a removal decision allows courts to detect this discrimination.

### C. McDonnell Douglas Burden-Shifting

In order to analyze whether a school’s motives were proper under Title IX, this Article borrows from Title VII jurisprudence. Title IX was structured after Title VII and courts often borrow reasoning from Title VII decisions when faced with novel Title IX questions.<sup>223</sup> Specifically, the *McDonnell Douglas* burden-shifting framework—originally articulated in a Title VII case—has been adopted to Title IX decisions.<sup>224</sup>

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217. See *ACLU v. Miami-Dade*, 557 F.3d, 1177, 1202 (11th Cir. 2009).

218. *Id.* at 1183.

219. *Id.* at 1207.

220. See Achtman, *supra* note 92, at 993–94, 997.

221. See, e.g., Eric Glasser, *So-called ‘Book Ban Bill’ Advances in Florida Senate*, WTSP (Jan 26, 2022), <https://www.wtsp.com/article/news/politics/florida-so-called-book-ban-bill/67-4b8bd469-2863-4ffb-8bdb-6af06c4ca68b> (“‘The purpose of the bill,’ State Sen. Joe Gruters, R-Sarasota, ‘is to create transparency in the process. It’s not to censor anything.’”).

222. See, e.g., Press Release, Pen America, Proposal to Restrict Some Books Deemed “Obscene” from Minors in Huntington Beach, CA is “Nothing Short of Censorship,” Says PEN America (June 20, 2023), <https://pen.org/press-release/proposal-to-restrict-some-books-deemed-obscene-from-minors-in-huntington-beach-ca-is-nothing-short-of-censorship-says-pen-america> (describing the view that certain books were obscene as a “‘perversion’ of obscenity statutes [that] ignores established law”).

223. See *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1315–16 (2017) (showing the use of borrowed reasoning from Title IX to Title VII in both the legal standards, and the original test used to determine discrimination in the case).

224. See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973). In the absence of guidance from the Supreme Court with regards to Title IX, several circuits have employed the *McDonnell Douglas* framework. See *Title IX Legal Manual*, DOJ, <https://www.justice.gov/crt/title-ix#77> (last updated Sept. 14, 2023).

Under the *McDonnell Douglas* framework, a plaintiff must first allege a prima facie case of discrimination.<sup>225</sup> At this stage, a plaintiff is trying to show harm. For example, in a retaliation case, a prima facie case is established if a plaintiff is retaliated against within a set time after engaging in protected activity.<sup>226</sup> Next, if the plaintiff can demonstrate a prima facie case of discrimination, the defendant must then produce a “legitimate, nondiscriminatory reason” that would explain the discrimination implied by the plaintiff’s prima facie case.<sup>227</sup> For example, a plaintiff might justifiably be fired after a series of poor performance evaluations, regardless of whether they had recently engaged in protected activity.<sup>228</sup> Finally, if the defendant produces a legitimate reason, the plaintiff may then demonstrate that the legitimate reason is “mere pretext” for discrimination.<sup>229</sup> Turning back to the example, the whistleblower has an opportunity to demonstrate that the poor evaluations were merely pretext designed to lay the foundation for termination.<sup>230</sup>

A modified version of the *McDonnell Douglas* test should be employed when evaluating whether the removal of a book from the school library was proper. In the language of *McDonnell Douglas*, the framework would look like this: (1) the school articulates a legitimate reason for removing a book; (2) if that reason is undermined by the prima facie nature of the book; then, (3) the school must show by a preponderance of the evidence that the articulated reason is truly the motivation behind removal. A discussion of the modified framework, and the rationale underlying the modifications, follows.

First, if a school wants to remove a book from its library, it must articulate a legitimate reason for that removal. A legitimate reason would be one that courts have recognized, including the reasons discussed in Part II.A. As part of this, the school would provide notice of its intentions. However, the school must list the books they intend to remove and the “legitimate reason” for that removal.

This first step mirrors step two of the *McDonnell Douglas* test where the defendant articulates a “legitimate, nondiscriminatory reason” for the act in question.<sup>231</sup> It is placed first in this context because the overall burden of

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225. *Id.*

226. *See, e.g., Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1179 (10th Cir. 1999) (noting an adverse employment action that occurred within six weeks of a plaintiff engaging in protected activity satisfied the temporal requirements).

227. *McDonnell Douglas*, 411 U.S. at 802–03.

228. *See Anderson*, 181 F.3d at 1180.

229. *McDonnell Douglas*, 411 U.S. at 798, 804.

230. *See Doe v. Univ. of Denver*, 1 F.4th 822, 829 (10th Cir. 2021).

231. *See Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1226 (10th Cir. 2000).

proof rests on the school.<sup>232</sup> Under the traditional *McDonnell Douglas* test, the plaintiff first needs to show that their discrimination claim is potentially valid.<sup>233</sup> Here, the school first needs to show that a removal is potentially legitimate.

Second, under this modified test, students or parents would be able to challenge the school's legitimate reason for removal. This would be similar to the prima facie case under *McDonnell Douglas*.<sup>234</sup> Here, a student would need to show that the challenged book is likely to be the target of discriminatory removal. The second step would be satisfied, for example, by showing that the book centers on LGBTQ identity or has a queer protagonist. This serves a similar purpose to the prima facie stage of *McDonnell Douglas*—filtering out valid claims.<sup>235</sup> Third, under this modified test, the school must prove that the legitimate reason offered for why it removed a book is actually the reason the book was removed. The school must prove by a preponderance of the evidence that the book meets the standards for one of the legitimate reasons for removal. This third step is similar to the *McDonnell Douglas* prima facie case in that it requires the school to establish certain elements.<sup>236</sup> It also mirrors the third step in *McDonnell Douglas*, differentiating legitimate motives from merely pretextual ones.<sup>237</sup>

The value of the *McDonnell Douglas* test comes from its focus on motivation. Whether discretion was properly exercised turns on the motivation animating a decision.<sup>238</sup> Both school and the employment context function a bit like autocracies: teachers and employers have enormous discretion. However, they cannot exercise that discretion in a manner contrary to the law. The *McDonnell Douglas* test and the modified test both keep the focus of the inquiry centered on the motivation.

In the traditional *McDonnell Douglas* framework, the burden of persuasion bounces between the two parties, but the plaintiff bears the burden of proving discrimination at all times.<sup>239</sup> This burden of proof allocation makes sense when placed against employment: an employer generally may

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232. See *Tex. Dep't of Cmty. Affs. v. Burdine*, 450 U.S. 248, 253 (1981) (discussing how the plaintiff bears overall burden of proof at every stage of the *McDonnell Douglas* test).

233. *Id.*

234. See *McDonnell Douglas*, 411 U.S. at 802.

235. *Burdine*, 450 U.S. at 253–54.

236. See, e.g., *McDonnell Douglas*, 411 U.S. at 802 (outlining the elements for establishing a prima facie case of racial discrimination).

237. *Id.*

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

239. See *Burdine*, 450 U.S. at 252–53 (discussing how plaintiff bears overall burden of proof at every stage of the *McDonnell Douglas* test).

fire an employee freely so long as it is not discriminatory. When transferring this principle over, however, the ultimate burden should lie with the school. The state cannot restrict constitutional rights without a compelling reason.<sup>240</sup>

In practice, the analysis would resemble the following. Assume a parent petitions the school board to remove five books they find inappropriate. The school board or designated official would conduct an inquiry into the titles according to the district's proscribed process. In this hypothetical, the school board agrees with the parent and the books are to be removed. Under this Article's proposal, the school board would be required to post a list of the titles it intends to cull. From there, another parent or student may challenge the removal as illegitimately discriminatory. In light of the targeted removal of LGBTQ titles, removing any book about a LGBTQ character or written by a LGBTQ author should be treated as presumptively illegitimate and subject to inquiry.

Suppose three of the five titles challenged and listed for removal involve a LGBTQ character. The school board would be required to explain their removal decision and to justify it under one of the legitimate reasons to remove a book from a public school library. If the school board cannot meet its burden, the books cannot be removed. However, if one of the three LGBTQ-centric books is genuinely obscene (and miraculously slipped its way past the librarian), the school board may remove it.

#### CONCLUSION

School boards across the country have been engaging in a concerted effort to remove LGBTQ literature from public school libraries. While these removals are often cloaked in rhetoric about obscenity or vulgarity, they are rarely anything more than an attempt to censor a disfavored idea. The one Supreme Court decision on point—*Pico*—prohibits such censorship. However, that decision has been called into question and would likely be decided the other way today. To ensure the rights protected by *Pico* remain, the Secretary of Education should promulgate a regulation under Title IX. This regulation would require school districts receiving federal funds to follow a certain framework before removing books from public school libraries. This framework, based off the *McDonnell Douglas* burden-shifting framework, should focus on separating legitimate motives from illegitimate

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240. See, e.g., *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969) (“In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.”).

motives. As a result, the regulation would harmonize with existing First Amendment jurisprudence and protect LGBTQ students.