Banning books: Unlawful censorship, or within a school's discretion?

BY ROBERT KIM

Book banning is back, big time. The American Library Association (ALA) reported more than 470 book removal requests from September to December 2021 alone; they call it an "unprecedented spike." Most of the books, according to the ALA, "address the voices and lived experiences of Black, Indigenous, and people of color and LGBTQIA+ individuals." (There are notable exceptions: *Maus*, for one.)

The specter of governmental censorship raises the question: Does removing books from public school libraries violate the First Amendment, or is it a permissible act of discretion by school officials? An examination of court cases over the past 40 years suggests that the answer hinges on what *motivated* schools to shield students from particular books. In other words, when school officials yank books like Toni Morrison's *The Bluest Eye* off the shelves (as they did recently in Missouri), the courts tend to ask: *What were they thinking?*

However, as the cases in this arena reveal, a legal framework that casts judges as mind readers can be difficult to use. For this and other reasons, this remains an unsettled area of the law — one that, given the recent spate of book removals, courts will increasingly be forced to grapple with.

The *Pico* case

Forty years ago, in *Island Trees Union Free School District v. Pico* (U.S. Sup. Ct., 1982), the U.S. Supreme Court considered the decision by a school board in Long Island, New York, to remove books it deemed objectionable from school libraries. After receiving a lengthy list of objectionable books from a conservative parent group, members of the Island Trees district's school board stole into the high school library (at night, according to local accounts) and removed nine of the listed books from the stacks, including *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Black Boy*, by Richard Wright; *A Hero Ain't Nothin' but a Sandwich*, by Alice Childress; *Down These Mean Streets*, by Piri Thomas; and *Slaughterhouse-Five*, by Kurt Vonnegut. (Two of the nine books were eventually returned to the shelves, while two other books, including *The Fixer* by Bernard Malamud, were later identified and removed.) The school board stated that the removed books were "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy" and that it had an obligation to protect students from "moral danger."

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Students in the district sued, arguing that the board impermissibly removed the books not because they lacked educational value but because they offended the board's social, political, and moral tastes. In a fractured opinion, members of the Court's liberal wing, led by Justice William Brennan, held in *Pico* that students have a First Amendment right to "receive information and ideas" and that public schools "may not remove books from school library shelves simply because they dislike the ideas contained in those books." Schools may remove library books because they are "pervasively vulgar" or aren't age-appropriate or "educationally suitable," but not to instill "orthodoxy" in how students think about a given topic.

Here, the Court foreshadows its evolving doctrine on governmental "viewpoint" discrimination, developed more fully the following year in the *Perry Educators' Association* case (U.S. Sup. Ct., 1983), in which the Court explained that, even in a forum that is not fully open to the public, a school board may not act with an intent to "discourage one viewpoint and advance another."

On its face, *Pico* appears unequivocally to serve as a legal deterrent to book censorship. So why do so many school districts still feel legally entitled to ban books? One clue: No part of *Pico* garnered support from enough justices to make it binding precedent, giving schools and courts leeway to bypass the First Amendment barrier it erected (though, as seen in the cases described below, *Pico* remains influential).

Disagreements run rife through *Pico*. For example, Justice Brennan stated that school libraries are places where students "must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding," which distinguishes them from the classroom or the curriculum (over which schools have near-absolute discretion to determine content, see Kim, 2021). But, in a dissenting opinion, Justice William

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Rehnquist stated that, "elementary and secondary school libraries are not designed for freewheeling inquiry; they are tailored, as the public school curriculum is tailored, to the teaching of basic skills and ideas . . . by its very nature, [it] is a place for the selective conveyance of ideas."

Another bone of contention among the *Pico* justices: Is there really a right to *receive* ideas in government-run settings (e.g., public schools)? Justice Brennan reasoned that, in a democratic society, the right to receive ideas is an important corollary to the First Amendment right of individuals or the press to *send* them because "[t]he dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them." But multiple justices objected to the notion that a right to "receive ideas" exists at all; if such were the case, they argued, what would be the limit to such a right? Could a student sue a school for failing to *acquire* a book? Wouldn't this right to "receive ideas" also apply to the curriculum, not just school libraries? Or to adults, not just school-age children?

Justice Brennan also emphasized the role of schools (and the access to diverse ideas they provide) to prepare students for "for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members." But the dissenting justices argued that, in order to prepare students for civic life, schools (and their libraries) must have discretion to inculcate values and ideas to children in a selective manner, as they see fit.

Finally, some justices in *Pico* worried that courts were in danger of becoming a "super censor of school board library decisions." Justice Sandra Day O'Connor stated that "it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability." (Her worry is echoed by courts adjudicating curriculum disputes: For example, in a 1998 case involving a legal challenge to Mark Twain's *The Adventures of Huckleberry Finn* and William Faulkner's story "A Rose for Emily," a federal appellate court stated that it is "simply not the role of courts to serve as literary censors or to make judgments as to whether reading particular books does students more harm than good.")

Pico may have raised more questions than it answered: whether a school library is more like an open community forum versus a closed curriculum; whether a student (or anyone) has a right to "receive" diverse content and viewpoints; whether the government has a role in fostering, not just reflecting, participatory democracy; and whether the courts should supervise school boards' library content decisions.

And as a quartet of cases since *Pico* illustrate, even when courts have attempted to follow Justice Brennan's main takeaway — that schools can't ban books in a "narrowly partisan or political manner" to prevent access to ideas with which they disagree — they have labored to distinguish between legitimate and illegitimate actions by school boards.

Book removal cases after *Pico*

In *Campbell v. St. Tammany Parish School Board* (5th Cir., 1995), the banned book in question was *Voodoo & Hoodoo* by Jim Haskins, which explores the migration of African tribal religion to Black communities in the United States, including Louisiana (where the case originated). A parent complained that the book, available in her 7th-grade daughter's junior high school library, would cause her daughter to become infatuated with the supernatural and "spells." In response, the school placed the book on the library's reserve shelf, accessible to *8th* graders only. (Evidently, one year makes all the

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difference when it comes to Voodoo tolerance.) The school board then decided to banish the book from the parish altogether. Despite evidence that multiple board members found the book "unhealthy" and "immoral," the Fifth Circuit sent the case back to the lower court to answer the *Pico* question: Was banning *Voodoo & Hoodoo* an act of idea suppression (not OK) or a determination of educational suitability (OK)? The case eventually settled, and the book was placed back on the restricted reserve shelf for 8th graders.

In *Counts v. Cedarville School District* (W.D. Ark., 2003), a parent and her pastor — who happened to be on the local school board — became alarmed that the Harry Potter books (you may have heard of them) were in circulation in the local high school library. (The case is surely proof that widespread availability of books *outside* school libraries is no deterrent to a determined litigant.) Their primary concern was that the Harry Potter series promoted "witchcraft" and "the occult." The school board voted to place the books in a location "visible yet not accessible" to students, who could only check them out with parental permission. When parents sued, the court held that the book restriction violated the First Amendment: Regardless of board members' "personal distaste for witchcraft," the court stated, it was not within their power to prevent students from entering the fictional houses of Hogwarts.

In *Case v. United School District No. 233* (D. Kan., 1995), a district court considered the decision of the board of the Olathe School District in Kansas to remove *Annie on My Mind*, an award-winning novel by Nancy Carden depicting a romantic relationship between two teenage girls. Several board members objected to the "glorification" of homosexuality, which can lead to "death, destruction, disease, [and] emotional problems"; one member declared that leaving the book on the shelves would signify the board's "endorsement" of a "homosexual lifestyle"; another member observed that, while the book had "proper sentence structure and all of that," he did not think it was well-written; and still another member went so far as to say that the school library should not contain *any* fictional books and instead stick to "factual books like the Bible." The court concluded that the district's determination of the lack of "educational suitability" of the book did "nothing to counterbalance [the] overwhelming evidence of viewpoint discrimination." In other words, the district had removed the book to deny students access to ideas with which they disagreed, in violation of the First Amendment and *Pico*.

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A fourth case, *ACLU v. Miami-Dade County School Board* (11th Cir., 2009), involved the book *A Visit to Cuba* and its Spanish-language counterpart, *¡Vamos a Cuba!*, which were part of a book series for children ages 4 to 8 about "what life is like for a child" in various countries. A parent — a former political prisoner from Cuba — alleged that the book's references to Cuba's history and culture ("People in Cuba eat, work, and go to school like you do") were "untruthful" and "portray[ed] a life in Cuba that does not exist." The board agreed that the book presented a skewed picture of life in Cuba, which "in reality under the Castro regime is bad — really bad," and they pointed to mischaracterizations of Cuban customs, dress, and art. The ACLU countered that the claim of "inaccuracy" was a cover for the board's anti-Castro views. The court sided with the school board, declaring that "there is no constitutional right to have books containing misstatements of objective facts shelved in a school library."

In these cases, it's hard not to notice the impact of religion — specifically, the concern that Voodoo (*Campbell*), witchcraft (*Counts*), and homosexuality (*Case*) were anti-Christian. There's also a discomfort with race, national identity, and history that presages today's anti-critical race theory movement (see Kim, 2021); for example, when asked to give an example of "anti-Americanism" in the removed books, two board members in *Pico* pointed to a reference in Childress' book to the fact that George Washington was a slaveholder.

It's also evident that discerning the legitimacy of board members' motivations can be a headache for courts. It's one thing when there's plenty of evidence of discriminatory views against specific populations (as in *Case v. United School District*); but when a challenge to a 26-sentence picture book for young children results in a 70-page judicial opinion (as in *ACLU v. Miami-Dade*), it's clear that it isn't easy for judges to answer the question, *What were they thinking?*

As the number of school book bans rise, we may see courts adopt a more deferential role to local school officials. But will schools and the law also recognize the need — especially for students without access to the internet or public libraries outside of school — to access materials that differ from, or even challenge, the prevailing views in their immediate communities? Or will access to diverse information and perspectives (much like access to equitable educational opportunities) depend on where a child happens to live? ■

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