ARTICLES

BALANCING INTERESTS: HARMFUL BANS & HARMFUL BOOKS

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Efforts to ban books in school libraries are on the rise in the US as part of a broader, conservative-led effort to control school curriculums. Proponents of these bans often argue children have access, or are directly exposed, to obscene or inappropriate material in schools. State officials and local school boards may use this argument as a pretextual justification to target disfavored political and social ideas. The obscurity of obscenity law provides a manipulatable avenue to do so. This Article argues, however, that the Supreme Court's narrow definition of obscenity renders moot almost all claims that book bans target content within the Constitution's areas of non-protection. Therefore, book bans and similar discretionary measures to control school content are subject to strict scrutiny as content-based speech regulations. This Article offers a framework for considering the government interest under a strict scrutiny analysis, separating the interest into three categories: preventing moral, emotional, and physical harm. The Article concludes that many of the current efforts to ban books and restrict school curriculums do not pass strict scrutiny and thus violate the Constitution.

Part I of this Article examines the "intractable obscenity problem" and the use of obscenity as a pretextual justification for regulation. In Part II, this Article breaks down the governmental interest underpinning book bans into three categories and weighs these interests against the public's

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interest in retaining access to a wide array of books. Part III discusses the Supreme Court's approach to judicial deference in the school context and argues for the adoption of a three-part test to evaluate both the decisions of school administrators and legislators pushing unconstitutional legislation.

"[I]n our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear. Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk . . . and our history says that it is this sort of hazardous freedom – this kind of openness – that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society."—Justice Fortas.[1]

[1] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 508–09 (1969) (citing Terminiello v. Chicago, 337 U.S. 1 (1949)).

I. INTRODUCTION

Efforts to remove certain books, and even entire categories of material, from bookshelves throughout US schools have increased in recent years as citizen groups, parents, and government officials seek to control the content of school curriculums.[2] Calls for book bans work in tandem with specified efforts to reel back lessons on certain topics such as critical race theory and other subjects related to diversity, equity, and inclusion.[3]

Book bans are not a new phenomenon and, like most socio-political and cultural currents, ebb and flow with time.[4] Calls for book bans in the US have soared in recent years, however, especially since the beginning of the COVID-19 pandemic.[5]

In one of many recent efforts to censor reading materials available to young people, the Texas legislature introduced a bill that would impose content regulation requirements for written materials sold to schools.[6] Republican Representative Jared Patterson filed H.B. 900, the READER Act, on March 7, 2023.[7] The bill sought to ban sexually explicit books from

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[2] Jonathan Friedman & Nadine Farid Johnson, *Banned in the USA: The Growing Movement to Censor Books in Schools*, PEN AMERICA (Sept. 19, 2022), https://pen.org/report/banned-usa-growing-movement-to-censor-books-in-schools/. *See generally* Marisa Shearer, *Banning Books or Banning BIPOC*, 117 NW. U. L. REV. ONLINE 24, 26 (2022) (discussing the "increasing prevalence of book bans aimed at critical race theory").

[3] *See* Stephen Kearse, *GOP Lawmakers Intensify Effort to Ban Critical Race Theory in Schools*, STATELINE (June 14, 2021, 12:00 AM), https://stateline.org/2021/06/14/gop-lawmakers-intensify-effort-to-ban-critical-race-theory-in-schools/ ("[Critical race theory] has lately come under fire by Republican lawmakers who assert critical race theory is un-American and racist, and argue it will further divide the country.").

[4] *See* Shearer, *supra* note 2, at 26 ("Book banning in American culture predates the formation of the United States itself—Thomas Morton's *New English Canaan*, published in 1637, is the first known book to be 'explicitly banned in what is now the United States.'") (noting that calls for book bans in US schools have grown "at an unprecedented rate in recent years.").

[5] *Id.* at 26; Erin Anderson, *Who Decides What Texas Kids Read in School?*, TEX. SCORECARD (Feb. 8, 2022), https://texasscorecard.com/state/who-decides-what-texas-kids-read-in-school/ ("When COVID closures prompted parents across Texas to take a closer look at what their kids read in school, many were shocked at what they found: books with sexually explicit content and images that clearly fit the definition of obscenity.").

[6] H.B. 900, 2023 Leg., 88th Sess. (Tex. 2023) (titled Restricting Explicit and Adult-Designated Educational Resources (READER) Act); *see also* Cameron Abrams, *Texas Lawmaker Introduces Bill to Prohibit 'Sexually Explicit Material' from Public School Libraries*, THE TEXAN (Jan. 27, 2023), https://thetexan.news/state/legislature/88th-session/texas-lawmaker-introduces-bill-to-prohibit-sexually-explicit-material-from-public-school-libraries/article_a7575036-86a2-54a4-a26c-5a9222b61d5e.html.

[7] H.B. 900.

public school libraries by imposing requirements and restrictions on book vendors.[8]

The Texas bill emerged amid a wave of mania surrounding library books available to school children.[9] Local media outlets, news pundits, and government officials around the country have criticized the array of books available to school children and called for more stringent regulation.[10]

Book bans are not the only conservative-led movement on the rise. Bans targeting books on race and LGBTQ+ issues are accompanied by state efforts like Florida's controversial "Don't Say Gay" law and Tennessee's ban on drag performances.[11] The Florida legislature has also passed new legislation restricting sex education curriculums and discussions about sex and sexuality.[12]

The Florida legislature enacted House Bill 1069, sponsored by Republican State Representative Stan McClain, into law on May 17, 2023.[13] Among other things, H.B. 1069 requires schools to teach abstinence-only sex-education outside of marriage along with the benefits of monogamous,

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[8] *Id.*

[9] *See* Friedman & Johnson, *supra* note 2.

[10] Jacob Asmussen, *More 'Trans' Grooming Books Found in Texas School Districts*, TEX. SCORECARD (Mar. 29, 2022), https://texasscorecard.com/state/more-trans-grooming-books-found-in-texas-school-districts/ ("Texas public school officials are not only offering sexually explicit books and promoting hazardous sexual behaviors to kids, but they are also teaching them 'trans' ideology—the idea that you can turn into whatever biological sex or creature you feel like."); Fiona Baum, *Time to Ditch CRT Indoctrination and Teach Kids About Liberty!*, GOLDWATER INST. (Dec. 17, 2021), https://www.goldwaterinstitute.org/time-to-ditch-crt-indoctrination-and-teach-kids-about-liberty/ ("The public education establishment simply isn't teaching children what they ought to be learning—our founding principles, the importance of the Constitution, and the values that make our great country second to none.").

[11] H.B. 1557, 2022 Leg., Reg. Sess. (Fl. 2022); TENN. CODE ANN. § 7-51-1401 (2023). *See generally* Rick Rojas et al., *Tennessee Law Limiting 'Cabaret' Shows Raises Uncertainty About Drag Events*, N.Y. TIMES (Mar. 5, 2023), https://www.nytimes.com/2023/03/05/us/tennessee-law-drag-shows.html ("The law is part of a cascade of legislation across the country fueled by a conservative backlash to drag events, which has also spurred protests from far-right groups and threats directed at performers."); Jaclyn Diaz, *Florida's Governor Signs Controversial Law Opponents Dubbed 'Don't Say Gay'*, NPR (Mar. 28, 2022, 2:33 PM), https://www.npr.org/2022/03/28/1089221657/dont-say-gay-florida-desantis ("Public school teachers in Florida are banned from holding classroom instruction about sexual orientation or gender identity after Florida's Gov. Ron DeSantis, a Republican, signed the controversial 'Parental Rights in Education' bill.").

[12] H.B. 1069, 2023 Leg., Reg. Sess. (Fl. 2023).

[13] Press Release, Human Rights Campaign, Gov. DeSantis Signs Slate of Extreme Anti-LGBTQ+ Bills, Enacting a Record Shattering Number of Discriminatory Measures into Law (May 17, 2023), https://www.hrc.org/press-releases/gov-desantis-signs-slate-of-extreme-anti-lgbtq-bills-enacting-a-record-shattering-number-of-discriminatory-measures-into-law.

heterosexual relationships.[14] It also provides a streamlined process for the removal of books to which parents have objected.[15]

H.B. 1069 limits instruction on sexuality to students in grades six through twelve and requires instructions on "the binary, stable, and unchanging nature of biological sex."[16] When asked whether the bill would prevent a fourth or fifth grade student who has already begun their menstrual cycle from conversing about it, Representative McClain affirmed that it would.[17]

The unstated political and religious motivations behind the READER Act are clear. It is possible, if not likely, that Representative Patterson offers pretextual justifications for the bill—*i.e.*, protecting children from inappropriate material about sex—in order to impose his own subjective views on sex and sexuality.[18] Such proposed restrictions, however, are likely to isolate children, diminish certain practices or values, and prohibit children from learning about their own bodies.[19] The READER Act almost certainly will harm schoolchildren more than any material it seeks to ban.

While proponents of book bans argue that the restrictions will protect school children from inappropriate or obscene material,[20] their place in the broader censorship movement suggests additional motives, and indeed, carries significance under the First Amendment analysis.

Book bans like the READER Act, and curriculum restrictions like Florida's H.B. 1069, blatantly violate the First Amendment because they do not satisfy the obscenity test and cannot pass strict scrutiny.[21]

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[14] H.B. 1069.

[15] *Id.*

[16] *Id.*

[17] *Florida May Ban Girls' Period Talk in Elementary Grades*, AP (Mar. 18, 2023, 5:01 PM), https://apnews.com/article/florida-ban-girls-period-talk-elementary-schools-7e2e5843d296dc9d8fbf82d55fe8cc70.

[18] *See infra* Parts II–III, discussing the dangers of subjectivity in the context of freedom of expression.

[19] *See infra* Part II.B.

[20] News Release, Governor Ron DeSantis, Governor Ron DeSantis Debunks Book Ban Hoax (Mar. 8, 2023), https://www.flgov.com/2023/03/08/governor-ron-desantis-debunks-book-ban-hoax/ (claiming "pornographic and inappropriate materials" are available in Florida classrooms and libraries to "sexualize" students).

[21] *See* Miller v. California, 413 U.S. 15, 24 (1973) (announcing a three-part test for determining whether a particular expression constitutes obscenity); *see also* Brown v. Ent. Merchs. Ass'n,

Sometimes, bills like these do not make it through the legislature; but other times they become law, and opponents swiftly bring lawsuits challenging their constitutionality.[22] In either case, the laws represent little more than political stunts that flout the First Amendment and squander taxpayer money. To remedy this abuse of office, tort sanctions should be available for legislators who knowingly sponsor bills that blatantly violate the Constitution.

Part I of this Article examines the "intractable obscenity problem"[23] and the use of obscenity as a pretextual justification for regulation. In Part II, this Article breaks down the governmental interest underpinning book bans into three categories and weighs these interests against the public's interest in retaining access to a wide array of books. Part III discusses the Supreme Court's approach to judicial deference in the school context and argues for the adoption of a three-part test to evaluate both the decisions of school administrators and legislators pushing unconstitutional legislation.

II. OBSCENITY RATIONALE

"*[I]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion[.]"*— Justice Brennan[24]

For laws like the READER Act or H.B. 1069 to survive a constitutional challenge, the restricted speech must either be of such low value that it evades the First Amendment's reach, or the government's interest in such a content-based regulation must be so compelling that it overcomes the First Amendment interest in free speech.[25]

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564 U.S. 786 (2011) (applying strict scrutiny to a content-based restriction that could not be categorized as obscenity).

[22] *See, e.g.*, *Coalition of Local and National Booksellers, Authors and Publishers File Suit to Challenge New Censorship Law and Defend the Right of Free Expression in Texas*, ASS'N OF AM. PUBLISHERS (Jan. 25, 2023), https://publishers.org/news/coalition-of-local-and-national-booksellers-authors-and-publishers-file-suit-to-challenge-new-censorship-law-and-defend-the-right-of-free-expression-in-texas/.

[23] Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 704 (1968) (Harlan, J., dissenting) ("These cases usher the Court into a new phase of the intractable obscenity problem: may a State prevent the dissemination of obscene or other obnoxious material to juveniles upon standards less stringent than those which would govern its distribution to adults?").

[24] Bd. of Educ. v. Pico, 457 U.S. 853, 870 (1982) (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

[25] Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 195 (1983).

The rationale—that is, the governmental interest—underlying book bans and other restrictions on curriculum is to protect children from inappropriate or obscene content and is "typically premised on the idea that children are a particularly vulnerable group."[26] Although a laudable goal, "obscenity" is one of the more complex and difficult areas of First Amendment law and is ripe for abuse and manipulation by those pursuing an inimical agenda.

The first step in analyzing content-based regulations such as these book bans is determining whether a particular class of speech is of only "low" First Amendment value.[27] The Court in *Chaplinsky v. New Hampshire* offered the principal framework for low value speech, noting that "certain well-defined and narrowly limited" classes of speech are not entitled to constitutional protection.[28]

In 1957, the Court held that obscenity falls outside the scope of constitutionally protected speech,[29] but markedly departed from this understanding less than two decades later, articulating a new test for obscenity which offers some tenuous constitutional protection.[30]

Despite the Court's efforts over the decades to define obscenity and offer a practical test for analyzing this category of speech, it remains a difficult area of First Amendment law[31]—one that is susceptible to abuse and manipulation.

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[26] Shearer, *supra* note 2, at 27.

[27] Stone, *supra* note 25, at 194.

[28] 315 U.S. 568, 571–72 (1942) ("There are certain well-defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words—those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas . . . .").

[29] *See* Roth v. United States, 354 U.S. 476, 484–85, 487 (1957) (noting, however, that sex and obscenity are not synonymous).

[30] *See* Memoirs v. Massachusetts, 383 U.S. 413 (1966).

[31] *See* Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 704–05 (1968) (Harlan, J., dissenting) ("The subject of obscenity has produced a variety of views among the members of the Court unmatched in any other course of constitutional adjudication.").

A. The "Intractable Obscenity Problem"[32]

Proponents of book bans often argue that the regulated speech invariably qualifies as low value, characterizing the content as obscene.[33] Although the factors for determining whether speech qualifies as low value are obscure, the Court considers "the extent to which the speech furthers the historical, political, and philosophical purposes that underlie the first amendment."[34] Historically, the Court has categorically classified obscenity as low value speech.[35]

Addressing a low value category of speech, the Court in *Schenck v. United States* asked simply whether the restricted speech created a "clear and present danger."[36] Since this 1919 case, the Court has employed various standards for assessing content-based restrictions for different classes of low value speech.[37] The Court in *R.A.V. v. St. Paul*, however, noted that, despite decisions over the last century narrowing the scope of the First Amendment, "a limited categorical approach has remained an important part of our First Amendment jurisprudence."[38]

Regardless of the standard, however, the Court has held that "[a]ll ideas having even the slightest redeeming social importance—unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion—have the full protection of the [First Amendment] guaranties. . . . But implicit in the history of the First Amendment is the *rejection of obscenity as utterly without redeeming social importance*."[39]

Except for obscenity, each of the low value classes of speech—including libel, profanity, and fighting words—present some form of concrete harm to third parties.[40] Obscenity instead imposes a nebulous moral standard which the Court grappled with for decades.

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[32] *See id.* at 704.

[33] *See* H.B. 900, 2023 Leg., 88th Sess. (Tex. 2023) (noting that "obscene content is not protected by the First Amendment to the United States Constitution").

[34] Stone, *supra* note 25, at 194.

[35] Roth v. United States, 354 U.S. 476, 484–86 (1957).

[36] 249 U.S. 47, 52 (1919) ("The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent.").

[37] *See, e.g.*, Miller v. California, 413 U.S. 15 (1973); Hess v. Indiana, 414 U.S. 105 (1973); N.Y. Times Co. v. Sullivan, 376 U.S. 254 (1964); *Roth*, 354 U.S. 476; Cantwell v. Connecticut, 310 U.S. 296 (1940); *Schenck*, 249 U.S. 47.

[38] 505 U.S. 377, 383 (1992).

[39] *Roth*, 354 U.S. at 484 (emphasis added).

[40] *See generally* Jeffrey M. Shaman, *The Theory of Low-Value Speech*, 48 SMU L. REV. 297 (1995) (discussing the variable levels of harm low-value classes of speech impose).

The standard set in *Miller v. California* represents the current test for obscenity.[41] The permissible scope of a state statute regulating obscene materials must be specifically defined by state law and confined to works that depict or describe sexual content.[42] Further, the content, "taken as a whole, [must] appeal to the prurient interest in sex, which portray[s] sexual conduct in a patently offensive way, and which, taken as a whole, do[es] not have serious literary, artistic, political, or scientific value."[43]

Scholars have argued, and courts have sometimes suggested, that although obscenity is characterized as a low value category of speech, it still receives some First Amendment protections based on the "relative value of the speech and the risk of inadvertently chilling 'high' value expression."[44] Of the low value categories of speech, however, obscenity "is perhaps the least protected class . . . [and] may be suppressed whenever a relatively undemanding scienter requirement is satisfied."[45]

Recognizing that the Court has historically declined to confer First Amendment protection to obscene speech, proponents of book bans craftily frame their arguments as a defense against obscenity.

Although obscenity may not command First Amendment protection, the Court has abated this harsh proposition by severely narrowing the

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[41] *See* 413 U.S. 15 (discussing current and prior tests for obscenity). In Roth v. United States, the Court held that "obscenity is not within the area of constitutionally protected speech or press." *Roth*, 354 U.S. at 487. The Roth Court noted, however, that "sex and obscenity are not synonymous," and that "the portrayal of sex . . . in art, literature and scientific works" alone is not a sufficient reason to remove the material from the auspice of the First Amendment. *Id.* The Court defined obscenity in the following terms: "[w]hether to the average person applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interests." *Id.* at 489. Shortly thereafter, however, the Court departed from the Roth approach and elaborated on this definition in subsequent cases, creating the Memoirs three-part test for obscenity. Memoirs v. Massachusetts, 383 U.S. 413, 418 (1966).

[42] *Miller*, 413 U.S. at 24.

[43] *Id.*

[44] *See* Stone, *supra* note 25, at 195 (citing Dennis v. United States, 341 U.S. 494, 544–46 (1951) (Frankfurter, J., concurring); Gertz v. Robert Welch, Inc., 418 U.S. 323, 340 (1974); *Miller*, 413 U.S. 15; Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748 (1976); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942); New York v. Ferber, 458 U.S. 747 (1982)); *Memoirs*, 383 U.S. at 430–31 (Douglas, J., concurring) ("Neither reason nor history warrants exclusion of any particular class of expression from the protection of the First Amendment on nothing more than a judgment that it is utterly without merit. . . . Were the Court to undertake that inquiry, it would be unable, in my opinion, to escape the conclusion that no interest of society with regard to suppression of 'obscene' literature could override the First Amendment to justify censorship.").

[45] Stone, *supra* note 25, at 195.

definition of obscenity. Indeed, Justice Harlan questioned whether the "'utterly without redeeming social value' test has any meaning at all,"[46] and Chief Justice Burger noted that the test presents prosecutors with a virtually impossible burden to meet under criminal standards of proof.[47]

Indeed, the social value component of the obscenity test is the most difficult hurdle for opponents of material to overcome because it presents a practically insurmountable barrier. Even patently offensive material or material appealing solely to the prurient interest is likely to offer some social value. It is on this issue that book bans like the READER Act fail to pass constitutional muster.

This Article, therefore, proceeds under the presumption that most recent book bans in the US, including the READER Act, cannot rest on an obscenity rationale alone. Therefore, the bans are subject to strict scrutiny as content-based speech regulations. Part II of this Article expands on this thesis.

B. The Texas READER Act

A 2022 study by PEN America—a free speech advocacy group—found that Texas leads the country's crusade against allegedly inappropriate books with more than 800 restricted titles throughout the state's schools.[48]

In a March 7 press release, Representative Patterson's office said, "[t]he READER Act will force book vendors who sell books to school districts within Texas to rate inappropriate material as 'sexually explicit' or 'sexually relevant' which ensures that the Texas Education Agency is aware of all sexually inappropriate materials sold to schools."[49]

The READER Act explicitly recognizes that "obscene content is not protected by the First Amendment."[50] The law further defines "sexually explicit material" as "any communication, language, or material . . . that describes, depicts, or portrays sexual conduct . . . in a way that is patently offensive."[51] It is clear, then, that Representative Patterson intended for his

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[46] *Memoirs,* 383 U.S. at 459 (Harlan, J., dissenting).

[47] *Miller*, 413 U.S. at 22.

[48] Friedman & Johnson, *supra* note 2.

[49] Press Release, Representative Jared Patterson, Rep. Patterson Files Speaker Priority HB 900 – the READER Act (Mar. 10, 2023) (on file with author).

[50] H.B. 900, 2023 Leg., 88th Sess. (Tex. 2023).

[51] *Id.*

bill to target content that falls within obscenity's area of "non-protection" under the First Amendment.[52]

Rather than specifying targeted content, moreover, the READER Act simply references the obscenity subchapter of the Texas Penal Code.[53] This code contains an outdated obscenity definition based on an earlier Supreme Court decision rather than the more recent *Miller* opinion.[54] The law, therefore, neither presents a reasonably precise governmental interest nor confines the restriction to obscene speech as defined by the Supreme Court.

This Article explores the dangers of using obscenity to justify such a vague restriction on freedom of speech in the following section.

C. A Pretextual Justification

The controversy surrounding current efforts to regulate books in schools is a partisan issue, with political conservatives and Republicans calling for greater regulation and Democrats opposing such measures.[55] Opposition on the left is driven by a concern that "[s]chool officials, through their power to prescribe curriculum, textbooks, library books, and classroom discussion, may bias the educational environment to support one opinion over another."[56]

Indeed, in response to the recent discourse surrounding book bans, the Illinois legislature passed a law to limit such measures.[57] Illinois Governor JB Pritzker said in a statement, "[the bill] protects the freedom of libraries to acquire materials without external limitations. Prior to this, Illinois law did not provide such protections and according to Chicago-

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[52] *See* Stone, *supra* note 25, at 194.

[53] TEX. PENAL CODE § 43.21 (defining "obscene" as material that "the average person, applying contemporary community standards, would find that taken as a whole appeals to the prurient interest in sex"), *held unconstitutional by* Reliable Consultants, Inc. v. Earle, 517 F.3d 738 (5th Cir. 2008).

[54] *Compare* Roth v. United States, 354 U.S. 476, 489 (1957), *and* TEX. PENAL CODE § 43.21, *with* Miller v. California, 413 U.S. 15, 24 (1973).

[55] Deepa Shivaram, *More Republican Leaders Try to Ban Books on Race, LGBTQ Issues*, NPR, (Nov. 13, 2021, 1:40 PM), https://www.npr.org/2021/11/13/1055524205/more-republican-leaders-try-to-ban-books-on-race-lgbtq-issues.

[56] Stanley Ingber, *Socialization, Indoctrination, or the "Pall of Orthodoxy": Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, 23 (1987).

[57] Press Release, Governor JB Pritzker, Gov. Pritzker Signs Bill Making Illinois First State in the Nation to Outlaw Book Bans (June 12, 2023) (on file with author).

based American Library Association (ALA), there were 67 attempts to ban books in Illinois in 2022."[58]

Illinois Secretary of State Alexi Giannoulias said book bans "[defy] what education is all about: teaching our children to think for themselves."[59] Proponents of book bans, on the other hand, argue that the goal is to "protect children from ideas they don't consider age appropriate or find otherwise objectionable."[60]

Addressing the core of this partisan issue, the Court in *Board of Education v. Pico* held that whether the removal of books from school libraries violates the Constitution depends on the motivation behind the removal.[61] If an official intends to deny children access to ideas with which they disagree, and this intent is the "decisive factor" in the ban, the ban is unconstitutional.[62]

The complex nature of obscenity, as discussed in Part I.A., complicates this inquiry. Vague terms like "obscene", "inappropriate", or "unsuitable" "may conceal an intent to suppress speech or establish a 'pall of orthodoxy' in the schools," which the Court has unequivocally condemned as unconstitutional.[63]

Designating content as obscene creates a tricky dilemma for two reasons: first, classifying certain books as obscene is inherently subjective; and second, terms like "obscene," "offensive," or "inappropriate" are highly susceptible to manipulation—that is, being used to characterize ideas that are merely outside the mainstream.[64] Indeed, "what is considered inappropriate, offensive, or unsuitable reflects the social anxieties that exist when bans are proposed."[65]

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[58] *Id.*

[59] Alex Degman, *The Fine Print of Illinois' Ban on Book Bans*, NPR ILL., (June 14, 2023, 5:41 PM), https://www.nprillinois.org/illinois/2023-06-14/the-fine-print-of-illinois-ban-on-book-bans.

[60] *Id.*

[61] 457 U.S. 853, 871 (1982).

[62] *Id.* ("To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in *Barnette*.").

[63] Lee Pray, Note, *What Are the Limits to a School Board's Authority to Remove Books from School Library Shelves?*, 1982 WIS. L. REV. 417, 422 (1982) (citing Pico v. Bd. of Educ., 683 F.2d 404 (2d Cir. 1980)).

[64] *Cf.* Shearer, *supra* note 2, at 30 ("As evidenced by . . . the current slew of legislatures seeking to remove race-related content from schools, these recent book bans flout the principles of the First Amendment by seeking to silence the underprivileged and the oppressed.").

[65] *Id.* at 28.

For example, a recent study revealed that most of the books banned in US schools center on race, racism, abortion, and LGBTQ+ issues.[66] A state legislator in Texas recently provided a list of more than 850 books that he considers harmful,[67] but a local news outlet found that ninety-seven of the first one hundred books on the list were written by ethnic minorities, women, or LGBTQ+ authors.[68]

This staggering revelation underscores how legislators may abuse the obscurity of obscenity to pass laws that target opposing viewpoints and politics. By framing certain material as sexually explicit, legislators seek to brand the content as obscene and thus strip it of First Amendment protection.

Bad faith motivations and pretextual justifications for discretionary decision-making like this threaten to undermine First Amendment values. At the extreme, Stanley Ingber warns that the "[g]overnment might use schools to induce captive and immature children to accept values which support and enhance the status quo[]" and consequently "subvert the very core justifications of the [F]irst [A]mendment."[69]

Those who seek to regulate speech and expression in schools must have legitimate reasons beyond motivations rooted in personal politics or ideology. Because this Article rejects the obscenity rationale as a justification for content restrictions in schools, the State must have a compelling governmental interest in the regulation for the law to pass strict scrutiny. The following section explores the balance between governmental and First Amendment interests under a strict scrutiny analysis applied to book bans and other curriculum restrictions. The Article then discusses bad-faith efforts to regulate speech in schools and proposes a framework to evaluate this conduct.

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[66] Friedman & Johnson, *supra* note 2.

[67] *See* Michael Powell, *In Texas, a Battle Over What Can Be Taught, and What Books Can Be Read*, N.Y. TIMES (Dec. 10, 2021), https://www.nytimes.com/2021/12/10/us/texas-critical-race-theory-ban-books.html#:~:text=A%20few%20weeks%20later%2C%20State,books%20touching%20on%20sexual%20identity.

[68] *See* Anthony Zurcher, *Why Are Certain School Books Being Banned in US?*, BBC (Feb. 7, 2022), https://www.bbc.com/news/world-us-canada-60261660.

[69] Ingber, *supra* note 56, at 19–20 ("Parent, teacher, school board, community, and even student groups fight to control the process of indoctrination. All recognize the need for value training. With equal emotion, however, all fear the dangers inherent in the power to teach.").

III. BALANCING INTERESTS

"*A person who had never listened to nor read a tale or myth or parable or story, would remain ignorant of his own emotional and spiritual heights and depths, would not know quite fully what it is to be human."*— Ursula K. Le Guin[70]

For a content-based regulation like the READER Act or similar book bans to survive constitutional scrutiny, the law must be narrowly tailored to achieve a compelling governmental interest, and that interest must outweigh the First Amendment value of the speech.[71]

The application of strict scrutiny to content-based regulations rests on two significant and related rationales that are particularly pertinent to the focus of this Article. First, the exacting standard of review preserves "an uninhibited marketplace of ideas in which truth will ultimately prevail."[72] Second, the standard ensures that the government does not regulate "speech 'based on hostility—or favoritism—towards the underlying message expressed.'"[73]

Under this content-based analysis, the Court engages in a balancing of interests, weighing the extent to which the speech furthers First Amendment principles against a compelling governmental interest in restricting the speech.[74]

The Court in *Interstate Circuit, Inc. v. City of Dallas* engaged in this balancing test to evaluate an ordinance requiring a film exhibitor to classify a film as "not suitable for young persons."[75] The Court recognized that the government may regulate juveniles' access to objectionable material in a way that it may not for adults.[76] The Court nonetheless struck down the ordinance for imposing unconstitutionally vague standards.[77] Cognizant of the danger posed by vague restrictions on freedom of expression,

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[70] URSULA K. LE GUIN, THE LANGUAGE OF THE NIGHT: ESSAYS ON FANTASY AND SCIENCE FICTION (Harper Collins 1992).

[71] Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

[72] Reed v. Town of Gilbert, 576 U.S. 155, 181 (2015) (Kagan, J., concurring) (quoting McCullen v. Coakley, 573 U.S. 464, 476 (2014)).

[73] *Id.* (quoting R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992)).

[74] *Frisby*, 487 U.S. at 481 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n*,* 460 U.S. 37, 45 (1983)).

[75] 390 U.S. 676, 678 (1968).

[76] *Id.* at 690 ("[A] State may regulate the dissemination to juveniles of, and their access to, material objectionable as to them, but which a State clearly could not regulate as to adults.").

[77] *Id.*

the Court recognized that the First Amendment interests at play were "certainly broader than those of youths under [sixteen]."[78]

Applying strict scrutiny to the local ordinance, the Court noted that "legislation aimed at protecting children from allegedly harmful expression" must be clearly drawn and reasonably precise so that administrators may "understand its meaning and application."[79] The Court has followed this precedent in subsequent cases addressing obscene material while still affirming the legitimate state interest in protecting juveniles from exposure to obscene material.[80]

To evaluate book bans as a content-based speech regulation, courts must weigh the government interest underlying the bans against the First Amendment interests at stake.[81]

A. Government Interest

The public can logically understand book bans as an effort to protect children, and society more broadly, from the harms posed by "obscene" or inappropriate material.[82] Indeed, Florida Representative Joe Harding described Florida's "Don't Say Gay" law as a step toward "protecting our kids, empowering parents, and ensuring they have the information they need to do their God-given job of raising their child[ren]."[83] The ultimate question, then, is *what harm do the banned books cause*?

This Article considers three categories of harm—moral, emotional, and physical—each of which the courts have recognized as a sufficient interest to justify First Amendment infringement.[84]

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[78] *Id.* at 683 ("The vice of vagueness is particularly pronounced where expression is sought to be subjected to licensing.").

[79] *Id.* at 689.

[80] *See, e.g.*, Miller v. California, 413 U.S. 15, 18–19 (1973).

[81] Frisby v. Schultz, 487 U.S. 474, 481 (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 US 37, 45 (1983)).

[82] John Donvan, *Should Certain Books Ever Be Banned in School*?, OPEN TO DEBATE (May 19, 2023), https://opentodebate.org/debate/should-certain-books-ever-be-banned-in-school/.

[83] News Release, Governor Ron DeSantis, Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education (Mar. 28, 2022) (on file with author); *see also* H.B. 1557, 2022 Leg., Reg. Sess. (Fl. 2022) ("Classroom instruction by school personnel or third parties on sexual orientation or gender identity may not occur in kindergarten through grade 3 or in a manner that is not age-appropriate or developmentally appropriate for students in accordance with state standards.").

[84] *See* Feiner v. New York, 340 U.S. 315 (1951); Chaplinsky v. New Hampshire, 315 U.S. 568. 571 (1924); United States v. Mecham, 950 F.3d 257 (5th Cir. 2020).

1. Moral Harm

In *Chaplinsky*, the Court reasoned that some categories of speech, including the obscene, "are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in *order and morality*."[85]

Although courts have repeatedly recognized moral harm as a justification for First Amendment restrictions, this Article argues that courts should selectively embrace or outright reject morality as a compelling governmental interest for two reasons. First, government interest in morality inherently embraces moral relativism which "ultimately collapses into subjectivi[ty]."[86] Second, the notion of preventing moral harm through speech regulation is inconsistent with the First Amendment counter-speech doctrine.[87]

As a whole, book bans represent subjective decision-making.[88] As mentioned in Part I, politics often motivates the bans; politicians may exploit moral standards to impose their own subjective opinions about a given topic, such as race or sexuality.[89] Because views of morality reflect constantly shifting social and cultural dynamics, a general morality standard does not rise to a level sufficient to overcome foundational First Amendment rights.[90]

Almost one hundred years ago, Justice Louis Brandeis famously stated in his concurring opinion in *Whitney v. California* that the best remedy for speech with which we disagree is more speech, not less speech.[91]

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[85] *Chaplinsky*, 315 U.S. at 572 (emphasis added).

[86] Heidi Margaret Hurd, Note, *Relativistic Jurisprudence: Skepticism Founded on Confusion*, 61 S. CAL. L. REV. 1417, 1477 (1988).

[87] *See* Clay Calvert, *Off-Campus Speech, On-Campus Punishment: Censorship of the Emerging Internet Underground*, 7 B.U. J. SCI. & TECH. L. 243, 285–87 (2001).

[88] *See* Susan L. Webb, *Book Banning*, FREE SPEECH CTR. (Aug. 8, 2023), https://firstamendment.mtsu.edu/article/book-banning/#:~:text=Book%20banning%2C%20a%20form%20of,content%2C%20ideas%2C%20or%20themes.

[89] *See* discussion *supra* Part I.C.

[90] *See* Hurd, *supra* note 86, at 1471–72.

[91] 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be a time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution. It is therefore always open to Americans to challenge a law abridging free speech and assembly by showing that there was no emergency justifying it.").

Over the last century, free speech jurisprudence has embraced this proposition as a foundational First Amendment principle.[92]

2. Emotional Harm

Unlike moral harm, this Article recognizes emotional harm as a legitimate state concern. The issue, however, is the relative strength of any claim that books cause children to experience such acute emotional harm to sufficiently justify a ban.

In 2021, Texas Republican state representative Matt Krause initiated an inquiry into "Texas school district content" and requested identification of any books or content that addressed or contained:

> human sexuality, sexually transmitted diseases, or human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS), sexually explicit images, graphic presentations of sexual behavior that is in violation of the law, or contain[ed] material that might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex or convey that a student, by virtue of their race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.[93]

Representative Krause's concern regarding graphic depictions of sex in violation of pre-established law likely does not raise a constitutional issue. The other categories, however, beg two pressing questions: first, whether any of the books that address or contain the topics mentioned inherently pose a risk of emotional harm; and second, whether that risk outweighs the First Amendment value of the content.[94]

If Representative Krause's inquiry does identify books that "make students feel discomfort, guilt, anguish, or any other form of psychological distress," then the government possesses a legitimate interest in regulating the content.[95] The next question, however, requires a deeper analysis.

To pass strict scrutiny, the government's interest in preventing that emotional harm must outweigh the First Amendment value of the content.[96] The First Amendment interest at stake is evaluated in Part III.B.

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[92] David L. Hudson Jr., *Counterspeech Doctrine*, FREE SPEECH CTR. (Jan. 1, 2009), https://firstamendment.mtsu.edu/article/counterspeech-doctrine/.

[93] Letter from Rep. Matt Krause, Tex. House of Representatives, to Lily Laux, Deputy Comm'r Sch. Programs, Tex. Educ. Agency (Oct. 25, 2021) (on file with author).

[94] *See id.*

[95] *Id.*

[96] Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

3. Physical Harm

No compelling argument has been made that the books targeted by these bans pose a risk of physical harm to students. Nonetheless, proponents could argue that certain content encourages sexual or violent behavior which may effectuate physical consequences.

The government has only a weak claim that these books present a significant risk of physical harm resulting from sex.[97] To the contrary, proper sex education—available through academic resources such as library books—leads to well-educated and informed students knowledgeable about their bodies and safe sex practices.[98]

As for physical harm resulting from violence, the Supreme Court has set the bar for "incitement to violence" relatively high.[99] In *Brandenburg v. Ohio* and its progeny, the Supreme Court held that, to strip speech of First Amendment protections, it must be directed to inciting or producing imminent lawless action and likely to produce such action.[100] Applying this standard, the Court has struck down various regulations based on a finding that the restricted speech did not satisfy the *Brandenburg* test.[101]

Finally, the government may argue that emotional harm suffered as a result of certain content may manifest physically. Absent evidence to support this assertion, however, the claim that certain books pose a risk of physical harm to children is not sufficient to outweigh the First Amendment interest.[102]

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Book bans must not only be justified by a compelling governmental interest, but the laws must also be "clearly drawn and reasonably

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[97] *See The Importance of Access to Comprehensive Sex Education*, AM. ACADEMY OF PEDIATRICS, https://www.aap.org/en/patient-care/adolescent-sexual-health/equitable-access-to-sexual-and-reproductive-health-care-for-all-youth/the-importance-of-access-to-comprehensive-sex-education/#:~:text=Comprehensive%20sex%20education%20provides%20the,of%20STI%20and%20HIV%20prevention (last updated July 14, 2023).

[98] *See id.*

[99] *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969).

[100] *See id.* at 444–45 (reversing the conviction of a Ku Klux Klan member for engaging in speech threatening revenge and marching to Congress); *see also* NAACP v. Claiborne Hardware Co., 458 U.S. 886, 928 (1982) (holding that the speech did not pass the *Brandenburg* test); Hess v. Indiana, 414 U.S. 105, 108 (1973) (holding that the speech did not pass the *Brandenburg* test).

[101] *See, e.g.*, Lorillard Tobacco Co. v. Reilly, 533 U.S. 525 (2001); 44 Liquormart v. Rhode Island, 517 U.S. 484 (1996).

[102] *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

precise."[103] Most sweeping book bans do not satisfy this requirement, including the READER Act and Florida's "Don't Say Gay" law.[104]

Justice Brandeis's concurrence in *Whitney v. California* offers yet another available defense to book bans.[105] Arguing that "[f]ear of serious injury cannot alone justify suppression of free speech," Brandeis posits that a showing that there is no emergency to justify a law can overcome such a law abridging free speech.[106] The previous sections illustrate that neither a threat of moral, physical, or emotional harm constitutes an emergency to justify restricting free speech and expression. The following section further illustrates the First Amendment interests that book bans threaten.

B. First Amendment Interest

In *Pico*, the Court recognized that students' First Amendment rights may be "directly and sharply implicated by the removal of books."[107] The First Amendment interest may be thought of as two distinct, but interrelated concepts: first, as a constitutionally protected "right to read"; and second, as an independently sufficient interest in access to the material.

Scholars have argued that a corollary right to read attaches to the First Amendment's freedom of speech and press guaranties.[108] Indeed, courts have adopted this interpretation and held that the Constitution protects the right to receive ideas and information.[109] In addition to a purported constitutional right to read, books offer an independent benefit that acts as a counterweight to the government's interest in protecting children from harmful content.[110]

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[103] Interstate Cir., Inc. v. City of Dallas, 390 U.S. 676, 689 (1968); *see also supra* Part I.B.

[104] *See supra* Part I.B. Scholars have also criticized Governor DeSantis's "Don't Say Gay" law for not only its blatant attack on the LGBTQ community, but also for its jarring vagueness. *See* Daniel Putnam, *Florida's Anti-Gay Bill Is Wrong. It's Also Unconstitutional.*, NBC NEWS (Mar. 28, 2022, 5:09 PM), https://www.nbcnews.com/think/opinion/florida-hb-1557-anti-gay-parental-rights-education-violates-free-ncna1293466 ("A well-drafted law would define its terms carefully. Precisely because HB 1557 does not do so, it could be read to prohibit any of these activities. Yet the U.S. Constitution does not tolerate that degree of vagueness.").

[105] 274 U.S. 357, 376 (1927) (Brandeis, J., concurring).

[106] *Id.*

[107] Bd. of Educ. v. Pico, 457 U.S. 853, 866 (1982).

[108] *See* Pray, *supra* note 63; *see also Pico*, 457 U.S. at 867; Right to Read Def. Comm. v. Sch. Comm. of Chelsea, 454 F. Supp. 703, 711–12 (D. Mass. 1978).

[109] Stanley v. Georgia, 394 U.S. 557, 564 (1969).

[110] *See* Shane Morris, Note, *The First Amendment in School Libraries: Using Substantial Truth to Protect a Substantial Right*, 13 DREXEL L. REV. 787, 788 (2021).

It is the value that books offer—a concrete benefit—that courts must balance against the government's interest in protecting children from the potential harm caused by any allegedly obscene or inappropriate material within a given book.[111] Courts should weigh the harm from a book or books against the resultant harm from banning books. The Court in *Elrod v. Burns* said, "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."[112] The marketplace of ideas—a foundational principle of the First Amendment—rests on the notion that greater access to ideas or books, not less, is the solution to any harmful idea or book.[113]

1. Right to Read

The Supreme Court has held in a variety of contexts that "the Constitution protects the right to receive information and ideas."[114] The *Pico* Court explained that this right is an "inherent corollary" of the First Amendment's free speech and press guaranties that flows first from "the *sender's* First Amendment right" then secondly, and more importantly, from "the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom."[115]

The United States District Court for the District of Massachusetts opinion in *Right to Read Defense Comm. v. School Comm.* aptly summarizes the rationale of the right to read in the school context: "[A] student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum. . . . [The] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom."[116] The right to read represents a cornerstone principle of the First Amendment—that is, the right to discover and test ideas.

2. Benefit of Books

In addition to a general First Amendment right to receive information manifested as the right to read, children derive tangible benefits from reading, which courts must balance against any interest furthered by banning certain reading materials.[117] Shane Morris states that these benefits include: "healthy brain development, valuable vocabulary skills, and

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[111] *See id.*

[112] 427 U.S. 347, 373 (1976) (citing N.Y. Times Co. v. United States, 403 U.S. 713 (1971)).

[113] *See supra* notes 84–86 and accompanying text.

[114] *Stanley*, 394 U.S. at 564; Kleindienst v. Mandel, 408 U.S. 753, 762–63 (1972).

[115] Bd. of Educ. v. Pico, 457 U.S. 853, 867 (1982).

[116] 454 F. Supp. 703, 715 (D. Mass. 1978).

[117] *See* Morris, *supra* note 110.

perhaps most importantly, the ability to 'see[] things from a different perspective.'"[118]

Books offer schoolchildren the opportunity to learn about concepts not covered in traditional curricular subjects such as math, science, history, and literature. The National Children's Book and Literacy Alliance emphasized the benefits of books, noting that "[b]ooks inform us about other people, other countries, other customs and cultures."[119]

"[J]ust as access to ideas makes it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner, such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members."[120] Arguing that books help children develop empathy, the Child Mind Institute notes that as children read books about people who are different from them, "they gain an appreciation for other people's feelings, as well as other cultures, lifestyles, and perspectives."[121]

These extracurricular learning endeavors allow students to explore social issues, form their identities, and develop their views of society.[122] For this reason, this Article contends that the value of unrestricted access to books and other educational materials outweighs the state interest in preventing moral, emotional, or physical harm that any books may cause.

Because books influence children's development of their personal, political, and social consciousness to such a large degree, access to books is especially susceptible to politicization and manipulation, as discussed in Part I.[123] Therefore, a mechanism must exist to hold accountable those who seek to restrict access to books based on ulterior motivations. The following section discusses this further and offers a standard for evaluating legislators' efforts to regulate speech in schools.

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[118] *Id.*

[119] *Why Do Kids Need Books?*, NAT'L CHILD.'S BOOK & LITERACY ALL., https://thencbla.org/advocacy/why-do-kids-need-books/ (last visited Dec. 1, 2023).

[120] *Pico*, 457 U.S. at 868.

[121] Hannah Sheldon-Dean, *Why Is It Important to Read to Your Child?*, CHILD MIND INST., https://childmind.org/article/why-is-it-important-to-read-to-your-child/ (last updated Jan. 19, 2023).

[122] Stanley Ingber argues that "[t]he goals of free speech – pursuing truth, self-governance, and self-fulfillment – are absurd if society leaves children unprepared to act as autonomous individuals." Ingber, *supra* note 56, at 19.

[123] Meagan M. Patterson, *Children's Literature as a Vehicle for Political Socialization: An Examination of Best-Selling Picture Books 2012–2017,* 180 J. GENETIC PSYCH. 231, 235 (2019); *see* discussion *supra* Part I.

IV. THE NEED FOR A GOOD-FAITH INQUIRY

"*A school library, no less than any other public library, is 'a place dedicated to quiet, to knowledge, and to beauty.' . . . '[S]tudents must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' The school library is the principal locus of such freedom."*—Justice Brennan[124]

Legislatures are not the only parties seeking to restrict content available to school children; parents and school administrators have joined in the fervid national dialogue surrounding school curriculum and books.[125] First Amendment mandates nonetheless bind school boards and administrators just as they do legislators.

The Supreme Court has discussed First Amendment rights in the school context on several occasions and has unequivocally held that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[126] Indeed, the Court has articulated a standard to preserve First Amendment rights in schools, which this Article argues should apply to legislators seeking to pass bills that encroach on the First Amendment.[127]

The following sections explore how this standard serves as a counterbalance to the broad deference that courts afford school boards and administrators.

A. A Standard for School Administrators

The Supreme Court has "long recognized that local school boards have broad discretion in the management of school affairs."[128] In 2017, Chief Justice Roberts confirmed the substantial judicial deference given to school administrators, cautioning that "the absence of a bright-line rule . . . should not be mistaken for 'an invitation to the courts to substitute their

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[124] *Pico*, 457 U.S. at 868–69 (1982) (first quoting Brown v. Louisiana, 383 U.S. 131, 142 (1966); then quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

[125] Elizabeth A. Harris & Alexandra Alter, *Book Ban Efforts Spread Across the U.S.,* N.Y. TIMES (June 22, 2023), https://www.nytimes.com/2022/01/30/books/book-ban-us-schools.html.

[126] Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969); *Pico*, 457 U.S. at 865.

[127] *See Pico*, 457 U.S. at 864–69.

[128] *Id.* at 863 (citing Meyer v. Nebraska, 262 U.S. 390, 402 (1923); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925)).

own notions of sound education policy for those of the school authorities which they review.'"[129]

Indeed, courts defer to school administrators more than any other administrative agency because they recognize the importance of allowing school administrators to focus on education.[130] Further, permitting schools to expend resources on education rather than litigation is sound public policy.

Bernard James argues, however, that the "good faith inquiry" has given way in favor of a "tacit presumption of validity" for officials' discretionary decision-making.[131] In the 1968 landmark case *Epperson v. Arkansas*, the Court recognized that public education in the US "is committed to the control of state and local authorities," and that federal courts should not ordinarily intervene in the operation and management of school affairs.[132] James notes that in the decades since *Epperson*, the Supreme Court has advanced this understanding of the education system.[133] He further argues that, rather than applying an objective presumption of validity, courts should conduct a rigorous examination of First Amendment disputes because free speech cases are "qualitatively different and more vulnerable to abuse."[134]

In line with this view, the Court in *Tinker v. Des Moines Sch. Dist.* held that "First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and

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[129] Endrew F. v. Douglas Cnty. Sch. Dist., 580 U.S. 386, 404 (2017) (quoting Bd. of Educ. v. Rowley, 458 U.S. 176, 206 (1982)) ("At the same time, deference is based on the application of expertise and the exercise of judgment by school authorities.").

[130] *See Pico*, 457 U.S. at 909 (Rehnquist, J., dissenting) ("[I]t is helpful to assess the role of government as educator, as compared with the role of government as sovereign. When it acts as an educator, at least at the elementary and secondary school level, the government is engaged in inculcating social values and knowledge in relatively impressionable young people."); Bernard James, Tinker *in the Era of Judicial Deference: The Search for Bad Faith*, 81 UMKC L. REV. 601, 603-04 (2013) ("[J]udicial review . . . in the American Republic education policymaking is set apart from other government functions.") (noting there is a surprising level of judicial deference to school officials).

[131] James, *supra* note 130, at 606.

[132] 393 U.S. 97, 104 (1968).

[133] James, *supra* note 130, at 605–07 ("School officials seeking to place their policies on the constitutional side of the line and the students for whose benefit the line exists deserve to be released from the opacity of current judicial review.").

[134] *Id.* at 609–11 (arguing that a shift toward greater rigor in analyzing school policies and decision-making is desirable).

students."[135] The Court articulated a requirement that school officials seeking to prohibit a particular expression of opinion "be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint."[136]

The *Tinker* Court struck down the regulation at issue after finding that the school appeared to have based its decision on "an urgent wish to avoid the controversy which might result from the expression."[137]

James argues that the courts should "return to the initial purpose of Tinker as a tool designed to expose authority exercised in bad faith under the pretense of pursuing the education mission."[138] Specifically, James proposes that courts defer to decisions by educators that: "(1) are made in good faith, (2) further the education mission, and (3) avoid the violation of clearly settled constitutional rights."[139]

This Article adopts James's proposition as not only a sound standard for evaluating the decisions of school boards and administrators, but also legislators seeking to influence school curriculums and materials.[140] This three-pronged test protects constitutional rights, encourages good-faith efforts to direct and regulate curriculum, and safeguards against bad-faith efforts to restrict free expression in schools. The good-faith inquiry also provides an accountability mechanism for reviewing decisions of those in positions of authority. Courts can apply this standard to legislators who knowingly and intentionally promulgate unconstitutional legislation in the same way that they can apply it to school boards that infringe on constitutional rights.

B. A Standard for Legislators

In the seminal case *Bd. of Educ v. Pico*, the Court held that school boards may not censor the content of school libraries simply because they disagree with or dislike the ideas contained in the books.[141] Rather, the discretion of school boards is confined to action which comports with "the transcendent imperatives of the First Amendment."[142] The Court recognized that school boards "might well defend their claim of absolute

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[135] 393 U.S. 503, 506 (1969).

[136] *Id.* at 509.

[137] *Id.* at 510, 514.

[138] James, *supra* note 130, at 602.

[139] *Id.* at 603.

[140] *See id.*

[141] 457 U.S. 853, 872 (1982).

[142] *Id.* at 864.

discretion in matters of *curriculum*", based on their duty to instill community values, but that this discretion does not extend beyond the classroom into the realm of voluntary inquiry that is the cornerstone of the school library.[143]

The Court further reasoned that, whether a school board denies students their First Amendment rights depends on the motivation behind the book removal.[144] The Court held that a book removal is constitutional if the State bases its decision solely upon the "educational suitability" of the books.[145]

The motivation inquiry proffered by the *Pico* court aligns with James's three-part test requiring good faith decisions.[146] Further, the Court's emphasis on motivation underscores the discussion in Part I of this Article, which examined the Court's dismissal of obscenity as without constitutional protection and explained how legislators may manipulate this area of non-protection to legitimize legislation targeting opposing or minority viewpoints.[147]

Legislators can easily use obscenity as a justification to ban books because obscenity does not command constitutional protection. Thus, legislators can abuse this area of non-protection to enact legislation targeting allegedly obscene content for other reasons, such as political or ideological beliefs. An inquiry into a legislator's motivation that considers, first, whether the legislation furthers the educational mission and, second, whether the legislation violates constitutional rights safeguards against this tactic.[148]

If tort sanctions are permitted for legislators who pass bills that blatantly violate the Constitution, for which this Article advocates, then this framework can be used to evaluate the conduct. As previously discussed, the Florida legislature is currently considering or has already passed, several arguably unconstitutional laws.[149] Indeed, a federal court recently

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[143] *Id.* at 869.

[144] *Id.* at 871.

[145] *Id.*

[146] *Id.* at 871–74; James, *supra* note 130, at 603.

[147] *Pico*, 457 U.S. at 871.

[148] *See id.*

[149] *See* C.A. Bridges, *DeSantis vs. the Courts: How Many of the Florida Governor's Plans Have Been Blocked?*, TALLAHASSEE DEMOCRAT (June 30, 2023, 7:54 AM), https://www.tallahassee.com/story/news/politics/2023/06/30/florida-gov-ron-desantis-laws-keep-getting-blocked-a-partial-list/70367966007/.

blocked Florida Senate Bill 1438 (Protection of Children) for being overly vague and unconstitutional.[150] The law sought to prohibit admitting children to certain drag show performances.[151]

Courts have struck down several bills signed into law by Governor DeSantis in the last year.[152] These laws do not merely represent failed legislative attempts; they are also a burden on the court system, a waste of taxpayer money, and, most egregiously, an unlawful infringement on First Amendment rights. To address the unconstitutional laws motivated by political and ideological beliefs, the US needs a mechanism by which to hold legislators and officials accountable for the pursuit of such endeavors.

V. CONCLUSION

Though not all efforts to regulate the materials available to children in schools are unconstitutional, these measures can and often do clearly violate the First Amendment.[153] Using obscenity as a means to circumvent First Amendment protections, legislators seek to pass laws that restrict both children's access to books and the content of their conversations in the classroom.

Legislators cannot and should not rely on obscenity alone to justify these bans, however, because the Supreme Court has articulated such a narrow test for obscenity that practically no content can satisfy.[154] Instead, the State must possess a compelling interest for such a content-based regulation to survive strict scrutiny; but neither the threat of moral, emotional, nor physical harm can justify the free speech restrictions imposed by book bans.[155]

The larger issue, however, lies in legislators' attempts to restrict content and expression with which they disagree by branding the material as obscene. By using obscenity as a pretextual justification, legislators seek to pass unconstitutional laws that further their political agenda. To remedy

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[150] HM Florida-ORL, LLC v. Griffin, No. 6:23-CV-950-GAP-LHP, 2023 U.S. Dist. LEXIS 111612, at *19–21 (M.D. Fl. June 23, 2023) (denying defendant's motion to dismiss and granting plaintiff's motion for preliminary injunction) ("It is this vague language–dangerously susceptible to standardless, overbroad enforcement which could sweep up substantial protected speech–which distinguishes [this law] and renders Plaintiff's claim likely to succeed on the merits.").

[151] *See* FLA. STAT. § 827.11 (2023).

[152] *See* Bridges, *supra* note 149.

[153] *See Pico*, 457 U.S. 853.

[154] Miller v. California, 413 U.S. 15, 24–25 (1973).

[155] *See* Frisby v. Schultz, 487 U.S. 474, 481 (1988) (quoting Perry Educ. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

this abuse of office and conscious constitutional violation, courts should possess the authority to impose tort sanctions on legislators who knowingly and intentionally pass unconstitutional laws regulating school content.

The standard for this should consider: (1) whether the legislators acted in good faith, (2) whether the law furthers the education mission, and (3) whether the law violates clearly established constitutional rights.