

Big Brother is Reading: An Examination of the Texas Textbook Controversy and the Legacy of *Pico*

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Abstract

Book censorship has long captured the minds and imaginations of literary and legal scholars alike. Book censorship, however, is not a relic of past generations; it is a problem that abides today. Politicians continue to censor books based on their content in order to influence the education of public school students. Nowhere is this more evident than the recent Texas textbook controversy.

In an attempt to accurately portray the constitutional remedies students have against book censorship, the article first examines three general lines of First Amendment jurisprudence: cases involving the removal of textbooks from public school libraries, cases involving the removal of textbooks from school classrooms, and cases involving the removal of content from public libraries.

^{*} Although all of the cases discussed in this Article are the product of “conservative” governmental action, this is a genuine survey of the jurisprudence on this topic and not an indication of any of my political or religious biases. I do not use the terms “conservative” or “Christian” derisively. Instead, I use these terms descriptively. In fact, I find the absence of similar lawsuits involving liberal governmental entities both conspicuous and troubling. It is my opinion that “liberal” governments are likely engaging in similar actions; however, their actions are remaining unchallenged and unchecked. If this article reveals any of my personal biases, I hope it unveils my healthy respect for the American Constitution and my love of legal discourse.

In addition to adding a disclaimer about my personal biases, I would also like to thank several people for helping with this article. First, I would like to thank all of my friends and colleagues who acted as sounding board for my arguments and proofreaders. Without you, my article would have a lot more typos. I would also to thank George Cochran for his help and mentorship, even if he refused to discuss *American Library Association* with me until after I watched *The Lives of Others*.

Second, the article creates a synthesis of this case law and analyzes the consequences to public school students' current first amendment rights. The article reaches several unique conclusions. First, there has been a devolution of *Board of Education, Island Trees Union Free School District 26 v. Pico*, 457 U.S. 853 (1982) since the Supreme Court's original decision, devolving from the standard articulated by Justice Brennan in the plurality to the "narrowly partisan or political" standard advocated in Chief Justice Rehnquist's dissent. Second, the current legal distinction between *Pico* cases and *Hazelwood School District v. Kuhlmeier*, 484 U.S. 260 (1988) cases is, at best, obscured, and, at worst, non-existent. Finally, the Supreme Court's seminal holding in *United States v. American Library Association, Inc.*, 539 U.S. 194 (2003) may significantly alter how federal courts consider *Pico* and *Hazelwood* cases. In other words, students have significantly fewer First Amendment rights today than they did after the Supreme Court decided *Pico* in 1982.

Finally, the article applies these abstract conclusions about students' First Amendment rights to the "real world" situation of the Texas textbook controversy. More specifically, this article discusses the changes in Texas' social studies, history, and economics curricula that took place in 2010. In 2010, the State Board of Education eliminated Thomas Jefferson from historical discussions because the Board disliked the fact that he coined the phrase "the separation between church and state." The State Board of Education also required schools to teach about the violence of the black power movement and mandated that children be tested on the conservative resurgence of the 1980's and the political influence of the National Rifle Association. The article advocates that students seeking to challenge the State Board of Education's decisions would bear the burden of proving that the Board's actions are "narrowly partisan or political" or cast a "pall of orthodoxy." Thus, the burden of proof that students must meet to call into question the Board's actions is so high that any constitutional challenge at this point would likely be unsuccessful.

Ultimately, this article sheds light on the limited First Amendment protection, or lack thereof, that children enjoy in public schools and serves as a call-to-action for legal scholars and parents to take measures to eliminate the use of education as a means of furthering school boards' political or religious biases.

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Big Brother is Reading

31

Table of Contents

Abstract	29
Introduction.....	32
I. Cases Involving the Removal of Books from school Libraries	34
A. Board of Education, Island Trees Union Free School District No. 26 v. Pico	35
B. Hazelwood School District v. Kuhlmeier	40
C. Campbell v. St. Tammany Parish School Board.....	41
D. Case v. Unified School Dist. No. 233	43
E. Counts v. Cedarville School District.....	44
F. American Civil Liberties Union of Florida, Inc. v. Miami- Dade County School Board.....	46
II. Public Library Cases	49
A. Sund v. City of Wichita Falls, Texas	49
B. United States v. American Library Association, Inc.....	51
III. Decisions Regarding a School Board’s Discretion Over Changes in Curricula	53
A. Pratt v. Independent School District No. 831.....	53
B. Virgil v. School Board of Columbia County, Florida	55
C. Chiras v. Miller	57
IV. Analysis.....	60
A. The Current Status of Pico	60
B. The Impact of American Library Association.....	64
C. Board’s Discretion to Remove Textbooks	66
V. Application: The Texas Textbook Controversy.....	74
A. Background of the Controversy	68
B. Application of the Progeny of Pico	68
Conclusion	78

Introduction

“We must all be alike. Not everyone born free and equal, as the constitution says, but everyone made equal . . . A book is a loaded gun in the house next door. Burn it. Take the shot from the weapon. Breach man’s mind.”¹

In his landmark dystopian novel, *Fahrenheit 451*, Ray Bradbury explores a futuristic American society where people do not read books or think independently. Instead, they watch television all day and listen to “Seashell Radios” attached to their ears. In this futuristic society, firemen do not extinguish fires, but, instead, they start fires in order to burn books. Bradbury wrote of a future America where mere possession of a book was a crime. But, how did this come to pass? According to the Fire Chief, Captain Beatty, America began banning books when special interest groups and “minorities” objected to books that offended them. Soon after, all books were the same, because writers wrote them so they did not offend anybody. Finally, society decided to burn books instead of supporting conflicting opinions.

Although modern-day America is not in the business of burning books, the government vis-à-vis school boards is actively attempting to remove books from school libraries because they find the their content to be dangerous or subversive to the educational experience. More frighteningly, school boards are given even broader discretion over curricular materials, often allowing their own political and religious biases to influence the selection of textbooks. In *Fahrenheit 451*, Ray Bradbury recognizes the importance of knowledge, reading, and free inquiry, comparing these values to a loaded weapon, dangerously threatening a totalitarian and unjust society. In his novel, Bradbury also warned of the dangers of state censorship and the consequences of limitations placed on educational inquiry.² The Supreme Court also emphasizes that, “[t]he

1 RAY BRADBURY, *FAHRENHEIT 451* 49 (1953).

2 Compare Amy E. Boyle Johnson, *Ray Bradbury: Fahrenheit 451 Misinterpreted*, LAWEEKLY, May 30, 2007, at <http://www.laweekly.com/2007-05-31/news/ray-bradbury-fahrenheit-451-misinterpreted/> (“Bradbury still has a lot to say, especially about how people do not understand his most famous literary work, *Fahrenheit 451*, published in 1953 . . . Bradbury, a man living in the creative and industrial center of reality TV and one-hour dramas, says it is, in fact, a story about how television destroys interest in reading literature.”); with RAY BRADBURY, *Coda, FAHRENHEIT 451* iii (1987) (“There is more than one way to burn a book. And the world is full of people running about with lit matches. Every minority, be it Baptist / Unitarian, Irish / Italian / Octogenarian / Zen

right [of students] to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom."³ Although it may seem that students should be able to invoke their First Amendment rights to resist the forces of school board censorship, the ability to bring a lawsuit to curtail a school board's action is becoming increasingly difficult.

School boards' power and control over school curriculum and libraries sits at a controversial juxtaposition between First Amendment law and the need to provide a meaningful education to students. Even though the Supreme Court has famously stated that students do not "shed their [First Amendment] constitutional rights . . . at the schoolhouse gate," school boards still retain great deference from the courts.⁴ School systems bear the responsibility to "inculcate fundamental values necessary to the maintenance of a democratic political system."⁵ Students, therefore, do not have many rights to access information or challenge censorship in schools. The Supreme Court addressed the power of school boards to remove books in *Pico*, barring them from removing "books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."⁶ *Pico* has been fractured and largely ignored, and lower courts, in large part, have ignored *Pico* and embraced legal standards that are much less protective of students' rights. Thus, students are afforded even fewer rights when courts consider a school board's ability to select or remove curriculum and textbooks from schools.

The purpose of this article is to trace the growing power of school boards over curricular and non-curricular resources in schools and the increase of judicial deference, approaching an assumption of infallibility, to their decision making. The article first looks at school library book removal cases, focusing largely on *Pico* and its treatment in lower courts. Then, this article analyzes public library book removal cases, in search of dicta applicable to school board discretion. Thereafter, it examines the

Buddhist / Zionist / Seventh-day Adventist / Women's Lib / Republican / Mattachine / FourSquareGospel feels it has the will, the right, the duty to douse the kerosene, light the fuse Fire-Captain Beatty, in my novel *Fahrenheit 451*, described how the books were burned first by the minorities, each ripping a page or a paragraph from this book, then that, until the day came when the books were empty and the minds shut and the library closed forever.").

3 Bd. of Educ., *Island Trees Union Free Sch. Dist. 26 v. Pico*, 457 U.S. 853 (1982).

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

5 *Ambach v. Norwick*, 441 U.S. 68, 76-77 (1979).

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

discretion school boards have over curricular material such as textbooks. Next, the article seeks to analyze the overarching themes or patterns that emerge from these cases, concentrating on the value of the *Pico* precedent in lower courts, the ramifications of the American Library Association opinion on school book removal cases, and the current method of First Amendment evaluation for school board curricular decisions. Finally, the article explores the Texas textbook controversy in depth and explores plausible victories and pitfalls to potential constitutional challenges to the Texas State Board of Education's most recent actions.

I. Cases Involving the Removal of Books from school Libraries

School libraries sit at an interesting crossroads between students' First Amendment rights and the broad discretion that the school boards are given. This is because it is patently unreasonable to ascribe every single book contained in a school's library to a curricular decision made by its school board.⁷ One commentator outlined the issue as:

We can not do too much in bringing libraries and schools into the closest harmony and co-operation, but they should be co-workers each keeping its proper field and giving the co-operation and respect due to its associate, and not drifting into the traditional relation of the lion and the lamb that lie down together, with the lamb inside the lion.⁸

Thus, before the Supreme Court addressed the matter in *Pico*, there was confusion among Circuit Courts over the scope of school board control over school libraries, because of their curricular-but-non-curricular "dual identity."⁹

Despite the lack of direction from the Supreme Court and the confounding constitutional nature of public school libraries, Pre-*Pico* library book removal cases displayed startling uniformity.¹⁰ When presented with school boards removing books on the basis of their vulgarity or obscenity, courts were generally deferential to the school board's judgment, denying students' First Amendment challenges.¹¹ If, on

⁷ Kelly Sarabyn, *Prescribing Orthodoxy*, 8 CARDOZO PUB. L. POL'Y & ETHICS J. 367, n. 94 (2010).

⁸ Richard J. Peltz, *Pieces of Pico: Saving Intellectual Freedom in the Public School Library*, 2005 BYU EDUC. & L.J. 103, 115 (2005).

⁹ Joelle C. Achtman, Note, *Pico Takes a Trip to Cuba: Will Pretext Become Precedent in the Eleventh Circuit?*, 63 U. MIAMI L. REV. 943, 949 (2009).

¹⁰ *Id.*

¹¹ *Id.*; see e.g., *Presidents Council, Dist. 25 v. Cmty. Sch. Bd. No. 25*, 457 F.2d 289 (2nd Cir. 1972) (dealing with the removal of a book from middle school libraries because of the graphically detailed "acts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting"); *Zykan v. Warsaw Cmty. Sch. Corp.*, 632 F.2d 1300 (7th Cir.

the other hand, the school board removed the book under factually suspicious motives that suggested political or religious censorship, courts generally held that students' First Amendment rights had been violated.¹² Significantly, each court's decision weighed heavily on the factual circumstances surrounding the school board's decision to remove a book, yielding fact specific, yet consistent,¹³ results. Furthermore, the delineation between the removal of books for reasons such as vulgarity and for suspicious reasons is significantly similar to the plurality decision in *Pico*, rendering many Pre-*Pico* decisions analogous and more-or-less applicable to Post-*Pico* decisions.¹⁴

A. *Board of Education, Island Trees Union Free School District No. 26 v. Pico*

Although there was relative uniformity in circuit courts, the Supreme Court used *Pico* to address the issue of school boards taking books out of school libraries for the first and only time.¹⁵ In *Pico*, three members of the Island Trees school board, who were responsible for the administration of schools close to Levittown, New York, attended a conference sponsored by the politically conservative organization: the Parents of New York United.¹⁶ At the conference, the board members received lists of books that the organization deemed to be

1980) (involving the removal of six books from course curriculum and the school library); *Bicknell v. Vergennes Union High Sch. Bd. of Directors*, 638 F.2d 428 (2nd Cir. 1980) (involving the removal of two books from a library for "vulgarity and indecency of language used").

¹² Achtman, *supra* note 10, at 952-53; see e.g.s, *Minarcini v. Strongsville City Sch. Dist.*, 541 F.2d 577 (6th Cir. 1976) (involving the removal of *Cat's Cradle* and *Catch 22* from school libraries and curriculum); *Right to Read Defense Comm. of Chelsea v. Sch. Comm.*, 454 F. Supp. 703 (D.C.Mass.,1978) (finding that an act of school committee in removing an anthology of writings by adolescents from high school library because it felt that language and theme of a poem in anthology might have a damaging impact on high school students did not serve a substantial governmental interest and constituted an infringement on First Amendment rights of students and faculty where, aside from ample evidence to support assertion that anthology was relevant to a number of courses taught at school, committee did not contend that book was obscene, improperly selected, or contributed to any shelf space problem); *Salvail v. Nashua Bd. of Ed.*, 469 F.Supp. 1269(D.C.N.H., 1979) (finding a school board failed to demonstrate substantial and legitimate government interest sufficient to warrant removal of MS magazine from high school library).

¹³ Achtman, *supra* note 10, at 949.

¹⁴ *Id.*

¹⁵ *Bd. of Educ., Island Trees Union Free Sch. Dist. 26 v. Pico*, 457 U.S. 853 (1982).

¹⁶ *Id.* at 856.

“objectionable.”¹⁷ After the conference, the school board discovered that the high school library contained nine of the books on the Parents of New York United’s lists.¹⁸ The board gave the “unofficial” direction to the superintendent of schools to remove all of the “objectionable” books from the library.¹⁹ In response to a scathing political cartoon in the *New York Daily News* depicting the school board as thugs surreptitiously sneaking into libraries to remove books, the school board issued a press release characterizing the books as “anti-American, anti-Christian, anti-Semetic [sic], and just plain filthy.”²⁰ Consequently, students filed suit against the schoolboard, alleging that the school board’s actions violated their First Amendment Rights.²¹

In briefs filed with the Court, the most significant point of disagreement was the school board’s motivation behind removing the books. Students claimed that the board “ordered the removal of the books from school libraries and proscribed their use in the curriculum because particular passages in the books offended their social, political and moral tastes and not because the books, taken as a whole, were lacking in educational value.”²² However, the board defended their actions claiming that:

[An] impermissible ideological sanitization of the school’s libraries as a result of a desire to follow the political ideology of a particular organization just did not occur. What did happen is that well intentioned board members in

¹⁷ *Id.* Frank Martin, the Vice-President of the board, described the books as “improper fare for school students.” *Id.*

¹⁸ *Id.* The books in the high school library that were on the list of “objectionable” books were: *Slaughter House Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*; *Laughing Boy*, by Oliver LaFarge; *Black Boy*, by Richard Wright; *A Hero Ain’t Nothin’ But A Sandwich*, by Alice Childress; and *Soul On Ice*, by Eldridge Cleaver. *Id.* at 856 n. 3. The school board also found an “objectionable” book, *A Reader for Writers*, edited by Jerome Archer, in the Junior High School library as well as another listed book, *The Fixer*, by Bernard Malamud, was being used as part of the curriculum for a twelfth grade literature course. *Id.*

¹⁹ *Id.* at 857. The superintendent objected to the school board’s directive, asserting that there was already an established procedure, designed to minimize public furor around such decisions, for removing books from libraries. *Id.* at 857 n. 4. The school board responded to the superintendent’s objection by repeating their request that all books should be removed from the library. *Id.*

²⁰ *Pico v. Bd. of Educ., Island Trees Union Free Sch. Dist.*, 474 F.Supp. 387, 390 n. 5 (E.D.N.Y. 1979).

²¹ *Pico*, 457 U.S. at 858.

²² *Id.* at 858-59.

furtherance of their duty to select and review curricular materials became aware of purportedly objectionable materials, examined same [sic], found some, but not all, to be objectionable and by varying votes at a public meeting proscribed the volumes in question.²³

Although the district court concluded that the board's actions were clearly content based, it granted the school board's motion for summary judgment finding that there was no violation of the First Amendment because school boards historically enjoy great discretion in creating educational policy.²⁴ The students appealed to the United States Court of Appeals for the Second Circuit.²⁵ The Court of Appeals reversed and remanded to the district court, holding that, under the First Amendment, the school board needed to provide a reasonable basis for removing the library books and that the school board had not provided a sufficient amount of evidence in support of the motivation behind their actions.²⁶ The Supreme Court granted certiorari and limited its review to the procedural question of whether the district court's grant of summary judgment should be reinstated.²⁷

In addition to the Court's limited procedural posture, the significance of the Court's holding was further tempered by the fact that the opinion was a three-justice-plurality. The plurality opinion, written by Justice Brennan, held that students have a fundamental First Amendment right to receive information, which is imperative for students to meaningfully exercise their rights to speech, press, and political freedom.²⁸ Furthermore, the plurality supported a high regard for the importance of school libraries in the education system and differentiated between a school board's ability to add and remove materials from school libraries, placing greater constitutional safeguards on the removal of school library

²³ App. To Pet. Cert., 1982 WL 608711, at 5.

²⁴ *Pico*, 474 F.Supp. at 395-97. As far as the Board's motivation, the District Court found "The board has restricted access only to certain books which the board believed to be, in essence, vulgar. While removal of such books from a school library may . . . reflect a misguided educational philosophy, it does not constitute a sharp and direct infringement of any first amendment right." *Id.* at 397

²⁵ *Pico*, 457 U.S. at 860.

²⁶ *Id.* (finding the students "should have . . . an opportunity to persuade a finder of fact that the ostensible justifications for [petitioners'] actions . . . were simply pretexts for the suppression of free speech.")

²⁷ *Id.* at 861.

²⁸ *Id.* at 861, 866-67 ("Just 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.").

books than the addition of them²⁹ The Court concluded that the Island Trees School District's school board's removal of books from the library violated students' First Amendment rights. The court held that "local school boards may not remove books from school library shelves simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."³⁰ However, a school district is permitted to remove a book if it is "pervasively vulgar" or educationally unsuitable.³¹

Justice Blackmun concurred with the plurality's opinion and defined the crux of the issue in the case as balancing the students' First Amendment rights with the broad discretion and interest of school boards to inculcate students with community values.³² He found that the correct balance in this scenario prohibits school boards from removing books for the purpose of restricting political ideas or social concepts discussed in them, when the removal is exclusively related to the disapproval of the ideas involved.³³ Essentially, Justice Blackmun advocated dispensing with the plurality's reverence for the school library as well as the students' rights to receive information and focused solely on the school board's unconstitutional discrimination between ideas.³⁴ Justice White, who wrote the other concurring opinion, asserted that there was not enough evidence of the school board's motives for the district court to enter a summary judgment decision.³⁵ Justice White refused to address the validity of the majority's test proscribing the removal of books to achieve political or social orthodoxy, stating that the Court "should not decide constitutional

²⁹ *Id.* at 869-70. ("[The school board] might well defend their claim of absolute discretion in matters of curriculum by reliance upon their duty to inculcate community values. But we think that [the school board's] reliance upon that duty is misplaced where, as here, they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom, into the school library and the regime of voluntary inquiry that there holds sway.")

³⁰ *Id.* at 872 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (internal quotations omitted)).

³¹ *Id.* at 871.

³² *Id.* at 876-77.

³³ *Id.* at 879-80.

³⁴ *Id.* at 878-79 ("I do not believe, as the plurality suggests, that the right at issue here is somehow associated with the peculiar nature of the school library; if schools may be used to inculcate ideas, surely libraries may play a role in that process. Instead, I suggest that certain forms of state discrimination between ideas are improper. In particular, our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons.") (internal citations omitted).

³⁵ *Id.* at 883 (White, J., concurring).

questions until it is necessary to do so, or at least until there is better reason to address them than are [sic] evident here.”³⁶

Four justices dissented to the plurality’s opinion. Justice Rehnquist’s dissent is the most significant in the jurisprudence of education law and the First Amendment. Justice Rehnquist argued that great deference should be given to the judgment of school boards and that it is completely constitutional for the board to take into account their “personal social, political and moral views” when making decisions.³⁷ Justice Rehnquist recognized that there may be some rare situations where a school board’s decision can violate students’ constitutional rights, but that, in this particular case, the Island Trees School District’s removal of books did not violate the Constitution.³⁸ Justice Rehnquist stated, “I can cheerfully concede [that school board discretion may not be exercised in a narrowly partisan or political manner], but as in so many other cases the extreme examples are seldom the ones that arise in the real world of constitutional litigation.”³⁹

Justices Burger, Powell, and O’Connor also dissented to the plurality opinion. Justice Burger was primarily concerned about the plurality’s creation of a new First Amendment right for students to receive information and disagreed with the plurality’s constitutional standard speculating that “virtually all educational decisions necessarily involve ‘political’ determinations.”⁴⁰ Justice Powell also disagreed with the plurality’s rule, which prohibited school boards from removing books simply because they dislike the ideas contained in them, deeming it a “standardless standard that affords no more than subjective guidance to school boards, their counsel, and to courts.”⁴¹ Justice O’Connor also dissented concluding that, “It is not the function of the courts to make the decisions that have been properly relegated to the elected members of the school boards. It is the school board that must determine educational suitability [of library books], and it has done so in this case.”⁴²

³⁶ *Id.* at 884.

³⁷ *Id.* at 909 (Rehnquist, J., dissenting).

³⁸ *Id.* at 907.

³⁹ *Id.*

⁴⁰ *Id.* at 890 (Burger, J., dissenting).

⁴¹ *Id.* at 895 (Powell, J., dissenting).

⁴² *Id.* at 921 (O’Connor, J., dissenting).

B. Hazelwood School District v. Kuhlmeier

Hazelwood was not a library book removal case but, instead, involved school administration censorship of a student paper.⁴³ In *Hazelwood*, the principal of Hazelwood East High School deleted two pages of a student newspaper, because he objected to the content of two of the articles in the paper.⁴⁴ One article addressed the difficulties associated with being the child of divorced parents; the other article interviewed several pregnant students and frankly discussed topics such as sex and birth control.⁴⁵ The school published the newspaper as part of the curriculum of a journalism class and funded the paper through school district funds.⁴⁶ Believing that the principal's deletion of their articles impeded upon their freedom of speech, students sued the Hazelwood School District in federal district court.⁴⁷

Although its facts are easily distinguishable from *Pico*, *Hazelwood* is significant in the *Pico* line of cases because it articulates a standard for school board deference for curricular decisions. Furthermore, *Pico* and *Hazelwood* are often discussed simultaneously and interchangeably, necessitating a brief discussion of *Hazelwood* in any *Pico* analysis. The Supreme Court established a relatively lenient test for school board regulation of matters that “may fairly be characterized as part of the school curriculum.”⁴⁸ Such regulation is permissible so long as it is “reasonably related to legitimate pedagogical concerns.”⁴⁹ *Hazelwood* is also significant because it is the first case in which the Supreme Court began to abrogate *Tinker* and assume a more speech restrictive tests. According to the Court, “Educators are entitled to exercise greater control over school-sponsored student expression than over students’ personal speech, in order to assure that participants learn whatever lessons expressive activity is designed to teach, that readers or listeners are not exposed to material which may be inappropriate for their level of maturity, and that views of individual speaker are not erroneously attributed to school.”⁵⁰

⁴³ 484 U.S. 260 (1988).

⁴⁴ *Id.* at 263.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 264.

⁴⁸ *Id.* at 270.

⁴⁹ *Id.* at 271.

⁵⁰ *Id.*

C. Campbell v. St. Tammany Parish School Board

In *Campbell*, the Fifth Circuit took responsibility for discerning the significance of the three-judge-plurality opinion in *Pico*.⁵¹ Generally, when an appellate court is left with a plurality precedent with no single rationale controlling the reason for the court's decision, then it should rule on the position of the narrowest grounds of the concurrences.⁵²

In *Campbell*, the parent of a seventh grade girl contacted the administrators of the St. Tammany Parish Junior High School concerning the availability of the book *Voodoo & Hoodoo* in the school's library.⁵³ According to the complaining parent, the book was "heighten[ing] children's infatuation with the supernatural and incit[ing] students to . . . explicit 'spells,'" which she believed was "potentially dangerous."⁵⁴ After several reviews of the book for content and appeals regarding the inclusion of the book in the library, the school board decided to remove the book from all of the school district's libraries.⁵⁵ The board offered no official explanation regarding its decision.⁵⁶ In response, parents of students in the St. Tammany Parish filed a lawsuit alleging that their children's First Amendment rights were violated by the removal of the book from the library.⁵⁷

The district court granted the parents' motion for summary judgment, relying on the precedent in *Pico*, and ordered all copies of the book be returned to the libraries immediately.⁵⁸ The court stated that, by removing *Voodoo & Hoodoo* from all public school libraries in St. Tammany Parish, the school board "intended to deny students access to

⁵¹ *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995).

⁵² *Gregg v. Georgia*, 428 U.S. 153, 169 n. 15 (1976) ("When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.").

⁵³ *Campbell*, 64 F.3d at 185. *Voodoo & Hoodoo* is a serious and scholarly work which details the development of African Tribal religion, its transfer and growth in the Western Hemisphere, and its survival in the present day United States through the practices of voodoo and hoodoo. *Id.* The book contains 220 examples of traditional voodoo and hoodoo spells. *Id.*

⁵⁴ *Id.* at 185-86.

⁵⁵ *Id.* at 187. The school originally included the book in the library because it offered further information and explanation of a topic included in the 8th grade social studies curriculum. *Id.* at 186.

⁵⁶ *Id.* at 187.

⁵⁷ *Id.*

⁵⁸ *Id.*

the objectionable ideas contained in the book, particularly the descriptions of voodoo practices and religious beliefs.”⁵⁹

On appeal, the Fifth Circuit determined that even though the *Pico* plurality opinion did not constitute binding precedent, it could serve as meaningful guidance in determining whether the school board’s motives were unconstitutional.⁶⁰ Furthermore, the court identified Justice White’s concurrence, which asserted that addressing the constitutional issues in *Pico* was inappropriate because material issues of fact regarding the board’s motivation were still at issue and precluded summary judgment, as the narrowest holding in *Pico*.⁶¹ Because the Supreme Court identified a school board’s motivation as the key inquiry in the constitutionality of a library book removal case, the Fifth Circuit reversed the district court’s summary judgment determination finding that there was not enough evidence of the St. Tammany School District’s school board’s motivation on the court record.⁶²

The *Campbell* court’s deviation from *Pico* is subtle, but it has a large impact on the disposition of students’ First Amendment § 1983 suits. In *Pico*, the Supreme Court reversed the district court’s decision in favor of the school district, a holding that asserted that there was not enough evidence of the school board’s motives for the district court to enter a summary judgment decision.⁶³ In other words, *Pico* erred on the side of caution in favor of student’s First Amendment rights. The court’s default was not in favor of the school district’s removal of the books. On the other hand, in *Campbell*, the Fifth Circuit reversed the district court’s student-speech-favorable decision, holding that there was not enough evidence to prove that board members removed the book with an unconstitutional motive. Thus, the Fifth Circuit in *Campbell* turned *Pico* on its head. It used a Supreme Court opinion that imposes a high burden on school districts at the summary judgment stage of litigation to offer proof that they did not violate students’ constitutional rights and transformed it into a greater evidentiary burden that students must meet to recover. In other words, the Fifth Circuit surreptitiously transformed a pro-student-speech opinion into a pro-school-board restriction opinion.

⁵⁹ *Id.*

⁶⁰ *Id.* at 189.

⁶¹ *Id.*

⁶² *Id.* at 190.

⁶³ Bd. of Educ., Island Trees Union Free Sch. Dist. 26 v. Pico, 457 U.S. 853, 883 (1982) (White, J., concurring).

D. Case v. Unified School Dist. No. 233

In 1995, the district court in Kansas also faced a constitutional issue regarding the removal of books from school libraries. In *Case*, two organizations began promoting gay and lesbian rights in Kansas City.⁶⁴ One of the organizations' campaign goals was to make sure that students had access to diverse information regarding gender and sexual orientation.⁶⁵ As a result, the organizations attempted to donate two books to the Olathe School District with gay or lesbian story lines: *Annie on My Mind*, by Nancy Garden, and *All American Boys*, by Frank Mosca.⁶⁶ Dr. Wimmer, the Olathe School District superintendent, rejected the book donations, despite a recommendation by librarians to accept the donation of *Annie on My Mind*. Instead, Dr. Wimmer proposed that the district remove all copies of *Annie on My Mind* already on school district shelves.⁶⁷ The district school board met after the superintendent's decision and reaffirmed his decision to remove the book from the district's libraries.⁶⁸ At no point in the process of removing the book from school libraries did the superintendent or the school board address the "educational suitability" of the book.⁶⁹ One school board member informed the court that he voted to remove the book because he was offended by the book's "glorification of the gay lifestyle."⁷⁰ Another board member supported the removal of the book because it promoted a "lifestyle that is sinful in the eyes of God."⁷¹

The district court adhered to the plurality rule articulated in *Pico*, which prohibits school boards from removing books from school libraries simply because they dislike the ideas contained in those books and seek to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion," because it was the only Supreme Court opinion

⁶⁴ *Case v. Unified Sch. Dist. No. 233*, 908 F.Supp. 864, 866 (D. Kan. 1995). The two organizations were the Gay and Lesbian Alliance Against Defamation/Kansas City (GLAAD/KC) and Project 21. *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 866-67. *Annie on My Mind* is a fictional work depicting a consensual lesbian relationship between two girls. *Id.* at 867. The book has received several awards and distinctions and includes no obscenity, vulgarity, or offensive language. *Id.*

⁶⁷ *Id.* at 868. Copies of *Annie on My Mind* had been on the shelves of the Olathe South High School since the 1980s. *Id.*

⁶⁸ *Id.* at 869.

⁶⁹ *Id.*

⁷⁰ *Id.* at 870.

⁷¹ *Id.* Another board member testified that it is not "okay" to be gay, "[b]ecause engaging in a gay lifestyle can lead to death, destruction, disease, emotional problems." *Id.* at 871. Only two board members voted to keep the book in school libraries. *Id.*

addressing the removal of library books from public school libraries.⁷² The court found that the “highly irregular and erratic actions” of the school board constituted “important evidence of [the board members’] improper motivation.”⁷³ The court also took into consideration that the board never addressed the “educational suitability” of the books when deciding whether to remove them.⁷⁴ The court determined that availability of the book in local public libraries and book stores did not cure the constitutional violation.⁷⁵ Thus, the court held, in accordance with *Pico*, that the board’s motivations were narrowly political and violated students’ First Amendment rights and granted an injunction requiring that all copies of *Annie on My Mind* be returned to Olathe School District libraries.⁷⁶

E. *Counts v. Cedarville School District*

In *Counts*, a mother and a local pastor, who was also a member of the school board, expressed concern about *Harry Potter and the Sorcerer’s Stone* being in circulation in the school libraries of Cedarville School District.⁷⁷ Consequently, a library committee was formed, pursuant to school district policies, to review the suitability of the *Harry Potter* book for school district use. The committee voted unanimously to keep the book in general circulation.⁷⁸ After reviewing the library committee’s findings, the school board decided to place *Harry Potter and the Sorcerer’s Stone*, as well as three other books from the *Harry Potter* series, on restricted reserve in school libraries, making them only accessible with signed, parental permission.⁷⁹ School board members testified that the reason they voted to restrict student access to the *Harry Potter* books was because “the books might promote disobedience and disrespect for authority,” and the books deal with “witchcraft” and “the

⁷² *Id.* at 875. The court also noted that there was no 10th Circuit precedent addressing the issue. *Id.*

⁷³ *Id.* at 876.

⁷⁴ *Id.* at 875.

⁷⁵ *Id.*

⁷⁶ *Id.* at 876-77.

⁷⁷ *Counts v. Cedarville Sch. Dist.*, 295 F.Supp.2d 996, 1001 (W.D. Ark. 2003). *Harry Potter and the Sorcerer’s Stone* is the first book in the *Harry Potter* series. *Id.*

⁷⁸ *Id.*

⁷⁹ *Id.* The Cedarville High School Principal issued a memo requiring all *Harry Potter* books be removed from school library shelves and placed “where they are highly visible, yet not accessible to the students unless they are checking them out.” *Id.* In order to check out the books, a student must have “a signed permission statement from their parent/legal guardian.” *Id.* The school board intended this to be a restriction on access to the books. *Id.*

occult.”⁸⁰ One board member asserted that he voted to restrict the books because the books “could create anarchy” and that he viewed witchcraft as a religion and did not want students in Cedarville schools exposed to “witchcraft religion.”⁸¹

The court, in ruling on the students’ motion for summary judgment, adopted the plurality opinion in *Pico*, providing that a school board may not remove a book from a school simply because they dislike the ideas contained within it and seek to proscribe what shall be orthodox in politics, religion, or other social ideas.⁸² The court held that, with regard to the school board’s allegation that the books could cause student misbehavior and anarchy, that the justification was entirely speculative because there were no instances of disobedience or disrespect related to the *Harry Potter* books.⁸³ Furthermore, the judge concluded that mere speculative apprehensions were not sufficient to excuse the school board’s violation of the Cedarville students’ constitutional rights. The court also held that the school board’s objections to the books’ treatment of witchcraft and the occult were purely based upon religion.⁸⁴ Thus, regardless of the strength of its personal objection to witchcraft, the school board was not entitled to remove the book on this basis.⁸⁵ The court held, “the conclusion is inevitable that defendant removed the books from its library shelves for reasons not authorized by the Constitution.”⁸⁶

The school board also defended its actions by truthfully asserting that the students’ access to this book was not completely banned.⁸⁷ However, the court reasoned that even the minimal loss of First Amendment rights is injurious.⁸⁸ Furthermore, the court reasoned that the

⁸⁰ *Id.* at 1002.

⁸¹ *Id.* at 1003-04. The board member asserted that removing the books was “a preventative measure at that school to prevent any signs [of anarchy] that will come up like Columbine and Jonesboro.” *Id.* at 1003. Another board member that voted for restriction of the book said he objected to the books because they “teach witchcraft.” *Id.* at 1004. However, he stated that he would not object to the books if they “promoted Christianity.” *Id.*

⁸² *Id.* at 1004.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ *Id.* at 1005.

⁸⁷ *Id.* at 998-99.

⁸⁸ *Id.* at 999. (“The inducement afforded by placing conditions on a benefit need not be particularly great in order to find that rights have been violated. Rights are infringed both where the government fines a person a penny for being a Republican and where it withholds the grant of a penny for the same reason.”) (quoting *Elrod v. Burns*, 427 U.S. 347, n. 13 (1976)).

fact that the books were available to the students with a parent's permission or at home did not negate the constitutional harm caused by the school board.⁸⁹ The court held that "one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."⁹⁰

F. American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board

In the most recent case decided in the lower courts about school library book removal, the Eleventh Circuit addressed the Miami-Dade County's removal of a children's book entitled *¡Vamos a Cuba!*.⁹¹ Juan Amador, a former political prisoner in Cuba, was outraged when his daughter brought home the book *¡Vamos a Cuba!* from her elementary school library.⁹² According to Amador, the book is rife with inaccuracies about the daily life of the Cuban people.⁹³ Consequently, Amador filed a "Citizen's Request for Reconsideration of Media" advocating the removal of the book from school libraries and seeking to replace it with a book "that truly reflects the plight of the Cuban people of the past and present."⁹⁴ After the book passed members of three different levels of review, all of which suggested school libraries continue to put the book on shelves, the Miami-Dade school board voted to remove all copies of the book as well as other books in the same series from all school libraries.⁹⁵ One school board member expressed fear of retaliation by members of the Miami Cuban community against board members who voted to retain the book by stating, "They can't walk out of here. If they don't vote for it, they can't go home, they might find a bomb under their automobiles, and I feel that's a shame to be put upon a school system that we are trying to

⁸⁹ *Id.*

⁹⁰ *Id.* at 1000 (quoting *Reno v. ACLU*, 521 U.S. 844, 880 (1997)).

⁹¹ *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177 (11th Cir. 2009).

⁹² *Id.* at 1182. *¡Vamos a Cuba!* is part of a series of books targeted at young readers. *Id.* at 1183. The books seek to show what life is like for children in other countries. *Id.*

⁹³ *Id.* at 1182. At the time of Amador's complaint, there were forty-nine copies of the book in both English and Spanish spread across thirty-three of the district's libraries. *Id.* at 1183. The book was shelved in the non-fiction section of elementary school libraries. *Id.*

⁹⁴ *Id.* at 1183-84. According to Amador, the book "portrays a life in Cuba that does not exist." *Id.* at 1184. *¡Vamos a Cuba!* follows a formulaic approach to introducing "superficial introductions to geography, people, customs, language, and daily life" of people in Cuba. *Id.* at 1183.

⁹⁵ *Id.* at 1187-88.

train our children to have equality and justice.”⁹⁶ However, most board members justified voting to remove the book based on alleged inaccuracies in its text, elaborating, “we recognize that this book due to its acts of commission, and omission does not teach our children the truth about Cuba, then it should be removed from our public school libraries, we have that sacred responsibility.”⁹⁷

Within a week of the school board’s removal of the book from elementary library shelves, the American Civil Liberties Union filed a suit alleging that the school board violated students’ Fourteenth Amendment rights.⁹⁸ The district court decided that “the heart of the argument” for the removal of *¡Vamos a Cuba!* is that it “omit[s] the harsh truth about totalitarian life in Communist Cuba.”⁹⁹ The school board advocated that the *Hazelwood* test allowing them to make broad curricular change, given they are justified by a legitimate pedagogical interest, applies in this case.¹⁰⁰ The district court held, however, that the *Hazelwood* test has not been expanded to apply when non-curricular books are at issue.¹⁰¹ The court ruled, even under the *Hazelwood* standard, the school officials’ actions were motivated not by pedagogical concerns relating to vulgarity and sexuality, but instead by disagreement with the views expressed in the book.¹⁰² The court adjudicated the removal of *¡Vamos a Cuba!* by applying the *Pico* plurality opinion rule that a school board may not remove non-curricular library books simply because the board “dislikes the ideas or the point-of-view contained in the books and seeks by their removal to prescribe what shall be orthodox in politics, nationalism,

⁹⁶ *Id.* at 1187. The same board member that stated he was voting to remove the book out of fear of the community’s reaction elaborated:

Will there be some condemnations? I honestly believe there will be. Will my children and my grandchildren be at risk? They just might be, because of the e-mails, and many of the things that have come in my direction have not been pleasant I can’t vote my conscience without feeling threatened. That should never happen in this community anymore. That should never happen anymore, and especially at this place that we call Miami-Dade County Public Schools, especially at this dias [sic], where we’re supposedly setting a tone for our children. *Id.*

⁹⁷ *Id.* at 1186. Some of the alleged inaccuracies in the book involve the title of the book being inaccurate because “Cuba is not a country [one is] free to visit.” *Id.* at 1185. Also, the cave drawings pictured on page twenty-nine of the book “were not painted 1,000 years ago as the text states.” *Id.*

⁹⁸ *Id.* at 1188.

⁹⁹ *ACLU v. MIAMI-DADE COUNTY SCH. BD.*, 439 F.SUPP.2D 1242, 1265 (S.D. FLA., 2006).

¹⁰⁰ *Id.* at 1272.

¹⁰¹ *Id.*

¹⁰² *Id.*

religion, or other matters of opinion.”¹⁰³ Ultimately, the court granted a preliminary injunction to replace all copies of the book in school libraries because the school board “intended by their removal of the books to deny schoolchildren access to ideas or points-of-view with which the school officials disagreed, and that this intent was the decisive factor in their removal decision” and the board “abused its discretion in a manner that violated the transcendent imperatives of the First Amendment.”¹⁰⁴

On appeal, the Eleventh Circuit participated in a *de novo* review of the district court’s factual determination regarding the board’s motivation for removing the book.¹⁰⁵ The court reversed the district court’s judgment regarding the school board’s motivations and determined that the board was motivated by inaccuracies within the book and not an Anti-Castro political agenda.¹⁰⁶ The court utilized the *Pico* plurality test only nominally.¹⁰⁷ The court, however, determined that the students’ First Amendment rights were not violated under the *Pico* test because the school board is not prohibited from removing a book for factual inaccuracies and there is no constitutional right to materials containing misstatements of fact.¹⁰⁸ The court stipulated that the book: falsely represented that people in Cuba ate, worked, and went to school just like American children did, with no mention of food rationing, that practically all citizens were required to work for the government, and that it was crime to exercise private initiative.¹⁰⁹

Also, rather ironically, after multiple pages of analysis exploring the inaccuracies contained in *¡Vamos a Cuba!*, the court held that courts should not be the arbiters of educational suitability of library books and that such decisions are best left to local school boards.¹¹⁰ Moreover, the Eleventh Circuit reversed the district court’s grant of a preliminary injunction and held that no First Amendment violation occurred with the removal of *¡Vamos a Cuba!*.¹¹¹

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 1283.

¹⁰⁵ *ACLU v. Miami-Dade County Sch. Bd.*, 557 F.3d 1177, 1198 (11th Cir. 2009).

¹⁰⁶ *Id.* at 1211.

¹⁰⁷ *See id.* at 1202.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 1201-1203.

¹¹⁰ *Id.* at 1225-26.

¹¹¹ *Id.* at 1227.

The ACLU attempted to appeal the Eleventh Circuit's decision to the United States Supreme Court.¹¹² The ACLU alleged that the circuit court erred in violating the well-established principle of deferential review to a district court's determination of intent or motive.¹¹³ Furthermore, the ACLU argued that even if the circuit court retained the right to disturb the lower court's factual determinations of motivation, such interference is not appropriate when the district court resolved factual disputes in favor of free speech.¹¹⁴ The Supreme Court, however, did not grant certiorari to the case.¹¹⁵

II. Public Library Cases

Although the following cases do not specifically involve the action of school boards and public school libraries, they do involve significant dicta pertinent to the interpretation of the current First Amendment analysis regarding school board acquisition and removal of books from school libraries.

A. *Sund v. City of Wichita Falls, Texas*

In 1997, the Wichita Falls Public Library obtained two copies of *Daddy's Roommate* and *Heather Has Two Mommies*, books aimed at the children of homosexual parents.¹¹⁶ After the books were placed in the children's section of the library, special interest groups began to wage a "moral battle" against the books, characterizing them as offensive and objectionable.¹¹⁷ In response to the special interest groups attempting to restrict children's access to the books, the City Council passed the "Altman Resolution," which provided that upon the collection of 300

¹¹² Petition for a Writ of Certiorari, *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 2009 WL 1763601 (U.S. Jun. 18, 2009).

¹¹³ *Id.* at 16-17.

¹¹⁴ *Id.*

¹¹⁵ *ACLU v. Miami-Dade County Sch. Bd.*, 130 S.Ct. 659 (2009) (*cert. denied*).

¹¹⁶ *Sund v. City of Wichita Falls, Tex.*, 121 F.Supp.2d 530, 532 (N.D. Tex. 2000). *Daddy's Roommate*, the first book written for children of gay men, portrays a story about a boy, his father, and his father's partner "as they take part in activities familiar to all kinds of families: cleaning the house, shopping, playing games, fighting, and making up." *Id.* *Heather Has Two Mommies* is about the three year-old daughter of lesbian mothers who discovers, through the help of a play group, that there are lots of different kinds of families. *Id.*

¹¹⁷ *Id.* at 533. The Pastor of the First Baptist Church in Wichita Falls, Reverend Robert Jeffress, checked out both copies of the two books and refused to return them, because he objected to their "homosexual message." *Id.* Reverend Jeffress destroyed the books and only reimbursed the library \$54.00 for their cost on the condition that the library would not purchase any replacement copies. *Id.*

signatures of citizens with library cards, children's books must be removed by the Library Administrator from the children's section of the library and placed in the adult section.¹¹⁸ In 1999, the Library Administrator received a petition in procedural compliance with the "Altman Resolution," mandating the removal of the books.¹¹⁹ Without a mechanism to verify the legitimacy of the signatures or appeal the draconian demands of the petition, the Administrator reshelved the books in the adult section. Shortly thereafter, several concerned citizens filed a lawsuit seeking an injunction against the reshelving of the books, alleging that it violated their First Amendment rights.¹²⁰

The United States District Court for the Northern District of Texas reexamined the fundamental right of children to receive information established by the plurality in *Pico*.¹²¹ According to the court, unlike school libraries, there is no interest to inculcate children with community values vis-à-vis public libraries.¹²² Children, therefore, enjoy greater First Amendment rights in public libraries than they do in public school libraries.¹²³ The court referenced the plurality's rule in *Pico* – that school administrators cannot remove books based on the fact that they do not like the ideas contained within them and seek to establish orthodoxy of ideas – and established that, if school administrators are prohibited from removing books because they dislike the ideas within them, 300 patrons of the library could not remove a book from the public library for the same reason.¹²⁴ The district court further affirmed the *Pico* plurality opinion's "sanctity of the library" approach, holding that libraries remain significantly important to the exercise of First Amendment rights and recognizing that libraries were designed to be places of "freewheeling inquiry."¹²⁵ The court also concluded that the "Altman Resolution" was

¹¹⁸ *Id.* at 533-34.

¹¹⁹ *Id.* at 535. Although *Heather Has Two Mommies* and *Daddy's Roommate* were the first victims of the "Altman Resolution," they were not the last. *Id.* The Library Administrator also received requests to remove *Humbug Witch* (about a child who dresses up as a pretend-witch); *I Wish Daddy Didn't Drink So Much* (about a little girl dealing with her father's drinking problem); *My Big Sister Takes Drugs* (about a boy who is dealing with his sister's drug use); *Mommy and Me by Ourselves Again* (about divorce); *Bunnies Wedding* (about interracial relationships); and *Through My Window* (about interracial relationships). *Id.* at 540.

¹²⁰ *Id.* at 535.

¹²¹ *Id.* at 547.

¹²² *Id.* at 547-48.

¹²³ *Id.* at 548.

¹²⁴ *Id.*

¹²⁵ *Id.* (quoting *Bd. of Educ., Island Trees Union Free Sch. Dist. 26 v. Pico*, 457 U.S. 853, 915 (1982) (Rehnquist, J., dissenting)).

enacted solely to suppress the speech contained in *Heather Has Two Mommies* and *Daddy's Roommate*, making the removal of the books both content and viewpoint based.¹²⁶ Moreover, the "Altman Resolution" also violated procedural due process principles, because there was not an adequate method to appeal a petition for removal.¹²⁷

The city council defended the reshelving of the books, correctly stating the books were not physically removed from the library's circulation but, instead, were moved to the adult section of the library.¹²⁸ The court found that this action still placed a significant burden on the exercise of First Amendment rights.¹²⁹ The district court held,

"[t]he possibility the Government could have imposed more draconian limitations on speech has never justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech."¹³⁰

Therefore, the court found an inexcusable violation of the First Amendment and granted a permanent injunction mandating the return of *Heather Has Two Mommies* and *Daddy's Roommate* back to the children's shelves.¹³¹

B. United States v. American Library Association, Inc.

In *United States v. American Library Association, Inc.*¹³², public libraries, their patrons, and website publishers challenged the constitutionality of the Children's Internet Protection Act (CIPA), which required public libraries to utilize internet filters that block pornography, obscenity, and websites that are harmful to children as a precondition for receiving federal funds.¹³³ The libraries contended that CIPA violated its patrons' First Amendment rights because the filtering software often blocked protected speech in addition to pornography and obscenity.¹³⁴ Website publishers whose websites were blocked by the software also

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.* at 549.

¹²⁹ *Id.* at 549-550.

¹³⁰ *Id.* at 550 (quoting *Denver Area Educ. Telecomm. Consortium, Inc. v. FCC*, 518 U.S. 72 (1996) (Kennedy, J., concurring in part and dissenting in part)).

¹³¹ *See id.*

¹³² *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194 (2003).

¹³³ *Id.* at 199.

¹³⁴ *Id.* at 207-08.

challenged the constitutionality of CIPA, asserting that they had a constitutional right to distribute information in libraries.¹³⁵

The Supreme Court held that website publishers had no standing to file suit to have their content included in libraries.¹³⁶ The Court concluded that forum analysis and heightened judicial scrutiny was inappropriate in this case, because librarians and public libraries have always enjoyed broad discretion to decide the content contained on library shelves.¹³⁷ In fact, the ability to include or exclude a book or material based on content is essential to fulfill the educational mission of the library.¹³⁸ In other words, “Internet terminals are not acquired by a library in order to create a public forum for Web publishers to express themselves. Rather, a library provides such access for the same reasons it offers other library resources: to facilitate research, learning, and recreational pursuits by furnishing materials of requisite and appropriate quality.”¹³⁹ Thus, website publishers and authors of books have no First Amendment right to have their content housed in a library.¹⁴⁰ While this holding was not explicitly extended by the Supreme Court to the book acquisitions of public school libraries, legal commentators and lower courts have inferred dicta applying it to the acquisition of books and selection of textbooks in public schools.¹⁴¹

Furthermore, in a departure from its previous holdings that even a minimal burden on First Amendment rights constituted a significant enough violation for redress, the Court held that the erroneous filtering of protected speech was not unconstitutional because a library patron could notify a librarian if he or she wanted to view the blocked page.¹⁴² Therefore, since there was no significant infringement on protected rights, the majority held that CIPA was an appropriate exercise of Congress’ power.¹⁴³

Pico was not cited or referenced at all in the majority opinion. Instead, the only justice to focus on the plurality in *Pico* was Justice

¹³⁵ *Id.* at 205-07.

¹³⁶ *Id.* at 195.

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ See generally Mark G. Yudof, *Personal Speech and Government Expression*, 38 CASE W. RES. L. REV. 671, 687 (1987) (“Even in the school library, the librarian must normally implement the board’s decisions, and certainly the writers of the books do not have a constitutional right to determine what books will be acquired.”).

¹⁴² *Am. Library Ass’n, Inc.*, 539 U.S. at 208-09.

¹⁴³ *Id.* at 214.

Souter, who authored the dissent.¹⁴⁴ Justice Souter asserted that the majority failed to take into consideration the distinction outlined in *Pico* between the discretion of libraries to initially exclude content and the removal of content.¹⁴⁵ Furthermore, Justice Souter lambasted the majority's reasoning that there was no First Amendment violation because patrons could get a librarian to unblock erroneously filtered content, asserting that "[t]he policy of the First Amendment favors dissemination of information and opinion, and the guarantees of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential."¹⁴⁶

III. Decisions Regarding a School Board's Discretion Over Changes in Curricula

Whereas the previously discussed cases have been non-curricular in nature, the following cases involve expressly curricular decisions made by school boards. First Amendment claims against school boards for curricular decisions are rarely successful and have very little consistency or clarity within lower courts.

A. *Pratt v. Independent School District No. 831*

The Eighth Circuit rendered its decision in *Pratt v. Independent School District No. 831*¹⁴⁷ between the Second Circuit's decision in *Pico* and the creation of the Supreme Court's *Pico* plurality.¹⁴⁸ Thus, there was no Supreme Court precedent governing the distinction between curricular and non-curricular school board decisions.¹⁴⁹ The circuit court recognized, however, that the Supreme Court has granted school boards "comprehensive powers and substantial discretion to discharge the important tasks entrusted to them."¹⁵⁰

In *Pratt*, the school board removed the short film *The Lottery* as well as the accompanying film trailer discussing the film's story and

¹⁴⁴ *Id.* at 242 (Souter, J., dissenting).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.* at 235.

¹⁴⁷ *Pratt v. Indep. Sch. Dist. No. 831*, 670 F.2d 771 (8th Cir. 1982).

¹⁴⁸ Raymond W. Johnson, Note, *Twenty-Five Years of "Tinkering" with the First Amendment in Public Schools*, 17 J. JUV. L. 45, 54 (1996).

¹⁴⁹ See generally *id.*

¹⁵⁰ *Pratt*, 670 F.2d at 776 (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

themes from high school American Literature classes¹⁵¹ *The Lottery* is based on a short story of the name, which depicts a small town whose citizens pick a different person to stone to death every year.¹⁵² The school board's objections to the films focused on their violence and its alleged impact on the students' family, religious, and moral values.¹⁵³ The district court's factual inquiry, on the other hand, determined that the films had been banned because of their "ideological content," which included "religious overtones."¹⁵⁴

On appeal, the circuit court recognized that school boards historically have substantial discretion in matters concerning school curriculum but:

[S]chool boards do not have an absolute right to remove materials from the curriculum At the very least, the First Amendment precludes local authorities from imposing a 'pall of orthodoxy' on classroom discussion which implicates the state in the propagation of a particular religious or ideological viewpoint.¹⁵⁵

The court held that the school board only constructed its objection to the violence contained in the films in preparation for litigation.¹⁵⁶ Thus, the school board did not have a substantial or reasonable interest for meddling with the students' right to access the information contained in the films.¹⁵⁷ Furthermore, the "religious overtones" in the record of the school board meeting was sufficient proof that the school board was attempting to subject the students to a "pall" of religious orthodoxy.¹⁵⁸

The school board attempted to justify its actions just as the school board in *Counts* and the city council in *Sund* did – by pointing out that the short story still remains available to students and teachers in the school library.¹⁵⁹ The court summarily rejected this argument, however, reasoning that "[r]estraint on protected speech generally cannot be

¹⁵¹ *Id.* at 773.

¹⁵² *Id.*

¹⁵³ *Id.* Critics of the film asserted that the "theme or purpose" of the film was the "breakdown of family values and tradition[s]." *Id.* at 774 n.1. They further accused the film of being a "subtle way of accomplishing destruction of [the] family unit. Causing them [the students] again to question their values, traditions and religious beliefs." *Id.* at 774.

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 776. (quoting *Keyishian v. Board of Regents*, 385 U.S. 589, 603 (1967)).

¹⁵⁶ *Id.* at 778.

¹⁵⁷ *Id.* at 777-78.

¹⁵⁸ *Id.* at 778.

¹⁵⁹ *Id.* at 779.

justified by the fact that there may be other times, places or circumstances for such expression.”¹⁶⁰ The court further held that access to the story was not the greater issue in the case, emphasizing that “[t]he symbolic effect of removing the films from the curriculum is more significant than the resulting limitation of access to the story. The board has used its official power to perform an act clearly indicating that the ideas contained in the films are unacceptable and should not be discussed or considered. This message is not lost on students and teachers, and its chilling effect is obvious.”¹⁶¹

The *Pratt* case is not only significant for its analysis under the “pall of orthodoxy” standard, but also, it is often the only cited case holding that the school board exceeded its discretion over curricular decisions and violated students’ First Amendment rights.¹⁶²

B. Virgil v. School Board of Columbia County, Florida

In *Virgil*, the Eleventh Circuit examined a challenge to the removal of a humanities textbook after the *Pico* and *Hazelwood* decisions.¹⁶³ An elective humanities course at Columbia High School used the textbook *Volume I of The Humanities: Cultural Roots and Continuities* for both required and optional reading.¹⁶⁴ In 1986, a parent of a student who had been enrolled in the course filed a complaint with the school board about the textbook.¹⁶⁵ The parent objected to the book’s inclusion of *Lysistrata*, written by Aristophanes, and “The Miller’s Tale”, written by Geoffrey Chaucer, neither of which was assigned nor required reading for the Humanities course.¹⁶⁶ Contrary to an advisory committee’s advice, the school board voted to terminate the use of the book in Columbia County schools on the grounds that it contained two stories which the school board deemed inappropriate for high school students.¹⁶⁷ Parents and students of Columbia County schools filed suit seeking an injunction

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² See generally, Martin D. Munic, Case Comment, *Education or Indoctrination – Removal of Books from Public School Libraries: Board of Education, Island Trees Union Free School District v. Pico*, 68 MINN. L. REV. 213, n.79 (1983); Stanley Ingber, *Socialization, Indoctrination, and the “Pall of Orthodoxy”: Value Training in the Public Schools*, 1987 U. ILL. L. REV. 15, n. 143 (1987).

¹⁶³ *Virgil v. School Bd. of Columbia County, Fla.*, 862 F.2d 1517 (11th Cir. 1989).

¹⁶⁴ *Id.* at 518-19.

¹⁶⁵ *Id.* at 519.

¹⁶⁶ *Id.*

¹⁶⁷ *Id.*

against the removal of the book, alleging that the removal of the book from school curriculum violated the students' First Amendment rights.¹⁶⁸

Upon review of the facts of the case, the district court determined that the primary motivation for removing the book was "the sexuality in the two selections" and their "excessively vulgar . . . language and subject matter."¹⁶⁹ Despite some misgivings about the inappropriateness of Chaucer and Aristophanes for high school students, the district court utilized the deferential standard in *Hazelwood* in order to hold that the removal of the books was "reasonably related" to a legitimate "pedagogical concern," and denied the plaintiffs' injunction.¹⁷⁰

On appeal, the Eleventh Circuit affirmed that the textbook at issue "may fairly be characterized as part of school curriculum" under the *Hazelwood* standard because they could "carry the imprimatur of school approval."¹⁷¹ It also utilized the *Hazelwood* "legitimate pedagogical concern" test; but it did not inquire further into the motives of the school board for removing the book on the basis of its excessive sexuality and vulgarity, because they were stipulated by the parties.¹⁷² The court further asserted that protecting students from vulgarity and obscenity were acceptable motivations for library book removal.¹⁷³ Thus, even if *Pico* did apply in this case, the stipulated motivations suggest that the book removal was constitutional.¹⁷⁴ Moreover, the circuit court reaffirmed the lower court's judgment, holding that there was not a First Amendment violation.¹⁷⁵

Perhaps in a subtle attempt to indicate that it likely would have ruled otherwise if the school board's motivations had not been stipulated, the circuit court scolded the school board for trying to shield students from classic literature.¹⁷⁶ The court wrote:

¹⁶⁸ *Id.*

¹⁶⁹ *Id.* at 1520. The district court acknowledged that "the School Board's decision reflects its own restrictive views of the appropriate values to which Columbia High School students should be exposed." *Id.* The court also expressed difficulty "apprehend[ing] the harm which could conceivably be caused to a group of eleventh- and twelfth-grade students by exposure to Aristophanes and Chaucer." *Id.*

¹⁷⁰ *Id.*

¹⁷¹ *Id.* at 1521-22.

¹⁷² *Id.* at 1522-23.

¹⁷³ *Id.* at n.8.

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* at 1525.

¹⁷⁶ *Id.*

Of course, we do not endorse the Board's decision. Like the district court, we seriously question how young persons just below the age of majority can be harmed by these masterpieces of Western literature. However, having concluded that there is no constitutional violation, our role is not to second guess the wisdom of the Board's action.¹⁷⁷

C. *Chiras v. Miller*

In *Chiras v. Miller*, the Fifth Circuit examined the rejection of a commonly used environmental science textbook.¹⁷⁸ Daniel Chiras submitted his textbook, *Environmental Science: Creating a Sustainable Future*, to the Texas State Board of Education for approval to be used in environmental science classes throughout the state.¹⁷⁹ Despite being the only book recommended for use in advanced environmental science courses by a rigorous peer review process and having undergone several revisions of the textbook to appease the Board of Education, the book was rejected for use in Texas schools allegedly because of errors and inaccuracies within the text of the book.¹⁸⁰ According to the Trial Lawyers for Public Justice, the book was rejected for supporting beliefs that were contrary to Christianity and free enterprise.¹⁸¹ Furthermore, many of the facts identified as erroneous by the Texas State Board of Education were matters of ideological controversy and irresolvable philosophical disputes, not matters of indisputable fact.¹⁸² In response, Chiras as well as students in Texas public schools filed a lawsuit, alleging their First Amendment rights had been violated by the rejection of the book.¹⁸³ In support of their constitutional claims, the plaintiffs submitted several statements of the board members espousing their condemnation of the book for supporting

¹⁷⁷ *Id.*

¹⁷⁸ *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005).

¹⁷⁹ *Id.* at 609.

¹⁸⁰ *Id.* at 609-10.

¹⁸¹ JONATHAN GREEN & NICHOLAS J. KAROLIDES, *THE ENCYCLOPEDIA OF CENSORSHIP* 564 (2005).

¹⁸² Frederick Clarkson, *They Ban Textbooks, Don't They?* SALON.COM, (Nov. 5, 2003), <http://www.salon.com/news/feature/2003/11/05/textbooks>. For instance, one alleged inaccuracy involved Chiras' claim that Native Americans practiced sustainable development, which required a unified set of goals. *Id.* The Board of Education rejected this suggesting that it was "more likely that most of these largely nomadic peoples espoused a 'frontier ethic' that was made possible by the fact of very small populations and large territories." *Id.* However, the use of the term "more likely" suggests that this is a matter of differing opinion as opposed to incontrovertible fact. *Id.*

¹⁸³ *Chiras*, 432 F.3d at 610.

the theory of global warming as well as negatively portraying the oil industry.¹⁸⁴

The district court determined the Texas State Board of Education's rejection of the textbook was curricular in nature and applied the *Hazelwood* test. The court decided that the board's motivations were "reasonably related to legitimate pedagogical concerns."¹⁸⁵ Furthermore, the board's curricular decisions did not have to be viewpoint neutral.¹⁸⁶ Thus, the district court granted the Texas State Board of Education's motion to dismiss the claim.¹⁸⁷

On appeal, the Fifth Circuit reviewed the district court's determinations *de novo*. First, the court examined Chiras' First Amendment claims, which were based on his right to have his textbook included in Texas environmental science curriculum.¹⁸⁸ The Fifth Circuit invoked the government speech exception to the First Amendment, a doctrine which provides that the Government has the ability to control its own message when it speaks or advocates a position related to the public interest.¹⁸⁹ The Fifth Circuit stated that the purpose of the State of Texas purchasing textbooks was to "enlist . . . private entities to convey its own message," not to relay a "diversity of views."¹⁹⁰ Furthermore, the court referred to the Supreme Court's decision in *American Library Association*,

¹⁸⁴ *Id.* Board member McLeroy wrote an article published on a Christian-Conservative website in which he indicated that the Board of Education rejected Chiras' textbook because it was based on a "false premise" and that the textbook's "claim that the root cause of environmental problems is economic growth is simply wrong." Second, the *Austin American-Statesman* reported that Appellee Shore told the newspaper that "[t]he oil and gas industry should be consulted" regarding passage of proposed environmental science textbooks, because "[w]e [the oil and gas industry] always get a raw deal." Third, the *Dallas Morning News* reported that Appellee Bradley told the newspaper that the Board was "seeing a change in the attitude of publishers. They are starting to work with conservative groups and textbook critics . . . who more accurately reflect the viewpoint of most Texans. I really think the pendulum is swinging back to a more traditional, conservative value system in our schools."

¹⁸⁵ *Id.*

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ *Id.* at 611.

¹⁸⁹ *Id.* The Government can, without violating the Constitution, selectively fund a program to encourage certain activities it believes to be in the public interest, without at the same time funding an alternative program which seeks to deal with the problem in another way. In doing so, the Government has not discriminated on the basis of viewpoint; it has merely chosen to fund one activity to the exclusion of the other. A legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right. *Id.* (quoting *Rust v. Sullivan*, 500 U.S. 173, 193 (1991)).

¹⁹⁰ *Id.* at 614.

finding that in cases regarding the acquisition of books and curriculum related matters, a forum analysis is completely inappropriate.¹⁹¹ Just as website publishers had no right to have their content included in libraries in *American Library Association*, textbook authors have no right to have their content included in school curriculum.¹⁹² Moreover, the court found that “[i]t is necessary for the Board to exercise editorial judgment over the content of the instructional materials it selects for use in the public school classrooms, and the exercise of that discretion will necessarily reflect the viewpoint of the Board members. The purpose of the Board is not to establish a forum for the expression of the views the various authors of textbooks and other instructional materials might want to interject into the classroom.”¹⁹³ Thus, there was no forum created by the State of Texas for textbook authors to express their views, and textbook authors do not have a constitutional right requiring the acquisition of their books.¹⁹⁴

The Fifth Circuit also assessed the validity of the students’ First Amendment claims.¹⁹⁵ The court rejected the district court and the Eleventh Circuit’s use of *Hazelwood* to determine the students’ constitutional rights.¹⁹⁶ It limited the application of *Hazelwood* to its facts and determined that the *Hazelwood* test only applies when a school is opening up a forum for student or private speech.¹⁹⁷ Because the Fifth Circuit determined that textbooks were a forum for government speech, the students’ rights could only be violated if the Board of Education was seeking to achieve a “pall of orthodoxy.”¹⁹⁸ The court rejected the students’ suggestion that *Pico* be extended to cover the rejection of textbooks.¹⁹⁹ However, the Fifth Circuit adopted the language of Rehnquist’s dissent in *Pico* finding that a rejection of the textbook would be unconstitutional if the Board’s motivation was “narrowly partisan or political.”²⁰⁰ But, the court found that the statements submitted to the district court as evidence of the board’s malicious motivations were not sufficient evidence to prove that the board’s decision was “narrowly

¹⁹¹ *Id.*

¹⁹² *Id.*

¹⁹³ *Id.* at 615.

¹⁹⁴ *Id.*

¹⁹⁵ *Id.*

¹⁹⁶ *Id.* at 616.

¹⁹⁷ *Id.*

¹⁹⁸ *Id.* at 619-620.

¹⁹⁹ *Id.* at 619.

²⁰⁰ *Id.* at 620 (quoting Bd. of Educ., Island Trees Union Free Sch. Dist. No.26 v. Pico, 457 U.S. 853, 871 (1982)).

partisan or political.”²⁰¹ Therefore, the exclusion of the textbook from Texas schools did not violate students’ First Amendment rights.²⁰²

IV. Analysis

A. *The Current Status of Pico*

Through studying the lower courts’ post-*Pico* decisions, several over-arching patterns emerge concerning the current level of school board discretion over curricular and non-curricular decisions. One of the most obvious is a trend toward greater deference toward school board decisions. *Pico*, being a plurality decision, was the last major Supreme Court opinion considered to be highly favorable to the protection of students’ First Amendment rights.²⁰³ Since *Hazelwood*, the Supreme Court has been much more deferential to the motivations and determinations of school boards.²⁰⁴ This can be seen simply by contrasting the standard articulated in *Pico* with the test in *Hazelwood*.²⁰⁵ *Pico* prohibits schools from removing books from public school libraries, “simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”²⁰⁶ On the other hand, *Hazelwood* allows school boards to make non-viewpoint neutral curricular decisions, as long as their decisions are “reasonably related to legitimate pedagogical concerns.”²⁰⁷ Essentially, *Hazelwood* is a florid way of applying rational basis review in an educational context.²⁰⁸ This shift from a more-rights protective test to a rational basis review can be ascribed less to a curricular/non-curricular dichotomy and more to a growing degree of deference to the decisions of school boards in the courts.²⁰⁹ More importantly, the lower courts have been obliged to follow this shift.

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ See generally Stuart L. Leviton, *Is Anyone Listening to Our Students? A Plea for Respect and Inclusion*, 21 FLA. ST. U. L. REV. 35 (1993).

²⁰⁴ See Brian S. Black, Note, *The Public School: Beyond the Fringes of Public Forum Analysis?*, 36 VILL. L. REV. 831, 858-60 (1991).

²⁰⁵ See *supra* notes 31, 47, and accompanying text.

²⁰⁶ Bd. of Educ., *Island Trees Union Free Sch. Dist. No.26 v. Pico*, 457 U.S. 853, 872 (1982).

²⁰⁷ *Hazelwood Sch. Dist. v. Kuhlmeir*, 484 U.S. 260, 273 (1988).

²⁰⁸ Lauren E. Tanner, Note, *Rights and Regulations: Academic Freedom and the University’s Right to Regulate the Student Press*, 86 TEX. L. REV. 421, 431 (2007).

²⁰⁹ See generally Bernard James, *The Doctrine of Deference: Shifting Constitutional Presumptions and the Supreme Court’s Restatement of Student rights after Board Education v. Earls*, 56 S.C. L. REV. 1 (2004).

Greater deference to school board decision-making is littered throughout the progeny of *Pico*. For instance, in *Pico*, the Supreme Court remanded the case for further consideration, determining that there was not enough evidence of the school board's motivations in order to grant summary judgment for the board. Lack of evidence to prove that the Board's motivation was constitutional was the primary focus of Justice White's concurrence.²¹⁰ Lower courts, however, have interpreted this holding in a way that is more restrictive to the rights of students after *Pico*. For instance, in *Campbell v. St. Tammany Parish School Board* the trial court granted summary judgment in favor of the students; and the Fifth Circuit determined that there was insufficient proof presented to make a speech-favorable ruling against the school board.²¹¹ Moreover, in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*, the Eleventh Circuit initiated a *de novo* review of the trial court's determination of unconstitutional board motivation for removing *¡Vamos a Cuba!*, holding that the Board removed the book for legitimate educational reasons.²¹² The transition from *Pico* to these lower court decisions is characterized by several adjustments in the courts approaches; from a concern for introducing enough evidence of a school board's good intentions for removing books in order to ensure students' First Amendment rights are not violated, to a concern for introducing enough evidence of a school board's unconstitutional intentions in order to rule in favor of students' rights, and, finally, to a determination by a circuit court placing an incredibly high burden of proof on plaintiffs to prove the malevolent intentions of school boards.

To be sure, one of the most enduring impacts of *Pico* was the importance of a thorough inquiry into the facts surrounding school board motivation.²¹³ Many circuits, however, may be taking this thoroughness a step too far. In *ACLU*, the Eleventh Circuit initiated a *de novo* review of the lower court's factual determination of the school board's motivation for removing *¡Vamos a Cuba!*.²¹⁴ It remains to be seen whether the court's review and reversal of the lower court's determination of the school board's motivation was correct in terms of civil procedure.²¹⁵ However, the fact that circuit courts feel entitled to participate in independent review of the lower courts in these cases is significant, because this essentially thrusts circuit courts into the role of fact-finding tribunals.

²¹⁰ See *supra* notes 37-38 and accompanying text.

²¹¹ See *supra* notes 58-60 and accompanying text.

²¹² See *supra* notes 102-08 and accompanying text.

²¹³ See *supra* notes 58-60 and accompanying text.

²¹⁴ See *supra* notes 102-08 and accompanying text.

²¹⁵ See *supra* notes 109-11 and accompanying text.

Even worse, the Eleventh Circuit accepted the school board's post hoc justification for removing the book. It is clear, from the facts and the district court's inquiry, that the school board removed the book because of its anti-Castro bias. The "inaccuracies" pinpointed prior to litigation related to the fact that the book did not malign the Castro regime and its governance of Cuba. For example, one of the "inaccuracies" the school district identified in the book was its name, because American children are not free to visit Cuba.²¹⁶ Taking into consideration the board's behavior with regard to the book; three committees independently approved the book as educationally appropriate and accurate, and the political climate of Miami, Florida, the reason for the book's removal is clear. The Eleventh Circuit should have affirmed the district court's analysis regarding the board's motivation and not allowed them to use a book's "inaccuracies" in order to camouflage a constitutional violation.

The Eleventh Circuit's practice in reviewing the factual determinations of the district court *de novo* and allowing the school board to side-step its constitutional violations by claiming that it made its decision based on "inaccuracies" presents the possibility that students' claims can be successful in the lower court and reversed in a circuit court, as was the case in *ACLU*, and gives a school board even more opportunities to successfully defend its motivations for removing a book from the library. Furthermore, *ACLU* encourages school boards to be subversive about the reason it is removing a book from the library. If school board members know that removing a book based on "inaccuracies" is permissible but removing a book based on a political disagreement is impermissible, they will learn to go through the farce of identifying "inaccuracies" in order to remove a book from a school library based on political reasons.

Another readily identifiable trend in the *Pico* progeny is a shift away from the plurality rule that school boards cannot remove books from school libraries "simply because they dislike the ideas contained in those books and seek by their removal to prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion" and toward the Rehnquist dissent's standard that school board discretion may not be exercised in a narrowly partisan or political manner.²¹⁷ It appears that the "standard-less standard," where only the most extreme cases are determined to be constitutional violations, is as unworkable as Justices

²¹⁶ See *supra* notes and accompanying text.

²¹⁷ Bd. of Educ., *Island Trees Union Free Sch. Dist. No.26 v. Pico*, 457 U.S. 853, 871 (1982) (Rehnquist, J., dissenting).

Rehnquist and Powell predicted.²¹⁸ Lower courts have fractured and splintered the plurality opinion in *Pico*, rendering it much less protective of First Amendment rights than Brennan intended it to be. For example, the two cases where courts have utilized the *Pico* plurality standard and found violations have involved the ban of the *Harry Potter* books because of the school board's uneasiness with witchcraft and the removal of *Annie On My Mind* because of a blatant school board prejudice against homosexuality.²¹⁹ These are both cases that would fulfill Rehnquist's "narrowly partisan or political" test. On the other hand, the removals in *Campbell v. St. Tammany Parish School Board* and *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board* were essentially upheld in lower courts, under much more factually developed scenarios than that in *Pico*.²²⁰ It appears that the plurality standard in *Pico* has been advantageously limited to its facts and has provided very little tangible guidance to lower courts. Thus, even where lower courts claim to be utilizing the *Pico* plurality standard, they are actually employing the more school board deferential "narrowly partisan or political" test articulated by Rehnquist.

A further trend in the school board cases is the blurring of the distinction between *Hazelwood* and *Pico*. Although the Supreme Court designed the tests to apply to two very factually different situations, lower courts have been using the language of the two tests interchangeably. For instance, the Eleventh Circuit in *Virgil* utilized the *Pico* "obscenity" and "vulgarity" language when applying the *Hazelwood* test to the removal of a humanities textbook from a high school class's curriculum.²²¹ Although the application of *Pico* in *Virgil* was unnecessary, it resulted in a decision more protective of First Amendment rights. However, in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*, the Eleventh Circuit purported to apply the *Pico* plurality test to the removal of a children's book from a school library; but the court resolved the case on the basis of *Hazelwood*, holding that the school board's decision was based on an educational purpose.²²²

Furthermore, the *Pico* decision was a plurality opinion issued on appeal for a motion for summary judgment.²²³ It lacked serious significance as precedent when it was handed down by the Supreme Court.

²¹⁸ See *supra* notes 32-43 and accompanying text.

²¹⁹ See *supra* notes 61-87 and accompanying text.

²²⁰ See *supra* notes 49-60, 88-110 and accompanying text.

²²¹ See *supra* notes 168-70 and accompanying text.

²²² See *supra* notes 102-06 and accompanying text.

²²³ See *supra* notes 28, 33 and accompanying text.

The weight of the *Pico* plurality opinion has been further abrogated by increasing deference by lower courts to the judgment of the school boards. Essentially, lower courts have not strictly applied the *Pico* plurality opinion, resulting in courts following the much less rights-protective “narrowly partisan or political” standard employed by the Rehnquist dissent. The courts’ movement away from *Pico* is most evident in *American Civil Liberties Union of Florida, Inc. v. Miami-Dade County School Board*, where the Eleventh Circuit abandoned the *Pico* plurality opinion language in favor of the *Hazelwood* “reasonably related to legitimate pedagogical concerns” test. In the future, when arguing that school boards are violating students’ constitutional rights by removing books from school libraries, courts will most likely continue to utilize the language of the *Pico* plurality opinion, absent a further articulation of a standard by the Supreme Court. Thus, lower courts have constructively abandoned the *Pico* plurality opinion as it was written by Brennan in 1982, and are instead employing much more rights-restrictive constitutional tests. Therefore, in order to be successful on a *Pico* claim, plaintiffs will most likely have to prove both that the board’s decision was “narrowly partisan or political” and that it was not related to a “legitimate pedagogical interest.”

B. *The Impact of American Library Association*

Although *American Library Association* is a public library case, its dicta could influence how lower courts can handle potential First Amendment claims similar to those in *Pico*.

Generally, the Supreme Court does not overrule its previous opinions *sub silentio*.²²⁴ Thus, because the Supreme Court did not articulate that it was limiting the *Pico* plurality opinion or overruling it in any way, the *Pico* plurality opinion likely endures, in some iteration, after *American Library Association*.

Yet, it is obvious that there is a significant conflict between *Pico* and *American Library Association*, as outlined by Justice Souter’s dissent. According to *Pico*, there is a significant bifurcation between deciding to exclude material from the library altogether and removing the content from library shelves. In *American Library Association*, on the other hand, the full contents of the Internet were already available to patrons without a filter; and the imposition of a filter was, essentially, the removal of that content.²²⁵ However, the Supreme Court did not address the *Pico*-

²²⁴ *Shalala v. Ill. Council on Long Term Care, Inc.*, 529 U.S. 1, 18 (2000).

²²⁵ See *supra* note 141 and accompanying text.

articulated bifurcation when it affirmed the constitutionality of the use of the filter. Furthermore, unlike physical libraries, there are no pre-acquisition space limitations on the Internet. Thus, there is less justification for librarian discretion in deciding to reject or accept the placement of new content in the library, because it is readily available in its entirety in the space provided.

Assuming that *Pico* is still good law, how can it be reconciled with *American Library Association*? First, perhaps the nature of the content itself holds the answer. Although both cases seem comparable because they both involve library content, perhaps the Supreme Court sees a significant difference between library books and the Internet. Maybe the Supreme Court, with the exception of Justice Souter, never intended for *American Library Association* to be read alongside *Pico*. In other words, *American Library Association*, addressing the removal of Internet content from libraries, and *Pico*, addressing the removal of books from libraries, are proverbial apples and oranges.

However, even this proposed distinction between the removal of books and the removal of Internet content does not yield the neatest results, especially in an age where technology is often replacing printed media such as books and newspapers. This problem might be most easily understood through a hypothetical. Take into consideration the following facts:

What would happen if a school board made books available to students exclusively through e-reader technology, i.e. nooks, kindles, and iPads. The school had a very limited set of rights to a select number of books that a librarian had chosen based on their suitability for children; having created, in effect, a virtual library, the school would use the Internet to provide students with the books. Suddenly, the district's school board decides to remove the *Harry Potter* series from its bookshelves because the school board members think that the books encourage Satanism.

Is this set of facts more akin to *Pico* or to *American Library Association*? In short, it is unclear. If the Supreme Court intended for *Pico* and *American Library Association* to be read in tandem, where the cases establish a distinction between the removal of book content and the removal of internet content, this distinction will be blurred with the steady progress of technology.

Another logical option is that the Supreme Court did intend to "overrule" *Pico* by way of its holding in *American Library Association*.

Although the Supreme Court generally avoids silently overruling its previous precedents,²²⁶ does *Pico* really even count as a precedent? *Pico*, a plurality opinion, is essentially florid dicta that lower courts have used to guide their decisions. Now that *American Library Association* has rejected the content addition/removal dichotomy, this could be the law with regard to the addition and removal of books as well.

There is, of course, another obvious inconsistency between *American Library Association* and the *Pico* line of cases. In *American Library Association*, the Supreme Court held that the erroneous filtering of protected speech was not unconstitutional because a library patron could notify a librarian if he or she wanted to view the blocked page. This holding is significantly different from the district courts' decisions in *Sund* and *Counts*, where the courts held that "[t]he possibility the Government could have imposed more draconian limitations on speech never has justified a lesser abridgment. Indeed, such an argument almost always is available; few of our First Amendment cases involve outright bans on speech," based on Supreme Court precedent.²²⁷ Thus, school board action, such as placing a book on restrictive reserve or moving the book to a different part of the library based on their disagreement with its content, may no longer be a constitutional violation in the light of *American Library Association*. This approach would allow school boards significantly more censorship ability within the library itself because, instead of completely removing books, school boards could place books constructively out of access to students and be immune to suits claiming constitutional violations.

C. Board's Discretion to Remove Textbooks

Although the standard that lower courts utilize is inconsistent across library book removal cases, it is nearly impossible to discern in curricular textbook cases. Based on *Virgil* and *Chiras*, unlike in library book removal cases, lower courts do not distinguish between students' First Amendment rights in the acquisition and removal of textbooks.²²⁸ In *Pratt*, which was handed down before the Supreme Court's ruling in *Pico*, the court applied a "pall of orthodoxy" standard. This test determined that the removal of *The Lottery* from curriculum violated students' First Amendment rights.²²⁹ In *Virgil*, the Eleventh Circuit employed the *Hazelwood* test, which allowed the school board to remove a textbook

²²⁶ Shalala, 529 U.S. at 18.

²²⁷ *Sund v. City of Wichita Falls, Tex.*, 121 F.Supp.2d 530, 548 (N.D. Tex. 2000).

²²⁸ See *supra* notes 159-78 and accompanying text.

²²⁹ See *supra* note 151 and accompanying text.

from the curriculum for “legitimate pedagogical concern.”²³⁰ It also employed the “obscenity” and “vulgarity” language from *Pico*, because the parties had stipulated that the board’s removal of the Humanities textbook was for its excessive sexuality and vulgarity.²³¹ Finally, the Fifth Circuit employed the “narrowly partisan or political” test derived from Rehnquist’s dissent in *Pico*, upholding the rejection of Chiras’s textbook in Texas public schools. The Fifth Circuit asserted that *Hazelwood* was not the appropriate standard for matter of curriculum and only applies when the school board opens up a forum for speech that can reasonably be imputed to the school. It is not clear whether “narrowly partisan or political” is different than “pall of orthodoxy;” If it is, then it is unclear how the test is distinguishable. It is important to note, however, that there has been no consistency in which constitutional test courts are to apply in matters of curriculum determination.

The analysis is further complicated by the timeline involved in the cases. *Pratt* was decided before *Pico* and *Hazelwood*.²³² Thus, the *Pratt* court was deprived of the option to apply these standards. As the Fifth Circuit framed the situation, “*Virgil* was decided before *Rust*, *Rosenberger*, *Forbes*, *Finley*, and *ALA*, and therefore did not have the benefit of the Supreme Court’s clarification of the government’s authority over its own message, whether it speaks through its own employees or through private parties.”²³³ Moreover, the Eleventh Circuit in *Virgil* could not employ the government speech doctrine and, therefore, did not have the option to decide whether school curriculum is subject to the government speech dicta, which asserts that the government has the right to control its own message. It appears that, at the very least, plaintiffs should prove that a school board’s decision was “narrowly partisan or political” or instituted a “pall of orthodoxy” in order to be successful with his or her First Amendment claims. There is very little guidance from the Supreme Court or consistency within the lower courts, however, to help plaintiffs traverse the challenges presented when bringing First Amendment claims alleging that a school board’s curricular decision was unconstitutional.

One of the few aspects of First Amendment curricular challenges that is clear is the rule that textbooks’ authors do not have the constitutional right to have their books included in school curriculum or

²³⁰ See *supra* notes 167-73, and accompanying text.

²³¹ *Virgil v. Sch. Bd. of Columbia Cnty., Fla.*, 862 F.2d 1517, 1521 (11th Cir. 1989).

²³² See *supra* notes 158-61, and accompanying text.

²³³ *Chiras v. Miller*, 432 F.3d 606, 617 (5th Cir. 2005).

libraries.²³⁴ As established by *American Library Association* and *Chiras*, school curricula are exclusive by their very nature.²³⁵ Librarians and school boards have always had to practice discernment in including some content over others.²³⁶ Therefore, while there may be a cognizable First Amendment right for students to sue school boards for exclusion or inclusion of certain content, that right does not extend to textbook authors.

V. Application: The Texas Textbook Controversy

The way I evaluate history textbooks is first I see how they cover Christianity and Israel. Then I see how they treat Ronald Reagan—he needs to get credit for saving the world from communism and for the good economy over the last twenty years because he lowered taxes.²³⁷

- Don McLeroy, Former Chairman of the Texas State Board of Education

A. Background of the Controversy

The current jurisprudence concerning the amount of discretion school boards have could prove especially significant in potential future challenges to the recent actions of the highly conservative Texas State Board of Education (SBOE). The SBOE is no stranger to controversy. The books that it accepts and rejects are often the subject of national attention.²³⁸ The State is notorious for its bitter political skirmishes over subjects as far-reaching as sex education, phonics, and math.²³⁹ For example, *Chiras v. Miller*, discussed above, involves the State Board of Education's rejection of an environmental science textbook.²⁴⁰ Critics accused the textbook rejection of being a smoke-screen for the SBOE's ideological and religious objections to the content of the book.²⁴¹ In 2002, the SBOE's rejection of the book *One Out of Many*, on the basis that it discussed the number of prostitutes working in cattle towns in the 1850's,

²³⁴ See *supra* notes 186-90 and accompanying text.

²³⁵ *Id.*

²³⁶ *Id.*

²³⁷ Mariah Blake, *Revisionaries: How a Group of Texas Conservatives Is Rewriting Your Kids' Textbooks*, WASHINGTON MONTHLY, (January/February 2010), <http://www.washingtonmonthly.com/features/2010/1001.blake.html>.

²³⁸ See generally Terrence Stutz, *Back to the Basics: Define 'Fact' Texas Squabbles Over Textbooks Ignite and Spread*, DALLAS MORNING NEWS, Dec. 2, 2002, at 1J.

²³⁹ Blake, *supra* note 238.

²⁴⁰ *Chiras v. Miller*, 432 F.3d 606 (5th Cir. 2005).

²⁴¹ Stutz, *supra* note 232.

generated scathing criticism from the *New York Times*.²⁴² With a new ultra-conservative super-majority on the Board and the history, social studies, and economics curricula up for board review, the group is poised to make some of its most controversial and constitutionally questionable decisions to date.

The SBOE consists of fifteen members, elected from single-member districts throughout the state of Texas.²⁴³ The Board of Education is responsible for crafting the curricular policies and standards for schools throughout the state of Texas.²⁴⁴ It also selects textbooks upon their adherence to their curriculum for the 4.7 million children who attend Texas public schools.²⁴⁵ Texas is unique because it centralizes major educational decisions such as curriculum and which books to purchase in the SBOE instead of individual school boards. This makes the SBOE one of the most powerful textbook purchasers in the United States.²⁴⁶

Textbooks are not a new subject of controversy to Texas.²⁴⁷ Until the 1950's, history textbooks throughout the United States portrayed American history as a string of triumphs.²⁴⁸ However, since the 1960's, American history textbooks focused more on women and minorities and tackled sensitive issues such as slavery and American interventionism.²⁴⁹ History, which was previously a hagiography to the United States and its prominent leaders, became a far gloomier topic.²⁵⁰ The change in the tone and subject matter of history textbooks sparked the interest of social conservatives, who began to search for ways to return textbooks to their pre-1960's iteration. In the best example of this conservative push-back, a couple from Longview, Texas, Mel and Norma Gabler, discovered that the Texas legislature had a little-known citizen review process for textbooks.²⁵¹ Beginning in the 1960's the Gablers initiated a multi-decade crusade, originally instigated by their son's discovery of content that he

²⁴² See generally Alexander Stille, *Textbook Publishers Learn to Avoid Messing with Texas*, N.Y. TIMES (Jun. 29, 2002), <http://www.nytimes.com/2002/06/29/arts/textbook-publishers-learn-avoid-messing-with-texas.html?pagewanted=all&src=pm>.

²⁴³ *State Board of Education*, TEXAS EDUCATION AGENCY, <http://www.tea.state.tx.us/index3.aspx?id=1156>

²⁴⁴ *Id.*

²⁴⁵ Brian Thevenot, *SBOE Conservatives Rewrite American History Books*, TEX. TRIB., (Jan. 12, 2010), <http://www.texastribune.org/texas-education/social-studies-standards-debate/sboe-conservatives-rewrite-american-history-books/>.

²⁴⁶ Don Calderon, *Education Express*, SAN ANTONIO EXPRESS, Dec. 19, 1995, at 6B.

²⁴⁷ Blake, *supra* note 238.

²⁴⁸ *Id.*

²⁴⁹ *Id.*

²⁵⁰ *Id.*

²⁵¹ *Id.*

considered amoral in his school books, against what they considered to be a liberal-secular bias.²⁵² From their kitchen table, the Gablers composed long lists of proposed changes to textbooks.²⁵³ At one point, they descended upon a Board of Education meeting with a fifty-four foot “Scroll of Shame,” consisting entirely of proposed changes to a biology textbook.²⁵⁴ Although the Gablers started out as a mom-and-pop operation, they soon transformed their crusade into a business with multiple employees.²⁵⁵ By the 1980’s, the Gablers were the most dominate influence on the selection and composition of Texas textbooks.²⁵⁶ To avoid the possibility of not getting their textbooks accepted for use in Texas, textbook publishers began self-censoring or submitting their books to the Gablers for pre-review.²⁵⁷ As the Gablers’ witch-hunt against the subversive forces of “women’s lib” and “agitators” continued, they became increasingly unpopular in Texas.²⁵⁸ One columnist characterized them as “two ignorant, fear-mongering, right-wing fruitloops who have spent the last twenty years doing untold damage to the public education in [Texas].”²⁵⁹ In 1994, the Gablers demanded that a health textbook exchange the picture of a woman toting a briefcase to that of a mother baking a cake.²⁶⁰ In response, the legislature decided to curtail the influence that people like the Gablers had over the Texas education system.²⁶¹

The Texas legislature revised the textbook review process so that the Board of Education could only reject a textbook if it was manufactured poorly, did not cover the curriculum, or contained factual errors.²⁶² Because the Legislature’s revision to the law eliminated the influence of private citizens in the textbook purchasing process, social conservatives began to target seats on the Board itself.²⁶³ The Texas Republican Party, which was dominated by the religious right, began recruiting highly

²⁵² RANDALL HERBERT BALMER, *ENCYCLOPEDIA OF EVANGELICALISM*, 188 (2002).

²⁵³ Blake, *supra* note 238.

²⁵⁴ *Id.*

²⁵⁵ Douglas Martin, *Norma Gabler, Leader of Crusade on Textbooks, Dies at 84*, N.Y. TIMES (Aug. 1, 2007), http://www.nytimes.com/2007/08/01/education/01gabler.html?_r=0

²⁵⁶ Blake, *supra* note 238.

²⁵⁷ *Id.*

²⁵⁸ Jacquielynn Floyd, *Texas’ Textbook Squabble is a Lesson in Stupidity*, DALLAS MORNING NEWS, Mar. 16, 2010, at B1.

²⁵⁹ Balmer, *supra* note 253.

²⁶⁰ Blake, *supra* note 238.

²⁶¹ *Id.*

²⁶² *Chiras v. Miller*, 432 F.3d 606, 608 (5th Cir. 2005).

²⁶³ Blake, *supra* note 238.

conservative candidates to run against liberal and moderate incumbent Board members.²⁶⁴ What had previously been low-key local races became a place for bare-knuckle politics.²⁶⁵ Conservative political donors began pouring millions of dollars into the school board races.²⁶⁶ Meanwhile, highly conservative candidates began smear campaigns against their opponents.²⁶⁷ During one campaign, Texans for Governmental Integrity produced fliers suggesting that one Democratic incumbent, who was a Methodist Sunday School Teacher and grandmother of five, was a pawn of the “radical homosexual lobby” who advocated demonstrations on “how to masturbate and how to get an abortion!”²⁶⁸

After more than a decade of politics and maneuvering, the radical right claimed control of the Texas State Board of Education in 2006.²⁶⁹ Ten out of the fifteen seats on the Board were held by Republican members, while eight were held by “ultra-conservatives,” giving them a supermajority on the Board.²⁷⁰ Soon afterwards, Governor Rick Perry appointed super-conservative Don McLeroy to be chairman of the Board, just as the SBOE was about to reexamine the curriculum for every subject taught in the state (a process that occurs once every ten years).²⁷¹

If any commentators expected the Board to leave state curriculum intact, their expectations were shattered in early 2009 when the SBOE began reviewing science curriculum standards for all grades.²⁷² Despite the overwhelming scientific consensus accepting the existence of global climate change, the board mandated that students must “analyze and evaluate different views on the existence of global warming.”²⁷³ The Board also erased any reference to the Earth being 14 billion years old from standards on the grounds that this information conflicts with the Biblical timeline of creation.²⁷⁴ After a curriculum amendment that would have constructively necessitated instruction on the theory of creationism failed by one vote, McLeroy implored “Somebody’s gotta [sic] stand up to

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ See Blake, *supra* note 238.

²⁶⁸ Blake, *supra* note 238.

²⁶⁹ *Id.*

²⁷⁰ *Id.*

²⁷¹ Terrence Stutz, *Conservatives to Lead State Education Board*, DALLAS MORNING NEWS (Jul. 8, 2007).

²⁷² Blake, *supra* note 238.

²⁷³ *Id.*

²⁷⁴ *Id.*

[these] experts!”²⁷⁵ The ultra-conservative bloc proceeded to enact amendments that mandated students explore the explanations for gaps in the fossil record and reflect upon whether natural selection could have accounted for the complexity of cells, which are some of the primary arguments for Intelligent Design theory.²⁷⁶

Although the Texas Legislature showed its displeasure with the actions of the Board by refusing to confirm McLeroy’s nomination, ultra-conservatives maintained their supermajority on the Board.²⁷⁷ Most recently, the SBOE began reviewing social studies, history, and economics curriculum.²⁷⁸ Through a process wrought with accusations of political corruption and vote swapping, the Texas State Board of Education met to approve new curriculum standards in May 2010.²⁷⁹ A prelude to the Board’s decision occurred in January of that year, when it became apparent that all historical figures to be included in Texas curriculum were open to discussion.²⁸⁰ Overall, the approved Board made over one hundred curriculum changes, most of which involved accommodations to the Board’s ultra-conservative political and Evangelical Christian biases.²⁸¹

The changes require that students should “evaluate efforts by global organizations to undermine U.S. sovereignty,” which is aimed at

²⁷⁵ *Id.*

²⁷⁶ *Id.*; see also Christopher Hitchens, *The Texas-Size Debate Over Teaching Evolution*, NEWSWEEK.COM (Mar. 28, 2009), <http://www.newsweek.com/2009/03/27/the-texas-size-debate-over-teaching-evolution.html>.

²⁷⁷ See *Texas governor must keep students in mind when naming head of State Board of Education*, FT. WORTH STAR-TELEGRAM, Jul. 10, 2009, at A12.

²⁷⁸ *ABC News: Battle of the Books: Texas to Change History* (ABC television broadcast May 19, 2010); James C. McKinley, *Texas Conservatives Win Curriculum Change*, N.Y. TIMES (Mar. 12, 2012), http://www.nytimes.com/2010/03/13/education/13texas.html?ref=jamescjrckinley&_r=0.

²⁷⁹ See Mariah Blake, *Money and Power on the Texas State Board of Education*, WASHINGTON MONTHLY, January/February 2010, at <http://www.washingtonmonthly.com/features/2010/1001.blake-sb.html>; McKinley, *supra* note 280.

²⁸⁰ Evan Smith, *The Texas Curriculum Massacre*, NEWSWEEK.COM, Apr. 16, 2010, at <http://www.newsweek.com/2010/04/15/the-texas-curriculum-massacre.html>.

This time around, the vote is in May, but trouble’s been brewing since January, when it became clear that the list of historical figures deemed worthy of inclusion in civics textbooks was up for discussion: at various points, Thurgood Marshall and Cesar Chavez were among those on the chopping block, while the inventor of the yo-yo (I’m not making this up) was cheerfully inserted and the laundering of Joseph McCarthy’s reputation was contemplated. *Id.*

²⁸¹ McKinley, *supra* note 280.

calling into question the legitimacy of the United Nations.²⁸² Furthermore, students should “discuss alternatives regarding long-term entitlements such as Social Security and Medicare, given the decreasing worker-to-retiree ratio.”²⁸³ In addition, the Board rebranded American “imperialism” insisting that it be referred as “expansionism.”²⁸⁴ In reference to Russia’s expansionism, however, the correct terminology is “aggression.”²⁸⁵

In its revisions, the SBOE strongly targeted the use of the term “the separation between church and state.”²⁸⁶ Now, teachers must “contrast the Founders’ intent relative to the wording of the First Amendment’s Establishment Clause and Free Exercise Clause, with the popular term, ‘Separation of Church and State.’”²⁸⁷ One member even introduced an amendment that erased Thomas Jefferson’s name from the list of figures that helped influence revolutions in the late Eighteenth and early Nineteenth Centuries, largely in retaliation of his coinage of the controversial phrase.²⁸⁸ Thomas Jefferson was not the only relatively liberal President who was the subject to the SBOE’s ire. The Board also added the impeachment proceedings against Bill Clinton to a list of relevant political scandals.²⁸⁹

In their study of Thomas Jefferson’s legacy, which was left somewhat tarnished by the SBOE, history students must also study the conservative resurgence of the 1980’s, including the National Rifle Association, the Moral Majority, Phyllis Shafley, and the Heritage Foundation.²⁹⁰

The Civil Rights Movement was another time period subject to significant revisions.²⁹¹ When learning about the non-violent teachings of Martin Luther King Jr., students are required to study the violent teachings of the Black Panthers.²⁹² Additionally, teachers are required to emphasize the Republican votes in Congress on Civil Rights Legislation.²⁹³

²⁸² Barrett Sheridan, *Texas Cooks the Textbooks*, NEWSWEEK.COM, May 21, 2010, at <http://www.newsweek.com/2010/05/21/texas-cooks-the-textbooks.html>.

²⁸³ *Id.*

²⁸⁴ *Id.*

²⁸⁵ *Id.*

²⁸⁶ McKinley, *supra* note 282.

²⁸⁷ Sheridan, *supra* note 283.

²⁸⁸ McKinley, *supra* note 282.

²⁸⁹ Sheridan, *supra* note 283.

²⁹⁰ McKinley, *supra* note 282.

²⁹¹ *Id.*

²⁹² *Id.*

²⁹³ *Id.*

The most recent, and perhaps most controversial revisions the Board addressed, was the treatment of Islam in schools; the Board's curriculum compels pupils to discuss "how Arab rejection of the State of Israel has led to ongoing conflict."²⁹⁴ Thereafter, in September of 2010, the board encouraged history textbooks to curtail the number of positive references made to Islam.²⁹⁵ The Board studied history books no longer in use in Texas to determine that textbook publishers devoted more lines of text to Islamic beliefs and practices than Christian ones.²⁹⁶ The Board insisted that this determination was not a mandate to change the text of the textbooks by stating, "This is an expression of the board's opinion, so it does not have an affect on any particular textbook."²⁹⁷ However, the message to textbook publishers seeking approval of their history books in Texas is obvious.

These curriculum changes are important not only because they affect what will be taught in the classroom but also because they will relate to the textbooks that the Board approves for classroom use. Just as the State Board of Education reviews subject curriculum every ten years, it discusses the applicability of that curriculum to textbooks and endorses new books every six years.²⁹⁸ For each subject and grade level, the SBOE is required to create three lists of textbooks: one list of "conforming" textbooks, another list of "nonconforming" textbooks, and one last of books that are rejected for use.²⁹⁹ "Conforming" textbooks contain material covering each element of essential knowledge and skills of that subject as determined by the Board's curriculum.³⁰⁰ "Nonconforming" textbooks contain material covering at least half, but not all, of the SBOE's adopted curriculum.³⁰¹ Thus, all books that do not cover at least half of the State's curriculum or that are wrought with errors are rejected for use in schools.³⁰² The SBOE allows schools to decide which textbook to use for which course.³⁰³ The SBOE, however, only fully funds the purchase of "conforming" or "nonconforming" books.³⁰⁴ Schools wishing to use a

²⁹⁴ Sheridan, *supra* note 283.

²⁹⁵ April Castro, *Texas Education Board Adopts Resolution Limiting Islam*, LUBBOCK AVALANCHE-J., Sep. 25, 2010, at http://lubbockonline.com/stories/092510/edu_711857499.shtml.

²⁹⁶ *Id.*

²⁹⁷ *Id.*

²⁹⁸ Blake, *supra* note 238.

²⁹⁹ *Chiras v. Miller*, 432 F.3d 606, 608 (5th Cir. 2005).

³⁰⁰ *Id.*

³⁰¹ *Id.*

³⁰² *Id.*

³⁰³ *Id.* at 609.

³⁰⁴ *Id.*

“rejected” book will only receive 70% of the total cost of the book.³⁰⁵ Thus, textbooks not reflecting most of the changes the SBOE made to the curriculum will be rejected for use in Texas schools and will be much less likely selected for use.

Because of the State Board of Education’s aggregation of the purchase of textbooks for all 4.7 million of the State’s schoolchildren, Texas is the second biggest textbook market in the country, after California.³⁰⁶ Although publishers have the technology to craft different editions of books for different states, they most often tailor their books to the specifications of the largest buyers.³⁰⁷ As one industry insider stated, “[p]ublishers will do whatever it takes to get on the Texas list.”³⁰⁸ Thus, editions that conform to the Texas curriculum are often sold to school districts in other states.³⁰⁹ In fact, there is not a single state in the United States where a book tailored to the Texas curriculum has not been utilized.³¹⁰ The curriculum decisions made in Texas will therefore affect classrooms throughout the United States. Moreover, although the conservative biases in Texas are usually counterbalanced by the liberal biases in California, California has decided not to purchase new textbooks until at least 2014 because of the State’s budget crisis.³¹¹

B. Application of the Progeny of Pico

As discussed above, it is extremely difficult to bring a constitutional challenge to a school board decision absent a certain level of outrageousness.³¹² There is no doubt that the Texas State Board of Education’s political, social, and religious biases have influenced their recent changes to the social studies, history, and economics curriculum. But, did their decision constitute a violation of constitutional rights?

The discussion established that students seeking to challenge the school board’s decisions have very little guidance in terms of precedent. The Eleventh Circuit in *Virgil* utilized the *Hazelwood* “legitimate pedagogical concerns” test.³¹³ Essentially, under this test, plaintiffs must

³⁰⁵ *Id.*

³⁰⁶ Blake, *supra* note 238.

³⁰⁷ *Id.*

³⁰⁸ *Id.*

³⁰⁹ *Id.*

³¹⁰ See *Channel One: Texas Textbook Controversy* (Channel One news television broadcast Apr. 14 2010).

³¹¹ Blake, *supra* note 238.

³¹² See *supra* notes 212-14, and accompanying text.

³¹³ See *supra* notes 167-68, and accompanying text.

prove that there is no correlation between the board's action and the education of the students. Unfortunately, there is no federal court case providing that a board's action failed to address a "legitimate pedagogical concern." Thus, one is to assume that, in most cases, courts have determined that there is a rational basis for the decisions of most school boards, regardless of the possible political or religious biases. Consequently, in order to successfully challenge the Texas State Board of Education under this test, plaintiffs would have to prove that there is no legitimate educational concerns behind its decisions. Furthermore, although the Board is politically conservative and openly espouses Evangelical Christian beliefs, it will be difficult for plaintiffs to achieve the level of proof necessary to prove that its decision lacked a pedagogical concern. For instance, in the *Pico* cases, courts have been hesitant to rule in favor of plaintiffs without an overwhelming showing of proof of the school board's malicious intent. The school board in *Case* openly revealed that it banned *Annie On My Mind* because of the book's treatment of homosexuality as a normal behavior.³¹⁴ The school board in *Counts* banned *Harry Potter* books because it did not believe that witchcraft as a religion should be accessible in the school library.³¹⁵ These cases are significantly different from the Texas State Board of Education's amendments to the curricular standards because, although the Board's curriculum changes are assuredly conservative, none of the changes were blatantly made in opposition to any particular lifestyle or religion. The only exception to this observation is the Board's statement regarding its desire for fewer references to Islam in history textbooks. However, the Board was careful to only issue this statement as an "objective" for textbook publishers and not as a requirement. Even after the school board replaces textbooks in Texas schools, it is unlikely that this "objective" rises to the level of failing to meet a pedagogical concern because the Board claims that the "objective" is an effort to make history texts more balanced. Furthermore, although some of the Board's determinations may be politically biased, they are not factually false.

Any court hearing a challenge to the SBOE's curriculum will most likely not apply *Hazelwood*, however, because Texas is located in the Fifth Circuit where *Chiras* was decided. In this case, the court will likely hold that the school curriculum and subsequently adopted textbooks are government speech.³¹⁶ Moreover, in government speech cases, the government generally has the right to craft its own message, drastically

³¹⁴ See *supra* notes 66-68, and accompanying text.

³¹⁵ See *supra* notes 77-78, and accompanying text.

³¹⁶ See *supra* notes 184-90, and accompanying text.

reducing the likelihood of success for any First Amendment challenge.³¹⁷ Furthermore, the court will likely apply the “narrowly partisan or political language” from Rehnquist’s dissent in *Pico*. It is not clear whether this standard is different from a “pall of orthodoxy.” Courts give commentators and lower courts very little guidance, however, on how to properly apply these tests. Additionally, the only case that has found that a school board’s curriculum decision was an attempt at a “pall of orthodox” was *Pratt*. But, perhaps “pall of orthodoxy” or “narrowly partisan or political” can best be described as, “the line of permissible intrusion is drawn when persuasion to conform to societal norms becomes coercive indoctrination.”³¹⁸

Thus, in order to be successful on a First Amendment claim under the “pall of orthodoxy” or “narrowly partisan or political” standards, a plaintiff must prove that the Board’s motivation was coercive indoctrination of students. But, the circumstances surrounding the Board’s latest curriculum determinations are not significantly different than its rejection of Daniel Chiras’ environmental science textbook. In that situation, the SBOE disbelieved Chiras’ assertions referring to the sustainability of the Native Americans’ lifestyle and global warming.³¹⁹ These were two rather controversial assertions, falling in the realm of opinion instead of fact.³²⁰ Furthermore, the Board’s conservative, pro-oil industry bias was also involved in these claims. The Fifth Circuit, however, readily dismissed the students’ case in *Chiras*, with hardly any analysis at all concerning why the SBOE’s rejection of the environmental science textbook was not “narrowly partisan or political.”³²¹ Thus, given the precedent in the Fifth Circuit, where any challenge to the SBOE’s recent curriculum changes will be heard, plaintiffs are highly unlikely to be successful.

Finally, textbook publishers whose books get rejected for not conforming to the new curricula have no forum for redress.³²² The courts in *American Library Association* and *Chiras* determined that the public library and school curriculum are a government speech forum and therefore not available or open to authors to sue alleging First Amendment

³¹⁷ *Id.*

³¹⁸ Lee Pray, Note, *What are the Limits to a School Board’s Authority to Remove Books from School Library Shelves?* -- *Pico v. Board of Education, Island Trees Union Free School District No. 26*, 1982 WIS. L. REV. 417, 433 (1982).

³¹⁹ See *supra* note 178, and accompanying text.

³²⁰ *Id.*

³²¹ See *supra* notes 175-80, and accompanying text.

³²² See *supra* notes 228-30, and accompanying text.

violations.³²³ Thus, the only means for confronting the Board's new curriculum and subsequent selection of textbooks is through a sure-to-be-ill-fated suit brought on behalf of the students of Texas.

Conclusion

In sum, although the bleak future that Ray Bradbury described in *Fahrenheit 451* seems extreme, it is undeniable that various state and local governments, vis-à-vis school boards, are participating in more censorship than ever before. Courts have been giving more deference to the decisions of school boards. Despite the Supreme Court's ruling in *Pico*, there have been very few First Amendment cases that have been resolved in favor of students. Although outright indoctrination of students is still ostensibly unconstitutional, courts have been allowing school boards to remove books and make curriculum decisions based largely on their own biases. Furthermore, there has been insufficient guidance by the Supreme Court regarding these cases, leaving lower courts to render inconsistent opinions based on divergent constitutional tests. The most frightening concept that arises from this line of cases is the complete lack of control that students and parents have in ensuring that the education rendered in public schools is complete and unbiased. For instance, the conservative-leaning curriculum changes recently made by the Texas State Board of Education will likely be upheld by courts. It appears that the only true means of redress that students and parents have in school board determinations of curriculum and library book removal is to actively get elected and participate on their local school boards. Even though such a strategy seems to be the only way for parents to prevent their children from being indoctrinated with school board members' personal beliefs, it could further perpetuate the problem by leading to a relative "arms race" of competing political views, with each elected board member seeking to have his or her own views taught in schools. Ultimately, one sad truth remains: adults are prioritizing their political views over the integrity of the education of their children.

³²³ *Id.*