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Island Trees and Free Speech: The Consequences of the U.S.'s Current Philosophy on Speech

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Abstract:

Island Trees v. Pico (1982) has resulted in a complex legal landscape for the First Amendment repression of free speech in school libraries. This repression is intensified by contradicting legal philosophies used to judge these cases. By examining three cases following the precedent set by *Island Trees v. Pico* (1982), and the case of *Island Trees* itself, this paper will illustrate the differences between the primary guiding free speech philosophy used for other rulings and the philosophy used by the courts in cases regarding speech in school libraries. This text uses a four-pronged speech value evaluation to analyze whether speech is for the speaker, the audience, the parents, or the students. The results of this evaluation showcase the muddied precedent that *Island Trees* has left in the United States' legal landscape, and the ways different interests are abusing this precedent to excuse unethical and unconstitutional censorship. This text proposes a categorical value approach similar to the ones used in other free speech cases, which can be used to mediate the delicate balance between necessary censorship and the constitutional rights of all involved parties.

Keywords: First Amendment; Free Speech; Island Trees v. Pico; Censorship; Book Banning; Legal Philosophy; Legal Precedent

Introduction

Free speech in schools is a hotly debated topic, and restrictions of books within school libraries is heavily contested in the modern day. Books like Anne Frank's diary, *Looking for Alaska* by John Greene, *A Brave New World* by Aldous Huxley, and the *Captain Underpants* series all share a commonality: their presence in school libraries is frequently challenged (American Library Association 2020). Public schools and public school libraries are reliant upon the government for funding and are subject to the same constitutional restrictions of a governmental space. However, the conversation around book banning in school libraries has been dominated by contradicting philosophies which are seemingly detrimental to students, authors, schools, parents, and society. The leading free speech philosophy focuses on the speech rights of the speaker, while the exception to this doctrine can be found in book-challenge cases. This paper will discuss the history of free speech philosophy and contrast this with the philosophies used in *Island Trees v. Pico* (1982), *American Civ. Liberties Union v. Miami-Dade County* (2009), *Pen American Center, Inc v. Escambia County School Board* (2024), and *Book People v. Wong* (2024). This paper will examine how the philosophies used in these cases contradict and conflict with traditional free speech philosophy, and how these contradictions are being used for government-sponsored censorship. This paper will also unpack the free speech counterarguments being raised and explore an alternative framework. Ultimately, this text seeks to prove the framework established in *Island Trees* had fundamentally negative effects on society and propose a clear directive for future free speech rulings in school libraries.

1. What is "Free Speech"?

The First Amendment of the U.S. Constitution states, "Congress shall make no law abridging the freedom of speech" (U.S. Const., amend. I). At its core, the free speech clause – from which the concept of freedom of speech is recognized by the U.S. government – comes from this single passage. As Van Alstyne (1982) puts it, "The imperative is simple, straightforward, complete, and absolute: *Congress shall make no law abridging the freedom of speech*" (111). This idea of open dialogue was not invented by the framers of the Constitution, merely recognized by them (Chafee 1920). However, the outward simplicity of the free speech clause is a trap because not all forms of speech are equally protected under the law. Criminal

solicitation, perjury, obscenity, defamation and commercial fraud, amongst other crimes, are not protected within the freedom of speech (Van Alstyne 1982). This begs the question: what kinds of speech are allowed, and why?

1a: Popular Philosophy and Critiques

Popular philosophy around the rights of a speaker has supported a broad acceptance of speech and has been the guiding principle of the Supreme Court since the 1960s. This interpretation of freedom of speech has been heavily criticized, especially by hate speech scholars, but it continues to affect free speech rulings to this day. And there is merit in the robust discussion of it.

A major philosophy guiding the Supreme Court's interpretation of free speech is the marketplace of ideas theory. C. Edwin Baker (1977), a critic of the theory, outlines both the notable aspects and failures of this philosophy by separating it into two models, the "classic model" and "market failure model." The classic model states three things as fundamental truths: an unpopular opinion may hold the truth, and by silencing it we silence the truth; opposing opinions may each hold part of the truth, so by allowing robust debate we may find the whole truth in both opinions; and if the majority opinion is the truth, it becomes "dead dogma"[1] if nothing is allowed to challenge it (Baker 1977). The classic marketplace of ideas theory places the value of free speech onto the value free speech holds for society, not on the value free speech has for the speaker (Baker 1977). The market failure model, in contrast, argues that people do not have equal access to the same kinds of speech. For example, an ordinary person does not have access to the same media airtime as a politician running for re-election, and therefore, just like in an economic market, the government must step in and address the free speech market failure (Baker 1977).

The marketplace of ideas philosophy is not the only guiding force the Supreme Court acknowledges when ruling on free speech. As Emerson (1962) put forth in "Toward a General

[1] Dogma: "A philosophy, opinion, or tenet that is strongly held, is believed to be authoritative, and is followed steadfastly, usu. to the exclusion of other approaches to the same subject matter" (Garner 2024). The use of dead dogma implies that the majority opinion, if unexamined, becomes a dead philosophy which may no longer hold the truth.

Theory of the First Amendment," four guiding principles explain why free speech should be valued:

> (1) as assuring individual self-fulfillment, (2) as a means of attaining the truth, (3) as a method of securing participation by the members of the society in social, including political, decision-making, and (4) as maintaining the balance between stability and change in the society. (378-379)

Emerson's (1962) values have been used, criticized, and modified in the time since "Toward a General Theory of the First Amendment," but Emerson's philosophy is still acknowledged as an important part of the discussion around free speech today. Another important philosopher is C. Edwin Baker (1977), whose liberty model emphasizes the importance of speech to the speaker, as opposed to the value of speech for the audience or for society as a whole. Baker's and Emerson's philosophies are closely related and serve as important touchstones upon which the discussion around speaker-centric free speech can be oriented. While it is outside the scope of this paper to fully examine the ideas of these philosophers with the detail they deserve, it is important to acknowledge some of the work upon which the legal philosophy of free speech is built.

The discussion around free speech philosophy would be incomplete without an acknowledgement of the critiques surrounding the individualistic perspective of free speech. Richard Delgado (1982), in "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling," argues the harms unfettered speech can cause: severe emotional distress, humiliation, isolation, and self-hatred, as well as a disconnect from a society that seemingly accepts the constant verbal torment of individuals or groups of people. Delgado brings up these harms as a reason to restrict racial hate speech and give people victimized by hate speech a way to redress their issues. The discussion around hate speech legislation centers around a core critique of the present system, which allows most speech for both societal good—as in the marketplace of ideas theory—and for individual rights—such as in Emerson and Baker's philosophies. The argument over restrictions versus the greatest amount of freedom cannot be distilled into individual versus communal rights; however, it can be understood that the leading free speech philosophy in the contemporary era focuses on the speech rights of the speaker. The exception is book banning in schools, which uses a wholly different philosophy that is seen nowhere else in free speech rulings.

This foundation of philosophy and a shared understanding of free speech will allow a more in-depth analysis of *Island Trees v. Pico* (1982), and the other cases discussed in this text. By understanding the subconscious philosophy behind the rulings in these cases, this paper seeks to draw attention to the constitutional contradictions this philosophy relies on.

2. *Island Trees v. Pico* (1982)

In September of 1975, petitioners Richard Ahrens, Frank Martin, and Patrick Hughes attended a conference sponsored by a politically conservative organization called Parents of New York United (PONYU), created by parents concerned about education in New York. During the conference, these three people got lists of books from PONYU described as "objectionable" by Ahrens and "improper fare for school students" by Martin. Later, they found their local high school library carried nine of the books on those PONYU lists, while the junior high school library carried another of the listed books (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). In February of 1976, the school board gave an "unofficial direction"[2] that the listed books were to be removed from the libraries and brought to the board's offices so members could review them. When the directive was carried out, the board issued a press release to justify their actions and characterized the books as "anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy. . . [i]t is our duty, our moral obligation, to protect the children in our schools from this moral danger as surely as from physical and medical dangers" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 857).

Later, the board created a book review committee to read the listed books and recommend whether the books should be kept in the school libraries. They were also instructed to consider "educational suitability, good taste, relevance, and appropriateness to age and grade level" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 857). In July of 1976, the committee recommended that five of the listed books should be retained, two should be removed from the school libraries, two could not be agreed upon by the committee, one the committee took no position on, and one should be made available to students only with parental approval (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). The board rejected the recommendations of the committee and decided only one book would be

[2] Meaning that the order was not an official act by the school board, but instead an unofficial order.

returned to the high school library without restriction, while one would be made available with parental approval. The other nine, they decided, should be removed from the libraries and from use in school curriculum.

High school students Steven Pico, Jacqueline Gold, Glenn Yarris, and Russell Rieger, and junior high student Paul Sochinski—the respondents—brought action against the school board, consisting of Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim—the petitioners—alleging that the board denied them their rights under the First Amendment, noting that

> [petitioners] 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. (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 558-559)

The district court granted summary judgement[3] in favor of the petitioners and rejected the claim that the respondents' First Amendment rights had been infringed upon. While the court acknowledged that the removal of the books was content based, they found no constitutional violation of the requisite magnitude. A three-judge panel on the Second Circuit of the United States Court of Appeals reversed the judgment of the district court. Each judge filed a separate opinion, but Judge Sifton delivered the judgment of the court and concluded that the petitioners ". . . were obligated to demonstrate a reasonable basis for interfering with respondents' First Amendment Rights" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 860). The Supreme Court granted certiorari[4] to the case in 1981.

2a: Precedent Law

Before discussing the Court's decision on *Island Trees v. Pico*, we must first examine some of the free speech precedents set forth before 1982. In 1919, Dr. John L. Tildsey, Associate Superintendent of Schools in New York, stated that ". . . men or women who are Marxian Socialists, who believe in the Communist Manifesto, have no right to be in the school system

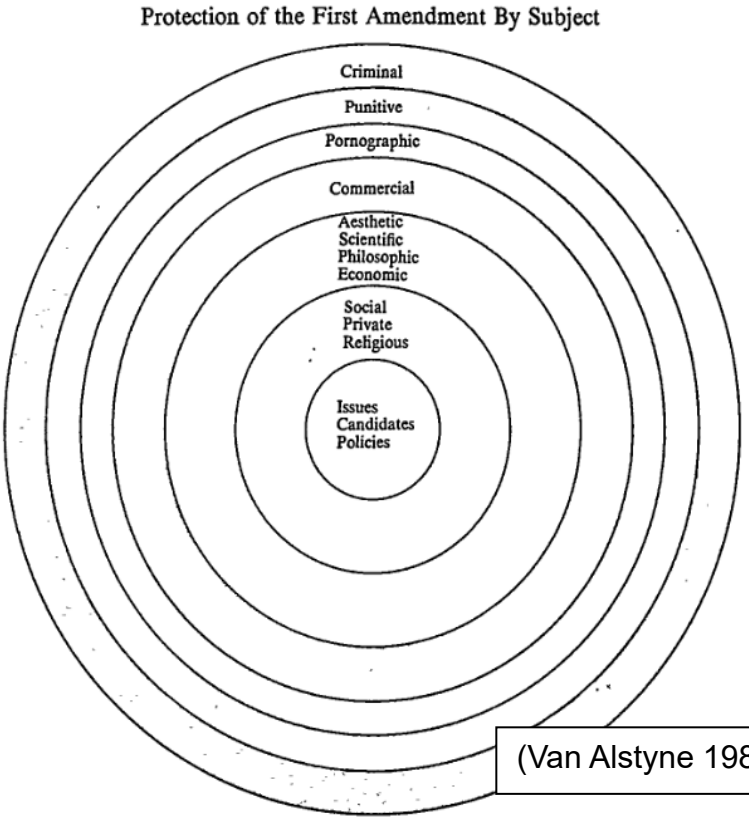
[3] Summary judgement: "A judgment granted on a claim or defense about which there is no genuine issue of material fact and on which the movant is entitled to prevail as a matter of law" (Garner 2019).
[4] Certiorari: A writ by a higher court sent to a lower court, requesting all documents related to a case so the higher court may review the case. A writ of certiorari is most used by the Supreme Court (Garner 2019).

because such teachers believe in the overturn by force of those elements on which our civilization is based" (Chafee 1920, 365-366). This discussion of the rights of teachers to hold, publicly or privately, unpopular beliefs is a battle that has been waged for over a century now and one that shows little sign of stopping. As far back as 1920, there have been calls for a careful weighing of the rights of individuals to speak, and the rights of society to restrict speech for any number of reasons, the "education of the young" being one of them (Chafee 1920). However, as these calls for careful weighing of individual rights were being made, so was the then-radical theory of free perspective taking root. As Chafee says,

> . . .this country has to be run by the people in it, and they are the people who are taught in the schools; and if the teachers cannot think for themselves, the pupils cannot think for themselves. They cannot discuss merely the questions of the past. They must discuss the critical problems of the present time if they are to solve them." (Chafee 1920, 373)

By looking only at Chafee, it would seem the discussion around freedom of speech in schools has only marginally evolved over the past century. To spring forward from Chafee, we can examine William Van Alstyne's (1982) "A Graphic Review of the Free Speech Clause." Published in 1982, the same year in which *Island Trees v. Pico* was decided, Alstyne's work is useful in examining the ways legal scholars interpreted free speech during the time of *Island Trees*. Alstyne attempts to answer three questions: what kinds of speech are protected or prohibited, and why? While the answers are not clear, Alstyne (1982) concludes that the First Amendment's own terms on freedom of speech are explanatory and there is no substitute formula—though many can be created that appear to fit the spirit, wording, and precedent law of free speech in the U.S. There are, however, trends in the kinds of speech which are more protected than others.

It can be seen then, that in 1982, the protection priority of the First Amendment looked very similar to today's priorities regarding free speech. Criminal, punitive, and pornographic speech were the three least prioritized for protection, with issues, candidates, and policy speech being the most prioritized (Van Alstyne 1982). There is little doubt that during the time of *Island Trees v. Pico* that the restrictions imposed by the school board were based in period-appropriate understandings of pornographic and criminal speech.



(Van Alstyne 1982)

2b: The Decision of *Island Trees v. Pico* (1982)

The decision of *Island Trees* reflects this historical backdrop. The Court specified that their intrusion into the matter does not usurp the long-time acknowledgement that school boards may have broad discretion[5] in their decisions related to school affairs; however, the issue at hand was related to library books, which were optional to students and not part of the curriculum (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). Therefore, the Court's decision did not affect the classroom or the courses taught by the school; instead, the Court narrowly tailored their decision to the question of the removal of books from school libraries (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). The issue was then reframed by the Court as two separate questions:

[5] Discretion: "1. Wise conduct and management exercised without constraint; the ability coupled with the tendency to act with prudence and propriety. 2. Freedom in the exercise of judgment; the power of free decision-making" (Garner 2024).

> First, does the First Amendment impose any limitations upon the discretion of petitioners to remove library books . . . Second, if so, do the affidavits and other evidentiary materials before the District Court, construed most favorably to respondents, raise a genuine issue of fact whether petitioners might have exceeded those limitations?" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 863)

The first question was answered by the Court in a manner that both reframed and recontextualized the situation at hand. Firstly, the Court cited *West Virginia Board of Education v. Barnette* (1943), which established the following principle applied to school boards: ". . . important, delicate, and highly discretionary functions,[6] but none that they may not perform within the limits of the Bill of Rights. . ." (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 864). This rationale continued to guide the court's decision-making process, referencing *Epperson v. Arkansas* (1968), *Tinker v. Des Moines* (1969), and *West Virginia Board of Education v. Barnette* (1943). The Court's opinion then took a sharp turn, reframing the issue as the right to receive ideas, such as in *Stanley v. Georgia* (1969) and *Kleindienst v. Mandel* (1972). The school library, a place known and established as a place for students to explore and discover different ideas, areas of interest, and gain new knowledge, is one such place where students can receive ideas. The school board in *Island Trees* overstepped the discretion they had over the curriculum and the classroom, into the places of "voluntary inquiry" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 869).

However, while the Court rejected the absolute discretion of school boards to remove books from school libraries, it also acknowledged the role of school boards in curating the content of school libraries. This discretion of decision is allowed to school boards, but not when it is used in a partisan or political way (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). The official suppression of ideas is not permitted by the Constitution; therefore, if the intent of the removal decision was to deny access to ideas with which the removers disagreed, then this discretion was in violation of the Constitution (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). As the Court put it, "we hold that local school boards may not remove books from school library shelves simply because they dislike the ideas

[6] Discretionary Act: "A deed involving an exercise of personal judgment and conscience. — Also termed *discretionary function*" (Garner 2024).

contained in those books" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 872).

The second question answered by the Court was whether the petitioners in this issue violated the respondents' Constitutional rights by using their authoritative discretion to remove the books in question from the school libraries (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). The respondents brought up that the petitioners had asserted their decision to remove the books was due, in part, to ". . . [their] personal values, morals and tastes" and petitioners' personal views on excerpts from the books perceived as "anti-American" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 872). Additionally, the book review committee was given criteria that were otherwise permissible—"educational suitability," "good taste," "relevance," and "appropriateness to age and grade level"—which the board then disregarded (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 873). The board itself ignored the advice of the committee, librarians, teachers, literary experts, and the superintendent; petitioners also claimed that the books were only put under review and the final decision made based on the books being on the PONYU list (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 874-875).

However, this question would remain unanswered by the Supreme Court; the court found no genuine material issue with the removal that would constitute a constitutional rights violation by the respondents towards the petitioners. The decision ends nebulously, affirming that ideas must not be suppressed while not acknowledging the constitutional rights of the petitioners.

2c: The Philosophy of *Island Trees*

It is useful to now examine the philosophy used in *Island Trees*, to determine what led to this ruling and what this decision was intended to accomplish.

To begin, the *Island Trees* decision[7] makes it clear that the Supreme Court's focus was on preventing political speech suppression: "But that discretion may not be exercised in a narrowly partisan or political manner" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico

[7] Decision: "A judicial or agency determination after consideration of the facts and the law; esp., a ruling, order, or judgment pronounced by a court when considering or disposing of a case" (Garner 2019).

1982, 870). Political speech is the most protected kind of speech and has been recognized as such for decades prior to this decision. The choice to frame this case through the lens of political speech is clear from the influence of PONYU—a Republican organization—on these books being discovered, chosen for review, and ultimately banned. Preventing the suppression of political speech is a foundational element of free speech philosophy, and as such, this element of this case took precedent over all other elements. The decision stated, "The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 871). This statement was not made for show but indicated the ways in which book banning could be used to circumvent other constitutionally protected rights.

There are two additional statements which are equally important to consider. First, "Our Constitution does not permit the official suppression of *ideas.*" And second, "If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed . . . then petitioners have exercised their discretion in violation of the Constitution" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 871). These statements communicate three concepts: firstly, that the suppression of ideas is constitutionally unacceptable; secondly, that the suppression of ideas must be done in an "official" manner; and thirdly, that the *denial of access* to ideas counts as suppression of ideas. Within these concepts, the marketplace of ideas theory can be seen as requiring a free flow of ideas to be tested against one another so the "strongest" truth may prevail. Suppressing ideas shuts down the marketplace and prevents ideas from being tested against each other. Buried in these concepts is also an assertion that suppression must be "official"—but what does official mean in this context? Does it mean that it's done by a government agent, or simply done in a systematic manner? For the purposes of this text, it will be assumed that both are true; a suppression can only be a constitutional violation if done by an actor of the government, and an accidental suppression does not count as a violation. For example, if a board member had thrown out a book because it was damaged, that would not count as a systematic removal of ideas.

What can be gleaned from these three concepts about the Court's intentions with this ruling? Firstly, it is another defense of political speech; in fact, it is first and foremost a defense of political speech. The suppression of ideas, no matter what form it takes, is recognized as ultimately being a threat to political speech and therefore must be curtailed and given appropriate boundaries. It's also another affirmation that the actions of a government actor, no matter how small, are official and subject to the limitations laid out in the Constitution. It confirms that the removal of books is an act of idea suppression; but the refusal to allow books to be curated—as in, disallowing a school library to purchase specific books—is not an act of idea suppression. This is an important distinction, as it ensures that libraries are not required to carry every book ever written, but they must be cautious and mindful with the books they have already stocked.

Island Trees is a landmark ruling on free speech in schools, and its influence cannot be understated. To truly understand the effects of *Island Trees* on speech, it is fundamental to examine other cases and make comparisons as to how *Island Trees*' philosophy has been used and changed since 1982.

3. *American Civ. Liberties Union v. Miami-Dade County* (2009)

On April 4th, 2006, the father of a young girl who attended Marjory Stoneman Douglas Elementary School, filed a "Citizen's Request for Reconsideration of Media" to get a book removed from the school library's collection (American Civ. Liberties Union v. Miami-Dade County 2009, 1183). The book in question was called *A Visit to Cuba*, with its Spanish counterpart called *¡Vamos a Cuba!*This book is part of a series which is written to give children basic information about the lives of people in other countries (American Civ. Liberties Union v. Miami-Dade County 2009, 1183). The book's content ranges from basic information about the geography of the country in question, to the language spoken there, and how Cubans live (American Civ. Liberties Union v. Miami-Dade County 2009, 1183). Juan Amador, the father who filed petition to have *A Visit to Cuba* removed, was a former political prisoner in Cuba. Amador said that the book's depiction of life in Cuba was not truthful and did not portray the reality of the problems Cuban people faced in the past and continue to face in the present (American Civ. Liberties Union v. Miami-Dade County 2009, 1184).

There is a four-tiered process in the school district to review books that citizens have requested be removed. The principal is the first to review the complaint and can give an explanation as to why the collection contains the book but cannot remove the book from the library. The next step in the process is that the complaint is made into a formal request and is submitted to an "ad hoc" group of students, parents, library specialists, teachers, administrators, and counselors who together create a school materials review committee (American Civ. Liberties Union v. Miami-Dade County 2009, 1184). As the committee reviews the book, it must consider fifteen criteria set out by the school board: "educational significance, appropriateness, accuracy, literary merit, scope, authority, special features, translation integrity, arrangement, treatment, technical quality, aesthetic quality, potential demand, durability, and lack of obscene material" (American Civ. Liberties Union v. Miami-Dade County 2009, 1184). After this reviewing process, the committee recommends to the principal whether the book should be removed, limited, or retained without limitations.

The complainant[8] may then appeal the committee's recommendation to the superintendent, who may decide based on the committee's recommendation or submit the appeal to a district materials review committee. Much like the school committee, the district committee is made up of an "ad hoc" group of principals, district administrators, library specialists, a union official, a member of the parent-teacher association, a student, and a "lay person" (American Civ. Liberties Union v. Miami-Dade County 2009, 1185). The book is once again reviewed by the committee and a recommendation is made to the superintendent, who may choose to remove the book. The superintendent's decision can be appealed to the school board, which has the final decision on whether the book is retained or removed.

The complainant, Amador, followed this process all the way to the school board, as the school committee and district committee both recommended the book be kept, and the superintendent followed their recommendations to keep the book. The school board, upon hearing Amador's appeal, considered and ultimately decided to remove *A Visit to Cuba*

[8] Complainant: "The party who brings a legal complaint against another; esp., the plaintiff in a court of equity or, more modernly, in a civil lawsuit" (Garner 2024).

(American Civ. Liberties Union v. Miami-Dade County 2009, 1186). The order to remove the book was issued on June 14th, 2006.

A week after the order was issued, the American Civil Liberties Union of Florida, Inc. and the Miami-Dade County Student Government Association—the plaintiffs—filed a complaint against the school board. The plaintiffs alleged that the board and superintendent violated their First and Fourteenth Amendment rights to freedom of speech, access to information, and right to due process (American Civ. Liberties Union v. Miami-Dade County 2009, 1188). The defendants, the School Board of Miami-Dade County, sought to dismiss the claim for lack of standing, because the ACLU did "not have organizational standing to bring the lawsuit because any First Amendment right of access to school library books belongs to the student, not the parent" (American Civ. Liberties Union v. Miami-Dade County 2009, 1189). The defendants also stated that because the Miami-Dade County Student Government Association was created and run by board employees, it could not sue "itself" by suing the school board (American Civ. Liberties Union v. Miami-Dade County 2009, 1189). The plaintiffs amended their complaint and added Mark Balzli, on behalf of his son Aidan and himself, both of whom were within the school district and would be affected by this book's removal; as a result, the district court accepted that the plaintiffs had standing to bring the suit (American Civ. Liberties Union v. Miami-Dade County 2009, 1189).

3a: The Decision of *American Civ. Liberties Union v. Miami-Dade County* (2009)

The district court found the following in their decision:

> (1) the plaintiffs were likely to succeed on their First and Fourteenth Amendment claims, (2) they would be irreparably harmed if the School Board's removal order were allowed to stand pending a trial on their complaint, (3) this irreparable harm to the plaintiffs outweighed the harm to the defendants in keeping the 'A Visit to' series books on the library shelves, and (4) it was in the public interest to protect the plaintiffs' constitutional rights to have access to the books. (American Civ. Liberties Union v. Miami-Dade County 2009, 1189-1190)

The district court found in favor of the plaintiffs and ordered that the removal order not be enforced and any removed books from the series be put back into school libraries (American Civ. Liberties Union v. Miami-Dade County 2009, 1190). The school board challenged this decision and brought it before the 11th Circuit Court of Appeals based on a challenge to the

plaintiffs standing; they alleged that the plaintiffs had not established imminent injury from the removal (American Civ. Liberties Union v. Miami-Dade County 2009, 1190).

The 11th Circuit Court of Appeals applied the criteria of *Lujan v. Defenders of Wildlife* (1992) to determine whether the plaintiffs in this case had standing. The Supreme Court in *Lujan* found that actual or imminent injury must be proven and imminence is not used in the realm of speculation; the injury must be impending and the certainty of that impending injury proven. The court, in its use of *Lujan*, narrowed the criteria to the following: "[i]mmediacy requires only that the anticipated injury occur with[in] some fixed period of time in the future" (American Civ. Liberties Union v. Miami-Dade County 2009, 1193). Balzli's intent to check out *A Visit to Cuba* upon the return to school on August 14th, 2006, was sufficient to prove imminent injury (American Civ. Liberties Union v. Miami-Dade County 2009, 1194-1195). Balzli was both suing on his son's behalf—who could not sue on his own—and as a parent, which he had the right to do, as parents have the right to visit and review books from the library; thus, Balzli would also be an injured party if *A Visit to Cuba* was removed (American Civ. Liberties Union v. Miami-Dade County 2009, 1195). The court found that Balzli had "sufficiently asserted that he and his son w[ould] suffer an imminent injury from the removal of *Vamos a Cuba* from the school district libraries" (American Civ. Liberties Union v. Miami-Dade County 2009, 1195). However, the court also found "the plaintiffs' declarations do not carry their burden of showing that they face a threat of imminent injury from the removal of any of the 'A Visit to' books from the school district's libraries except for *Vamos a Cuba*" (American Civ. Liberties Union v. Miami-Dade County 2009, 1197). In short, the plaintiffs' standing was recognized for the imminent injury if *A Visit to Cuba* was removed, but not if any of the other books in the "A Visit to" series were removed.

The lower court's decision to put a preliminary injunction[9] on the school board's ability to remove the book was found to be a potential abuse of discretion, depending on the board's motivation for removing the book; if the removal was based on "factual errors in the book," then the motive would be acceptable, and the injunction would be an abuse of discretion

[9] Preliminary injunction: "A temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case" (Garner 2019).

(American Civ. Liberties Union v. Miami-Dade County 2009, 1198). School boards are allowed under the First Amendment to remove books from their libraries if the books contain inaccuracies, and the board could remove a book because it's educationally unsuitable (American Civ. Liberties Union v. Miami-Dade County 2009, 1202). Despite the district court's earlier finding, the 11th Circuit Court of Appeals found that under the *Island Trees* standard, the school board's removal of *A Visit to Cuba* was due to factual inaccuracies agreed upon by experts on both sides (American Civ. Liberties Union v. Miami-Dade County 2009, 1207).

Ultimately, the preliminary injunction was vacated,[10] and the case was remanded[11] to the district court for further proceedings consistent with the 11th Circuit Court of Appeals' findings on February 5th, 2009 (American Civ. Liberties Union v. Miami-Dade County 2009, 1230).

3b: The ACLU's Statement

Years prior to the final decision on the case, the ACLU put out a statement about the case outlining their First Amendment concerns. Published on June 21st, 2006, the ACLU made the broad statement that the Miami-Dade School Board was defying U.S. laws against censorship and ignoring their own standards of due process by disregarding the recommendations of two committees and their superintendent (American Civil Liberties Union 2006). In this statement, Virginia Rosen was quoted as saying, "What's more alarming is that the school board decided to ban the entire series of books, without ever having reviewed them" (American Civil Liberties Union 2006). Within the ACLU's statement, they point back to the marketplace of ideas theory long upheld by the Supreme Court; as Howard Simpson is quoted saying, "…the lawful response—as the U.S. Supreme Court has said time and time again—is to add more information with different viewpoints, not enforce censorship" (American Civil Liberties Union 2006).

[10] Vacated: "To nullify or cancel; make void; invalidate" (Garner 2019).
[11] Remanded: "The act or an instance of sending something (such as a case, claim, or person) back for further action" (Garner 2019).

Ultimately, the ACLU's argument was null as the 11th Circuit Court ruled in favor of the school board; however, the legal reasoning raised in this case, and its use of *Island Trees*, offers a contemporary perspective on book removal and book banning in school libraries.

4. Contemporary Legal Landscape

The previously discussed cases have been noteworthy in their historical relevance; however, to fully understand the ramifications of these cases we must also examine the recent legal landscape. In 2023, there was an 11% increase in challenges to books in school libraries as compared to 2022; the American Library Association (2024) reported that 4,240 unique book titles were challenged in 2023. While it is out of the scope of this text to investigate book banning in public libraries, where much of the censorship is happening, the conflict continues to seep into K-12 school libraries.

4a: PEN America v. Escambia County School District (2024)

In May of 2023, the PEN America Center joined together with Penguin Random House LLC, Sarah Brannen, Lindsay Durtschi, George M. Johnson, David Levithan, Kyle Lukoff, Ann Novakowski, and Ashley Hope Pérez—collectively referred to as the plaintiffs—to file a lawsuit against the Escambia County School District—which will be referred to as the defendant—for an allegedly unconstitutional removal of books from school libraries (PEN America v. Escambia County School District 2023).

The plaintiffs, representing book authors, a book publisher, and parents of students within the district, made three counts, or primary complaints, against the defendants (PEN America v. Escambia County School District 2023). The first count was that the removals were ideologically driven, which is an unconstitutional suppression of ideas (PEN America v. Escambia County School District 2023). The second count was that this ideological removal of books is viewpoint discrimination against the authors' freedom to transmit ideas, another First Amendment violation (PEN America v. Escambia County School District 2023). The third count was that the books being removed were primarily authored by, or contained content about, specific protected groups, such as racial minorities and the LGBTQIA+ community, which is a violation of the Equal Protection Clause (PEN America v. Escambia County School District 2023).

The defendant argued that the complaint was a shotgun pleading;[12] the plaintiffs did not have adequate standing[13] to bring the case; the plaintiffs' claims were unripe[14] or moot[15]; and that the complaint did not give any adequate claims for relief (PEN America v. Escambia County School District 2023).

The district court both agreed and disagreed with both the plaintiffs and the defendant. The court found that the plaintiffs had adequate standing to bring the case; the parents had standing as per *American Civ. Liberties Union v. Miami-Dade County* (2009) (PEN America v. Escambia County School District 2023). The authors and the publishing house were found to have standing because the removal or restriction of their books impeded what was a previously accessible forum for their speech and prevented them from engaging with their target audience (PEN America v. Escambia County School District 2023). PEN America was found to have standing because their membership, composed of authors affected by the removals, would also have standing in this case; additionally, PEN America had to divert organizational resources away from other functions due to the circumstances of this case (PEN America v. Escambia County School District 2023). The case was found not to be a shotgun pleading, as it gave the defendants adequate notice of the claims being made against them (PEN America v. Escambia County School District 2023). The case was found neither moot nor unripe by the court, and thus was able to move forward.

The first two counts were found to have some merit, while the third count was dismissed (PEN America v. Escambia County School District 2023). The court found that the plaintiffs did not provide adequate evidence of the disparate impact to protected groups by the removal of books, due to the amalgamation of non-white and LGBTQIA+ identities, which are each a separate protected class (PEN America v. Escambia County School District 2023).

[12] Shotgun pleading: "A pleading that encompasses a wide range of contentions, usu[ally] supported by vague factual allegations" (Garner 2019).
[13] Standing: "A party's right to make a legal claim or seek judicial enforcement of a duty or right" (Garner 2019).
[14] Ripeness: "The state of a dispute that has reached, but has not passed, the point when the facts have developed sufficiently to permit an intelligent and useful decision to be made" (Garner 2019).
[15] Mootness: "Open to argument; debatable." A moot case is described as "A matter in which a controversy no longer exists; a case that presents only an abstract question that does not arise from existing facts or rights" (Garner 2019).

The case was partially dismissed, and the court advised the parties to find an alternate method to resolve this case outside of the legal system (PEN America v. Escambia County School District 2023). This case is too recent to have an easy resolution, and the legal questions it raises are still working their way through the court system. As alleged in the second count by the plaintiffs,

> … the School District and the School Board are depriving students of access to a wide range of viewpoints, and depriving the authors of the removed and restricted books of the opportunity to engage with readers and disseminate their ideas to their intended audiences. (PEN America v. Escambia County School District Document 1 2023, 3)

The concept of viewpoint discrimination against the authors of a removed book is an incredibly important one when it's considered in the nebulous web of legal philosophy surrounding book banning. The legal question has finally been raised: is it viewpoint discrimination when a government-funded forum is unceremoniously taken away for political reasons? According to *PEN America v. Escambia County School District* (2024), it might be.

This case does contend with the earlier, nebulous precedent set by *Island Trees v. Pico* (1982). *Island Trees* established that the denial of access to ideas counts as suppression of ideas (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). One could reason that revoking access to a government-funded forum, for political reasons, would insinuate a politically motivated suppression of ideas. A school librarian removing all books that rally against their political views would then be in violation of the constitutionally protected rights of authors and students. The main concern with this precedent is that it relies upon the foundation of audience-centered rights to generate individual rights, as opposed to the opposite, which is how the courts typically interpret First Amendment cases.

4b: Texas READER Act

In 2023, the Texas Legislature passed the Restricting Explicit and Adult-Designated Educational Resources (READER) Act, designed to prevent sexually explicit materials from being stocked in school libraries (Book People, Inc. v. Wong 2024). The act required all book vendors to issue warnings for all library materials they have sold, and will sell, based on sexual content within the books (Book People, Inc. v. Wong 2024). The two warnings the act designated were "sexually explicit" and "sexually relevant," which have different meanings as described below:

> 'Sexually explicit material' means any communication, language, or material, including a written description, illustration, photographic image, video image, or audio file. . . that describes, depicts, or portrays sexual conduct, as defined by Section 43.25, Penal Code, in a way that is patently offensive, as defined by Section 43.21, Penal Code.11
> 'Sexually relevant material' means any communication, language, or material, including a written description, illustration, photographic image, video image, or audio file. . .that describes, depicts, or portrays sexual conduct, as defined by Section 43.25, Penal Code.12. (Book People, Inc. v. Wong 2024, 4-5)

After the READER Act was passed, a group composed of bookstores, national trade organizations, and a legal-defense organization filed a suit for injunctive relief,[16] and alleged that the READER Act violated their First and Fourteenth Amendment rights (Book People, Inc. v. Wong 2024). The district court granted the plaintiffs' motion, and Texas then appealed the injunction (Book People, Inc. v. Wong 2024). The issue at hand was not the READER Act's standards, nor the intentions of the act; instead, the court narrowly examined the harm done to the plaintiffs based on their alleged First and Fourteenth Amendment complaints.

Firstly, the plaintiffs claimed that the act unconstitutionally compelled their speech, and by complying with the act they would suffer economic and reputational harm (Book People, Inc. v. Wong 2024). The court found that firstly, the issue of selling books is "arguably affected with a First Amendment interest" (Book People, Inc. v. Wong 2024, 11-12). Secondly, the act restricted the plaintiffs' future conduct (Book People, Inc. v. Wong 2024). Thirdly, the plaintiffs faced a credible threat from the act being enforced against them, which undermined the defendants' argument that the act lacked enforcement procedures (Book People, Inc. v. Wong 2024). The plaintiffs also established an economic injury due to the READER Act: through a loss of sales during the time between when the law went into effect and when the ratings were due, through the economic burden of rating each book, which would cost an estimated $200-$1,000 per book, and through a significant loss of revenue if the law were to go into effect (Book People, Inc. v. Wong 2024). The court found the economic impact to be acceptable evidence of injury (Book People, Inc. v. Wong 2024).

[16] Injunctive Relief: "A court order commanding or preventing an action. To get an injunction, the complainant must show that there is no plain, adequate, and complete remedy at law and that an irreparable injury will result unless the relief is granted" (Garner 2019).

The claims of the plaintiffs were found to be ripe, their standing reaffirmed, and that Commissioner Morath had an adequate connection to the enforcement of the READER Act, so he could be sued without sovereign immunity (Book People, Inc. v. Wong 2024).

Ultimately, the READER Act was found to be textbook compelled speech. The vendors were forced to issue the ratings, which would be attributed to them and not the state. If the state disagreed with their rating, they would, in essence, compel the vendor to change the rating and attribute that change to the vendor (Book People, Inc. v. Wong 2024). The ratings were based, in part, on subjective textual analysis, not on cut-and-dried fact (Book People, Inc. v. Wong 2024). To put it one way, the state was not requesting that vendors disclose whether a book had a character named "Steve" in it, but instead analyze the merit of any sexual content within a book.

While the state does have an interest in protecting children, it was found that the state's interest in protecting children does not supersede the unconstitutional nature of the regulation, and therefore has no compelling interest in defending a regulation that violates the First Amendment (Book People, Inc. v. Wong 2024).

The court affirmed the preliminary injunction against Commissioner Morath, vacated the preliminary injunction against Chairs Wong and Ellis, and remanded the case back to the district court (Book People, Inc. v. Wong 2024).

The precedent set by *Book People v. Wong* (2024) is seemingly harmonious with *Island Trees v. Pico* (1982) upon first examination, but with closer inspection, reveals an increasingly foggy legal philosophy. *Island Trees* established that disallowing a school library to purchase and curate certain books is not an act of idea suppression, whereas the removal of books is (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982). *Book People v. Wong* sidestepped this and instead examined the issue of compelled speech, ignoring the concept of idea suppression altogether. While this is an important issue to tackle, it neither affirms nor rebuts the precedent set in *Island Trees*, despite having ample opportunity to do so. *Book People, Inc. v. Wong* (2024) opened a new legal issue: is forcing publishers to disclose and categorize the contents of a book, analyzing the merit of the content within, a constitutionally reasonable thing to do? According to *Book People v. Wong*, this is unacceptable.

4c: Washington HB 2331

Washington State's legislature passed House Bill 2331 (HB 2331) in 2024. The first section of this bill is intended to prevent the politicized removal of materials from school libraries and curriculum simply because those materials depicted a protected class (Engrossed Substitute House Bill 23312024). HB 2331 also encodes in law a dispute process for parents to follow if they want to have a book removed from their school, which prioritizes resolving the conflict within the school without involving the courts until all other options have been exhausted (Engrossed Substitute House Bill 23312024).

HB 2331 is a new approach to the issue of book banning in school; it adds a layer of legal depth beyond the basic question of First Amendment rights. It follows up on the plaintiffs' argument in *PEN America v. Escambia County School District* (2024) about the disparate impact of book banning on people of protected classes. It also draws back to *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico* (1982) through its focus on removing materials for political reasons. This is a legal question that will likely continue to be discussed as more attention is drawn towards the authors of banned books and the marginalized characters within those books.

5. Speech for Who?

The subconscious philosophy surrounding book banning is one that can be reframed as a question: is speech meant for the audience, the speaker, the student, or the parent? There is considerable overlap between the four, as the audience and the student are often one and the same, the audience and the parent might also be the same in different instances, while the speaker and the student may be the same in other situations. Considering this potential overlap, cases can be analyzed to determine the subconscious priorities of the courts.

5a: Speech for the Audience

This analysis will start with establishing what speech for the audience entails. In critical scholarship surrounding the First Amendment, speech is reframed in the context of its importance to the audience, whereas Delgado's (1982) work establishes quite clearly the pitfalls of not considering the impact speech has on the listener, including a loss of self-esteem and social alienation. However, this scholarship is not mainstream by any means, and hate-speech

legislation still faces many challenges in the modern day due to the prominence of the marketplace of ideas philosophy. The Supreme Court has firmly established that free speech has a higher value to the speaker than it has consequences—or "value" —for the audience, except in school libraries. In school libraries, the impact on the audience is an important factor, as established in *Island Trees v. Pico* (1982). In *Island Trees*, the Court found that "If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed . . . then petitioners have exercised their discretion in violation of the Constitution" (Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico 1982, 871). This phrasing, at its core, reframes *Island Trees* to establish that denying people access to ideas is a First Amendment violation. This denial of access reframing is unique to *Island Trees* and the cases derived from it, in giving preference to the audience of speech as opposed to the speaker. If the Court had used a speaker-centric framework, they would have found that the suppression of ideas would be a violation towards the speaker's—the authors of the books—First Amendment rights, not the audience's First Amendment rights.

This framework would continue, establishing itself in future school library cases such as *American Civ. Liberties Union v. Miami-Dade County* (2009), wherein the plaintiffs' standing was decided based upon whether Balzli and his son needed imminent access to the books. Their standing, as it correlated to being the audience and receiver of the ideas within *A Visit to Cuba*, was never in question. Despite this long-held precedent of receiving ideas, the work of hate speech scholars amongst many other critical First Amendment scholars continues to be buried by a speaker-focused approach within every other facet of free speech precedent. This subconscious double-standard set between types of audiences—children and/or marginalized groups—permeates First Amendment interpretation and creates a division between free speech in school libraries and free speech in every other area of life.

5b: Speech for the Speaker

What, then, is free speech for the speaker? Speech for the speaker is a long-held value within First Amendment scholarship. Emerson (1962), when outlining his four primary values as reasons to protect free speech, puts "individual self-fulfillment" as the first of his values (878); to Emerson, the first value of speech is the value it provides to the speaker. While it can be

argued that, for Emerson, all four values are equal, many First Amendment scholars have become enamored with Emerson's first value and have sought to build philosophies around it. Baker's (1977) liberty model is built upon "…an arena of individual liberty… Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual" (966). Speech for the speaker is, in short, prioritizing the freedom of speech for the sake of the person speaking.

This framework is both popular judicially, as Emerson's work permeates through the courts, and popular within the populace. The right to speech as a speaker drives discussions of academic freedom, privacy, hate speech, and certain kinds of high school censorship. It's possible to randomly choose from a Supreme Court First Amendment case and find instances where speech for the speaker is a subconscious driving factor in the Court's decision-making process.

5c: Speech for Students

The discussion of speech frameworks is only further muddied by the Court's distinction between students and other citizens. Speech for students is a highly contentious and controversial topic, and yet it's the primary conscious framework the Court uses when discussing school speech. Speech for the student is an uneven melding of speaker/audience rights, by which student's rights as speakers are suppressed. Meanwhile their right as an audience is given critical examination by the courts, while simultaneously being suppressed. For example, "The Supreme Court has frequently held that the government has a right to protect children outside school from exposure to certain kinds of expression... [such as] sexually explicit expression" (Papandrea 2008, 1071). This kind of suppression has had very little analysis within the Supreme Court, though the given reasoning usually relates to protecting children—whether that means their moral or their emotional development (Papandrea 2008, 1071). In *Island Trees v. Pico* (1982), the speech rights of the students were of utmost importance when it came down to the core framework of idea suppression. Without the subconscious consideration of the rights of students to learn new perspectives and ideas, *Island Trees'* framework of idea suppression would not have been introduced, nor would it continue to be upheld.

In *American Civ. Liberties Union v. Miami-Dade County* (2009), when the court questioned the plaintiffs standing, a student from one of the schools was added to the suit in order to assure that they had a plaintiff in threat of direct harm on the case—despite the fact that the student's father was also included in the suit, and was later found to have independent standing as the parent of a student. This subconscious philosophy of student rights echoes throughout the conversation on book banning; in a sense, this subconscious philosophy gives the government and schools a way to exert authority over students' viewpoints and their ability to express them. Not only that, but this philosophy is also built upon the conscious idea of protecting children. As Papandrea (2008) puts it,

> . . . some restrictions on the constitutional rights of minors[are] permissible because children lack the emotional and intellectual experience and judgment to make rational decisions [which] has been used to justify other restrictions on minors' constitutional rights. (1072)

In this way, student status merges with the status of "child" and becomes interchangeable. This reframes the discussion even further; now, it is not only a matter of what students are permitted to learn, but what children are permitted to see and engage in.

According to a study of high school students by Hennen (2024), the students felt they should be permitted to learn more about diverse and divisive topics. When interviewed about the inclusion of LGBTQIA+ literature and racially diverse literature, most students felt these topics were both acceptable in schools and could have positive impacts on students (Hennen 2024). Some students showed concern about the depiction of racism in books, but ultimately believed it was the onus of the teacher—and the curriculum—to present these topics in a nuanced way so that students may learn from their discomfort, rather than avoid it wholeheartedly (Hennen 2024). When asked about sexual content and gore in books, only a minority of students felt discomforted by it, and only when the topics were presented in crass and unnecessary ways (Hennen 2024). What Hennen's study shows is that the one-size-fits-all approach of merging student identity and child status removes nuance and prevents difficult or uncomfortable topics from being taught—and learned—in a safe, supportive environment.

5d: Speech for Parents

The merging of student and child identities is at the core of the parents' rights movement, which puts forward another contender in the question of who speech is for: is it for

the parents? The courts, in part, agree with this framework; they have frequently agreed that restrictions on the free speech rights of adolescents are acceptable to support their parents' desire to raise their children however they want (Papandrea 2008, 1083). Parents and other concerned citizens have leapt on this framework, citing things such as the moral decline of society, protecting the innocence of children, and the corrupting influences preventing parents from imparting moral lessons to their children (Knox 2015). However, what exactly are children being protected from? Homosexuality, crime, and Christian-defined "indulgences" are amongst the list of things that the parents' rights movement, and the family values discourse that precedes it, put forward as hot-button issues (Bowman 2024; Clarke 2000). While few would claim that kindergarteners should be given access to pornography, the parents' rights movement would reframe any literature that depicts a same-sex couple as pornographic.

The modern trend of reframing literature as obscene, and the obscene as pornographic, is one way that the parents' rights movement has supported content restriction (Bowman 2024; Price 2022). This has resulted in a resurgence of obscenity laws, as the movement searches for meaningful legal ways to challenge books (Price 2022). This has led to books depicting LGBTQIA+ characters and people as "obscene" and challenged on that basis, even if the book would be considered mundane if the characters didn't have marginalized identities (Price 2022). Another tactic the parents' rights movement has used is the slippery-slope argument, citing that by exposing students to materials depicting things like nonstandard gender identity and sexual identity, the students themselves may be manipulated into changing their own identities (Bowman 2024). This is no different than the argument that by exposure to "obscene" materials, students may try to imitate the obscenity (Price 2022).

The parents' rights movement also fails to establish why they need governmental support to raise their children. It ignores parents who want their children to engage with difficult, taboo topics, and it gives boundless authority to schools to restrict and suppress whatever speech and viewpoints they dislike, based on defending parents' rights (Papandrea 2008, 1084). The courts have long understood that the purpose of restriction should be limited to preventing "lewd or vulgar expression" within the education system, yet the parents' rights

movement seeks to expand the scope of judicial oversight and attack the boundaries that have kept schools as bastions of free thought and unhindered learning (Holloway 2023).

So, then, who is speech for? What subconscious philosophy is the Supreme Court using in deciding? Unfortunately, the Court is using all of them. Speech is for everyone and no one simultaneously; audience speech is both prioritized and suppressed, the crucial concept of speaker speech is ignored, and the continuing clash between students' rights and parents' rights seems to have no end in sight.

5e: The Right to Censor

Is there a compelling state interest to ban books? Though this may seem like a simple question, it has broad implications; if there is a compelling interest, then what books may the state ban? Can it ban any books? Can the state not only ban books for children, but for adults as well? Can the government restrict the sale and ownership of a book for anyone? Does a book differ from any other kind of speech in a meaningful way? If the government bans a book, may it also ban the kind of speech expressed in that book? The answer to this seemingly simple question must be carefully examined to prevent government overreach and unconstitutional censorship.

To begin unpacking this question, we must first examine the meaning of a "compelling government interest." The Supreme Court has simultaneously given strict scrutiny to test this, while also not defining what "compelling" means; this omission makes it difficult for lawyers, legal scholars, and everyone living in the United Status to determine if the government is overextending its power and authority (Miller 2018). However, it can be narrowed down to two core components: an end and a "means", both of which must be examined and deemed worthy before a judgment can be cast (Miller 2018, 73). However, proving that an end is truly compelling or that a "means" is truly an appropriate avenue for government action requires not just legal consideration, but a moral and philosophical consideration of the purpose of government, which the Supreme Court has not wanted to explore (Miller 2018, 74-75).

However, we can still use the strict scrutiny[17] test, at the most surface-level, to determine if there is a compelling government interest in certain situations.

In the context of regulating school libraries, the "interest of instilling positive moral values in students" has long been considered a valid compelling reason for governmental intervention and restriction (Holloway 2023, 276). Alexander (2000) argues that, in the case of the First Amendment, the government must only have a compelling reason for regulating the restriction of ideas, not for, say, regulating any other kind of speech. By synthesizing these ideas of moral values and compelling reasons, the government potentially has a compelling reason for restricting free speech based on the ideals of safeguarding students' moral codes. However, the legal precedent set in *Book People, Inc. v. Wong* (2024) undermines this by setting the precedent that the government has no compelling reason to pursue unconstitutional restrictions.

Others argue that the government should be prioritizing moral self-realization over imparting community values that are often created by the majority and borne by the minority (Weissbord and McGreal 1991). By restricting the choice to interact with things that challenge a student's morality, a student cannot find self-realization and has no autonomous choice in their own moral code (Weissbord and McGreal 1991). An end cannot be based solely on seemingly subjective morality because it fails at the first hint of moral debate; it requires viewpoint discrimination on the very basis that some perspectives are more "immoral" than others and fails to establish strict boundaries which cannot be exploited to ban both pornography and any depiction of a targeted out-group.

5f: Finding an End for the Means

Establishing an appropriate and compelling end for the government to pursue is paramount to harmonizing the legal philosophy behind book banning. The two extremes of unfettered speech or rampant censorship are a philosophical trap of false dichotomy. Therefore, to better serve all involved parties—parents, students, individuals, and communities—a clear

[17] Strict Scrutiny: "In due-process analysis, the standard applied to suspect classifications (such as race) in equal-protection analysis and to fundamental rights (such as voting rights). Under strict scrutiny, the state must establish that it has a compelling interest that justifies and necessitates the law in question" (Garner 2019).

balance should be struck. This end should be the upholding of constitutionally-protected First Amendment speech.

The government has no compelling reason to pursue unconstitutional restrictions of free speech (Book People, Inc. v. Wong 2024), so we must look back to Van Alstyne's (1982) work to determine the constitutional hierarchy of protections for different forms of speech. For example, criminal speech that incites violence—such as a book that encourages a student to steal a gun and shoot a classmate—would be given the least amount of constitutional protection. Speech based in politics such as the autobiography of a president or other politician would be given the highest priority of constitutional protection. By focusing solely on upholding constitutionally-protected speech through the lens of the speaker, the courts are given a plethora of precedent law to examine and apply as needed.

This constitutionally-based hierarchy would require courts to make decisions based on the content brought before them, which is a potential pitfall that does not prevent the courts from muddying the legal precedent with personal biases and content-based censorship. However, it does give judges and the courts a flexible framework that can be applied to many different cases, as new thoughts and concepts enter the marketplace of ideas and are either accepted or discarded. Something that may be considered pornographic today might be acceptable in sixty years, and likewise, something considered socially acceptable today may be taboo in sixty years. Only by anticipating these possible societal shifts can a workable framework be established.

There is also an issue with the matter that schools, as a forum for speech, have a special set of circumstances as opposed to other forums for speech. When the audience is children and adolescents, there is an implied difference in allowable speech. This does not challenge the validity of a constitutional categorical approach; it merely contextualizes it. Giving the least protection to speech that encourages children to commit illegal actions is akin to giving the least protection to speech between adults who are conspiring to commit a crime together.

Another issue is, of course, with pornography, sexually explicit speech, and obscenity. Trying to legally define these concepts is outside the scope of this paper, and thus, this paper can only suggest these concepts be examined using a framework of psychological harm and not

morality. By anchoring the discussion in morals, the way is opened for movements to redefine any disliked subject as "obscene." As seen in *Island Trees v. Pico* (1982) and *Book People, Inc. v. Wong* (2024), materials may be taken out of context, labeled "obscene" for political reasons, or may be sexually explicit while still being educationally valuable. However, there is no constitutional right to cause harm, and therefore, the discussion around pornography, sexually explicit material, and other forms of potentially harmful speech should be oriented around that precedent.

By utilizing this categorical approach as a compelling end, the legal precedent for First Amendment speech can be harmonized. If *Island Trees* were to be analyzed using this method, it would show little change in the ruling; the concept of idea suppression would still be put forth in the first legal question answered by the Supreme Court. The fundamental change would come from the second question, wherein the respondents' constitutional rights were alleged to have been violated. However, the Supreme Court left this question open-ended. By applying this philosophy, this question would, instead, acknowledge and strengthen the precedent of defending the First Amendment rights of the audience to receive political ideas and the authors—the speakers—to express political viewpoints.

Conclusion

The negative effects of *Island Trees v. Pico* (1982) on the United States' legal precedent for free speech are numerous. *Island Trees* fundamentally deviated from the Supreme Court's typical framework and philosophy surrounding the First Amendment and created a sub-category of protected and unprotected speech, which allows an egregious amount of viewpoint discrimination. The Court's framework for speech in schools is flawed and relies heavily on conflicting perspectives on First Amendment rights, which does very little apart from confusing lower courts and allowing them to create their own interpretations of one of the United States' most crucial rights. The courts lack moral and philosophical depth in their urge to allow censorship, and this compulsion towards restricting free speech has only become more enticing for both government and private entities in the modern world.

The audience-centric framework set forth in *Island Trees* holds no legal weight in First Amendment cases divorced from public schools and enables various forms of censorship which

would be considered unconstitutional outside the context of a school. This text has proven various negative effects and elaborated upon the ways in which *Island Trees* and cases derived from the principles outlined in *Island Trees* have created a muddied, disconnected legal precedent. By moving away from these muddied moral frameworks and embracing First Amendment precedent and a categorical approach towards speech evaluation in school libraries, the courts can begin to build a fair and cohesive legal framework for censorship and free speech in schools.

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