

NOTES

WITH THE BANNED: SCHOOL BOOK BANS DEFY DOMESTIC AND INTERNATIONAL VALUES

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I. INTRODUCTION

The writing of Roman historian Ammianus Marcellinese preserved for the world two significant revelations: “that there was a massive library, and that it was destroyed.”¹ The “massive library” Marcellinese referenced is the legendary Library of Alexandria. To this day, many historians and book-lovers continue to be mystified by the legend of a library containing a vast majority of the world’s knowledge and the incredible loss that came with its destruction.² Part of this fascination comes from the sheer unfathomable loss of knowledge, but also from the idea that knowledge is a very powerful tool, and the grand obliteration of it shocks the conscience.³ Nonetheless, nations continue to decimate libraries and obscure knowledge, and the United States has continued the structural decimation of public school libraries and academic institutions through censorship.

A plethora of new laws introduced in the United States in the past several years have led to this systematic censorship in academic settings including public school libraries and the classroom. Florida’s “Don’t Say Gay” Act, HB 1557, has banned public schools from providing any “classroom instruction

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1. Richard Ovenden, *The Story of the Library of Alexandria Is Mostly a Legend, But the Lesson of its Burning is Still Crucial Today*, TIME (Nov. 17, 2020, 4:30 PM), <https://time.com/5912689/library-of-alexandria-burning/> [https://perma.cc/2R5K-S8X8].

2. *Id.*

3. See generally Preston Chesser, *The Burning of the Library of Alexandria*, EHISTORY — DEPARTMENT OF HISTORY (Oct. 26, 2023), <https://ehistory.osu.edu/articles/burning-library-alexandria> [https://perma.cc/7CW9-3Z8A].

related to sexual orientation or gender identity' in grades K-3.”⁴ Many of these bills have introduced potential sanctions for teachers and school employees who have “obscene” texts in their library or classrooms.⁵ Around twenty-seven recently introduced bills throughout the United States could eliminate protections put in place for teachers and other school employees who provide certain texts in their class and libraries to encourage discussion and guided, safe educational exploration of anatomy, sex education, art, literature, and more.⁶ Many of these proposed bills include provisions with the surface-level goal of protecting children from potentially harmful literature, “but in reality would ban books containing things like ‘profane language’ (e.g. HB 3826 in South Carolina), or ‘depictions of gender identity’ (e.g. HB 1205 in North Dakota).”⁷ This Note argues that thinly veiled discriminatory legislation is still unconstitutional and against both domestic and international values, even when hiding behind the auspicious goal of protecting children.

This is not to say that book banning is only a current trend in the United States. Internationally, many countries have issues with censoring literature and policing the kinds of information their citizens can access.⁸ Some of these countries have adopted human rights treatises which center on the right to freedom of expression, information, and, implicitly, the right to read.⁹ However, as this Note will discuss later, international treaties often fall short of the mark and these issues remain untouched by ratification.¹⁰

The number one reason for books being challenged or banned, as of 2020, was sexual content, followed by offensive language.¹¹ For purposes of today’s society, the term “obscene” generally encompasses both sexuality and profanity, and the United States has a long history of censoring and policing “obscene” literature and media, as this Note will discuss in Part III, Section A. This Note will analyze recent domestic legislation, both proposed and enacted, specifically concerning childhood education and literature and analyze them under both the First Amendment and under international law, arguing that these bills and laws cannot be supported by either.

This Note maintains that the recent legislation over-broadens and abuses the concept of the United States’ obscenity laws as an attack on the public education system’s right to provide literature for children and young adults that contains

4. Jonathan Friedman, Jeffrey Sachs, Jeremy C. Young & Samantha LaFrance, *Educational Censorship Continues: The 2023 Legislative Sessions So Far*, PEN AMERICA (Feb. 16, 2023), <https://pen.org/educational-censorship-continues-in-2023/> [<https://perma.cc/NC6V-C4FH>].

5. *Id.*

6. *Id.*

7. *Id.*

8. Dimitrije Curcic, *Global Book Banning Statistics*, WORDSRATED (Apr. 14, 2023), <https://wordsrated.com/global-book-banning-statistics> [<https://perma.cc/N3XJ-FZR8>].

9. Maeve McDonagh, *The Right to Information in International Human Rights Law*, 13 HUM. RTS.L. REV. 25, 26 (2013).

10. *See infra* Part V.A.

11. *How Do Books Get Banned?*, FIRST AMENDMENT MUSEUM (Aug. 20, 2024), <https://firstamendmentmuseum.org/how-do-books-get-banned/> [<https://perma.cc/2D52-5D4T>].

“non-traditional” topics, such as sexuality and real-world issues, even if they are focused around controversial issues, or otherwise mature content for the sake of educational purposes. Furthermore, this Note argues that recent legislation in U.S. schools go against longstanding American values of free expression that are essential to progress, and that by considering international treaties such as the Convention on the Rights of the Child (“CRC”) and the International Covenant on Civil and Political Rights (“ICCPR”), the United States can move forward and away from a regime of censorship and fear of providing mature or “obscene” material to students. Finally, this Note contends that categorical book bans are an imprecise solution that deprives students of valuable literature and violates individual rights, including their First Amendment rights, and there is a need for reformed educational standards that value students learning about difficult subjects in a controlled, academic setting.

In Part II, this Note will define some key terms related to this topic which will be helpful to keep in mind. Part III will explore attitudes towards censorship and book bans based on domestic and international law, including important case law from the United States, a student’s “right to read” in the United States, and a student’s “right to read” from an international perspective. Part IV will focus briefly on the importance of discussing the reasons and pitfalls for book bans, including how they affect children in marginalized groups, such as LGBTQ+ children, and will touch upon what little research has been done on the psychological effects on minors exposed to obscene literature and other content at a young age.

In Part V, this Note will analyze the United States’ legal framework for handling educational book bans related to obscene material as compared to the United States’ judicial decisions in the past. This will include a First Amendment analysis, as well as utilizing the international framework of “the best interest of the child,” provided by the CRC.¹² Part V will discuss why current international law is not adequate as a blanket provision for countries to look to when considering censorship in the classroom, and specifically discuss “The Convention on the Rights of the Child” and other international frameworks. Finally, Part VI will argue that banning or censoring books in educational institutions is not the end-all be-all solution for protecting children from “obscene” literature and will recommend a uniform model for school boards to use when considering if a text should be censored. This uniform model should be created by a body such as the American Libraries Association, subject to review and administration by certified educational professionals. The model would also redefine the term “obscene” in today’s modern world, among other criteria discussed herein.

12. Convention on the Rights of the Child, *opened for signature* Nov. 20, 1989, 1577 U.N.T.S. 3 (entered into force Sept. 2, 1990) [hereinafter CRC].

II. FRAMING THE ISSUE: IMPORTANT TERMS AND INTERNATIONAL HISTORY

A. Relevant Definitions for Analysis

First, it is important to establish what the phrase “book ban” means in the context of this Note. The term “book ban” is often used in a plethora of instances to describe many sorts of challenges to controversial texts; for the purposes of this Note, it will be used to indicate that the literature is not offered in a public school setting, either by an initial determination to keep it off the shelves or a challenge to a text already present in a public school setting. The term, for the purposes of this Note, does not refer to the challenges to a book being published or any penalties incurred by a publisher or author for doing so, but instead is referring to when a school board, other academic personnel, or legislative body advocates for or engages in the removal of certain texts from public school libraries and classrooms.

Another term used repeatedly in the literature and will be used throughout this Note is “challenge” or “challenged.” To challenge a text refers to “the process of formally requesting that a book be in some way removed from a school curriculum, school library collection, or public-school collection.”¹³ This is often done through parents of students but may also be brought forth by groups or other concerned organizations. “Challenge” does not necessarily mean “banned” because the books in question are not always ultimately censored or removed after the inquiry.¹⁴ Also, “ban” and “censorship” will be used interchangeably throughout this Note. They will both mean the removal of a book from a collection, whether that collection be the public-school library or a classroom’s personal collection. Further, as this Note will discuss in the next section, “obscene” has no singular definition in the United States’ legal framework.¹⁵ Therefore, when using the term “obscene,” this Note will refer to material which contains issues that may be deemed offensive to certain moral principles, such as sexual content, profane language, or discussions of sexuality and/or gender identity, or some other controversial topic. Further, as this Note will discuss, the term “obscene” as used in this Note is largely reliant on the phrase “the work, taken as a whole, lacks serious literary, artistic, political, or scientific value,” which is derived from the *Miller* test, examined below.¹⁶

Finally, this Note will discuss the systematic discrimination and marginalization of certain groups of individuals for which book bans are often targeted. One such group includes Lesbian, Bisexual, Gay, and Transgender, and more (“LGBTQ+”) as well as Black, Indigenous, and people of color

13. Emily J. M. Knox, *Silencing Stories: Challenges to Diverse Books*, 3 INT’L J. OF INFO., DIVERSITY, & INCLUSION 24, 26 (2019), <https://jps.library.utoronto.ca/index.php/ijidi/article/view/32592> [https://perma.cc/2D7C-9RVD].

14. *Id.*

15. *See infra* Part III.B.

16. *Miller v. California*, 413 U.S. 15, 16 (1973); *see infra* Part III.C.

(“BIPOC”) individuals. Therefore, knowing these acronyms will be essential for the forthcoming discussion.

B. A Brief Look at International History of Education

The “right to read” is closely linked with the right to education, which was first acknowledged internationally in the 1948 Universal Declaration of Human Rights.¹⁷ The 1966 International Covenant on Economic, Social and Cultural Rights then gave the right to education binding legal status.¹⁸ The Convention on the Rights of the Child further enshrined this right.¹⁹ These three key agreements launched greater international recognition and protection of the right to education through various legal instruments.²⁰ Today, book bans and censorship of literature in schools are often looked at from a pedagogical or educational standpoint, which affects how courts and legislative bodies consider the issue of book bans in schools.²¹ This Note will primarily focus on book bans in the context of schools or school libraries which are targeted towards children, and thus an understanding of education as a human right is important to keep in mind while examining First Amendment or freedom of expression issues in children’s literature censorship.

The Convention on the Rights of the Child is also important to consider when analyzing international laws regarding children and education. The CRC proscribes that children have the right to “development,” not just physically but also cognitively, socially, and culturally.²² Further, it enshrines the idea that children are free to have opinions on issues that affect them, and that they have a right to be heard and taken seriously.²³ This Note takes into consideration the idea that this ideology enshrined in the CRC is but one reason for allowing young students the right to choose their own reading materials. Additionally, young students should have the opportunity to read the materials in an academic setting where intelligent discussion is encouraged because it is fundamental in allowing their voices and opinions to be heard.

17. Lea Shaver, *The Right to Read*, 54 COLUM. J. TRANSNAT’L L. 1, 13 (2015).

18. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 933 U.N.T.S. 3 (entered into force Jan. 3, 1976).

19. CRC, *supra* note 12.

20. Shaver, *supra* note 17.

21. *See infra* Part III.A.

22. *Background to the Convention*, UNITED NATIONS HUMAN RIGHTS OFFICE OF THE HIGH COMMISSIONER, <https://www.ohchr.org/en/treaty-bodies/crc/background-convention> [https://perma.cc/PB38-8SRU] (accessed Feb. 10, 2024).

23. *Id.*

III. DOMESTIC AND INTERNATIONAL ATTITUDES TOWARDS CENSORSHIP

A. The Modern-Day Culling of Controversial Texts in Schools

Modern-day statutes have perpetuated inappropriate book banning in schools across the country. As previously mentioned in Part I, Florida enacted a trio of laws in the 2023 school year related to banning instruction on sexual orientation and gender identity in early elementary classes.²⁴ Furthermore, legislation such as HB 1467 requires schools to catalog all books, including those in classroom libraries.²⁵ Because the laws lack clear guidance, they have led educators and administrators to proactively remove books from shelves without any specific challenges being filed.²⁶ This preemptive book removal is happening even though no formal reviews or bans have been mandated, out of fear of not complying with vague legislation.²⁷

Similarly restrictive laws have been passed in other states. In Missouri, a law was passed to strengthen protections for sexual assault survivors, but before the law was approved, a provision was added that makes it a serious criminal offense for librarians or teachers to provide any “explicit sexual material” to a student.²⁸ On the outset, this seems like a fairly well-intentioned law to protect students and those who have suffered from sexual assault from being exposed to inappropriate or triggering content. However, the amendment of making it a Class A misdemeanor to provide such text and the vagueness of the law itself led to sweeping book bans.²⁹ Approximately 313 books were banned after the bill went into effect out of fear of criminal punishment.³⁰ According to a report published in Pen America, over half of the books taken off the shelves due to this new law were written by BIPOC individuals or those in the LGBTQ+ community.³¹

The dangers of wholesale bans on books in schools are extensive. In Tennessee, the state legislature passed the “Age-Appropriate Materials Act” (SB 2407) in 2022.³² This law led the state education department to issue a memorandum in August 2022 mandating that all books in classroom and school libraries be catalogued.³³ In response, many teachers reported on social media or at school board meetings that they had decided to completely remove all

24. Kasey Mehaan et al., *Banned in the USA*, PEN AMERICA (Apr. 20, 2023), <https://pen.org/report/banned-in-the-usa-state-laws-supercharge-book-suppression-in-schools/> [https://perma.cc/K9MU-KZ8A].

25. *Id.*

26. *Id.*

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.*

books from their classroom libraries.³⁴ These wholesale bans were made by teachers seeking to avoid punishment under the new law, rather than reviewing books individually to determine their appropriateness.³⁵ By indiscriminately removing entire classroom book collections, educators are removing important educational materials from the classroom. Beyond this, the right for children to choose what they would like to read in a classroom setting are taken away unnecessarily.

That is not to say that every new bill in recent legislation has been for the purpose of enabling wholesale book bans. In 2023, Illinois became the first state to outlaw book bans in public libraries.³⁶ The bill, HB 2789, “protects the freedom of libraries to acquire materials without external limitations” and “indicates that reading materials should not be proscribed, removed, or restricted because of partisan or personal disapproval.”³⁷ The law allows for the State Librarian and State Library to collaborate and develop their own written statement mandating that each library must provide an adequate collection of books and other media to meet the needs of all the diverse citizens of the state.³⁸ Secretary of State Alexi Gianoulis best encompasses the reasoning for Illinois’s unprecedented legislation, as he stated that “banning books contradicts the very essence of what our country stands for [and] defies what education is all about: teaching our children to think for themselves.”³⁹

B. Notable U.S. Court Cases and Law

A student’s right to read originates from the evolution of students’ First Amendment rights in the schoolhouse, whether this be within the walls of the classroom or in the public school library.⁴⁰ Over the years, United States legislation has embraced the importance of students’ rights even within the purview of the school board’s discretion.⁴¹ While books with obscene or mature content are not the only books censored or banned in educational institutions, parents or other dissenters to the text may use these elements of the text to ban them from schools for other, more idiosyncratic reasons.⁴²

First, a broad overview of United States obscenity laws is important to give a historical background of what the nation has considered “obscene” in media. Anthony Comstock successfully convinced Congress to pass the Comstock Act

34. *Id.*

35. *Id.*

36. *Gov. Pritzker Signs Bill Making Illinois First State in the Nation to Outlaw Book Bans*, ILLINOIS.GOV (Jun. 12, 2023), <https://www.illinois.gov/news/press-release.26575.html> [<https://perma.cc/9V33-DCS2>].

37. *Id.*

38. *Id.*

39. *Id.*

40. *See* Shaver, *supra* note 18, at 11.

41. *See infra* note 60.

42. *See infra* note 50.

in 1873 which provided that no “obscene, lewd, or lascivious book, pamphlet, picture, paper, print, or other publication of an indecent character [. . .] shall be carried in the mail.”⁴³ It can be reasoned, therefore, that the Comstock Act, while not directly related to the censorship of literature in a school context, demonstrated the ideology of imposing personal morals regarding sexual content and otherwise obscene material on others consumption of such material. It demonstrates how in the United States, the government feels an obligation to police or supervise an individual’s morals.

The first vital case for the birth of modern-day book censorship is *United States v. Bennett* in which the term “obscenity” in the context of the Comstock Act was loosely defined.⁴⁴ The court analyzed Britain’s test derived from *Regina v. Hicklin* and held the test for obscenity is “whether the tendency of the matter charged as obscenity is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall.”⁴⁵ In a sense, any text that tackled difficult or controversial topics may be considered to fall under the umbrella of obscenity as it could arguably corrupt the minds of impressionable youths.

In 1957, *Roth v. United States* created a new test for the issue of obscenity.⁴⁶ The shift from the *Bennett* test created a new standard, as now the material had to be distributed for obscene purposes, not just “happen” to be obscene.⁴⁷ The Court articulated “[t]he nature of the materials is, of course, relevant as an attribute of the defendant’s conduct, but the materials are thus placed in context from which they draw color and character.”⁴⁸ In this sense, we moved from a test of substance or content to one of intent. An author or publisher must have intended their work to be consumed in a way that was to corrupt or degrade the individual in society, not just happen to include controversial or taboo subjects.⁴⁹

C. Obscenity and Students’ Right to Read in the United States

Obscenity is still often used as the basis for book challenges and bans today, as mentioned previously. Moving from the broad conceptualization of obscenity laws in the United States, and how they are used when considering whether literature is deemed obscene or inappropriate for all or certain readers, this Note now turns to how students’ rights are affected by these laws. Ultimately, there are many examples of U.S. case law which both directly and indirectly deal with

43. Claudia Davidson, *Book Censorship in the United States: A Government Documents Story*, 51 DOCUMENTS TO THE PEOPLE 17 (2023), <https://www.journals.ala.org/index.php/dtp/article/view/8125/11316> [<https://perma.cc/X5HD-WW7B>].

44. *United States v. Bennett*, 24 F. Cas. 1093 (C.C.S.D.N.Y. 1879).

45. *Id.* at 1104.

46. *Roth v. United States*, 354 U.S. 476 (1957).

47. *See id.* at 495 (Warren, J., concurring).

48. *Id.*

49. *Id.*

book censorship in schools, as well as a student's First Amendment rights in educational institutions.

Book censorship occurs in many forms, and one of them is the removal of books from the school library. However, there are certain criteria that must be met before the removal of books from shelves in school libraries can manifest a constitutional issue which the courts can address. In *Presidents Council, District 25 v. Community School Board No. 25*, the Court of Appeals for the Second Circuit held that the removal of a book from a public-school library was not a constitutional issue if those opposed to the removal could not show the board had curtailed "freedom of speech or thought."⁵⁰ The book at issue depicted:

[a]cts of criminal violence, sex, normal and perverse, as well as episodes of drug shooting are graphically described . . . Presumably the educational value of this work, aside from whatever literary merit it may have, is to acquaint the predominantly white, middle-class junior high school students of Queens County with the bitter realities facing their contemporaries in Manhattan's Spanish Harlem.⁵¹

In this case, psychologists, teachers, and students provided that the text was educationally valuable and was not a "corruptive influence."⁵² Despite these affidavits, the court ultimately ruled that because the state legislature had determined that school boards were responsible for the selection of materials in public school libraries, they did not deem it appropriate to examine the Board's determinations.⁵³ Therefore, the court explicitly stated that they would only be reviewing whether or not the Board had stepped on the toes of the students' First Amendment rights. With no constitutional issues that the court could find, the court concluded that "[a]cademic freedom is scarcely fostered by the intrusion of three or even nine federal jurists making curriculum or library choices for the community of scholars."⁵⁴ The court, therefore, affirmed the dismissal of the civil suit.⁵⁵

Individual communities also have a mechanism for discerning their own obscenity regulations and what books should be banned because of them. In 1973, the *Miller* test emerged from the case *Miller v. California*.⁵⁶ This is the test for obscenity this Note considers to be the most prevalent, and therefore is the most discussed herein. In *Miller*, the Supreme Court held that a California publisher could be prosecuted for distribution of obscene material through

50. *Presidents Council, Dist. 25 v. Community School Bd.*, 457 F.2d 289, 293 (2d Cir. 1972).

51. *Id.* at 291.

52. *Id.*

53. *Id.*

54. *Id.* at 292.

55. *Id.* at 294.

56. *Miller v. California*, 413 U.S. 15 (1973).

California Penal Code § 311.2(a).⁵⁷ Chief Justice Warren E. Burger created a three-pronged test for obscenity cases:

(a) whether 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest . . . (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.⁵⁸

This test gives individual communities a way to establish their own standards for what is considered "obscene" and not protected under the First Amendment. However, the vague language of the last prong creates avenues for which communities can easily censor texts for partisan reasons, because what constitutes as a lack of "serious literary, artistic, political, or scientific value" is certainly discretionary and easily argued from any viewpoint.⁵⁹

While up until now it seems the courts have given vast discretion to communities and their schools to discern what they wish to ban, the progressive *Pico* decision spoke out in favor of rights on behalf of the students. In the 1980s, the Court decided *Board of Education v. Pico* in which the Court limited a school board's right to censor books from school libraries.⁶⁰ In *Pico*, "the school board directed that certain books be removed from school libraries, characterizing them as 'anti-American, anti-Christian, anti-Semitic, and just plain filthy.'"⁶¹ Students of the district sued on the basis that their First Amendment right had been violated and the board had removed the books due to partisan reasons, such as particular passages offending their social, political, and moral values, and not because the texts "were lacking in educational value."⁶² The dissents reasoned that school boards traditionally remove texts motivated by "social, moral, or political" values.⁶³ In the dissent authored by Justice Rehnquist, he states he whole-heartedly disagreed with a student's right to receive information, and argued that it is inconsistent with past precedent.⁶⁴

Pico further analyzed the difference between particular issues that come with the removal of books within the school library, outside the curriculum of the classroom, and required texts that are substantive parts of the class's curriculum.⁶⁵ Students are in a unique position when it comes to being within the school walls, as "all First Amendment rights accorded to students must be

57. *Id.*

58. *Id.* at 15.

59. *Id.*

60. *Bd. of Educ. v. Pico*, 457 U.S. 853 (1982).

61. *Id.* at 853.

62. *Id.* at 858–59.

63. *Id.* at 889 (Burger, C.J., dissenting).

64. *Id.* at 910 (Rehnquist, J., dissenting).

65. *Id.* at 861–62.

construed ‘in light of the special characteristics of the school environment.’”⁶⁶ The Court ultimately defined the difference between censorship within the confines of the classroom versus the school library, with the latter possessing distinctive features that “make that environment especially appropriate for the recognition of the First Amendment rights of students.”⁶⁷ Whether or not a student’s First Amendment rights have been violated by a book removal, the Court said, depends on the motivation of the remover’s actions. These motivations typically fall into two categories: to remove educationally devoid or undeniably harmful material, or deny students’ access to ideas which the remover disagrees with.⁶⁸ Ultimately, 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.’”⁶⁹ Despite this clear ruling by the Court, *Pico* is a plurality decision, and therefore is not binding precedent, although it is widely used. Some are skeptical of the *Pico* test as “even if courts were to begin strictly applying the motivations test, it would remain an unworkable standard, because *Pico* and its progeny provide a ‘road map’ for school boards to improperly remove books.”⁷⁰

In 1995, *Pico* was used in *Case v. Unified School District No. 233* which demonstrated issues of book bans within schools when it comes to personal dislike of the text. While considering the student, teacher, and parents as a whole, the court found that the removal of the book violated the First Amendment.⁷¹ The court was charged with determining the “actual motivation” of the school board members when deciding to remove a predominately LGBTQ+ novel from the public school’s shelves.⁷² The court found that the school board’s claim of the text lacking “educational suitability” was a thinly veiled attempt to remove a text which depicted LGBTQ+ themes, for which they disagreed with, and the court found this to be obvious discrimination.⁷³ This is evidenced by one board member who “testified that he voted to remove *Annie on My Mind* because he felt that the book was inappropriate and unsuitable for students because it ‘glorifies and promotes’ homosexuality.”⁷⁴ The lack of a pedagogical reasoning for removing the book from the school’s grounds showed that board members desired to “prescribe what shall be orthodox in politics,

66. *Id.* at 868 (quoting *Tinker v. Des Moines School Dist.*, 393 U.S. 503, 506 (1969)).

67. *Id.*

68. *Id.* at 871.

69. *Id.* at 872 (quoting *West Virginia Board of Education v. Barnette*, 319 U.S. 624, 642 (1943)).

70. Ryan L. Schroeder, *How to Ban a Book and Get Away With It: Education Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 382 (2021), https://ilr.law.uiowa.edu/sites/ilr.law.uiowa.edu/files/2023-02/N3_Schroeder.pdf [<https://perma.cc/8D8F-CUX5>].

71. *Case v. Unified Sch. Dist. No. 233*, 908 F. Supp. 864, 865 (D. Kan. 1995).

72. *Id.* at 875.

73. *Id.*

74. *Id.* at 870.

nationalism, religion, or other matters of opinion.”⁷⁵ Due to the reasons for removing the texts, the removal ultimately was unconstitutional.⁷⁶

One of the most modern-day examples of the *Pico* analysis at work is *ACLU of Florida, Inc. v. Miami-Dade County School Board*. In this case, “the board did not simply dislike the ideas in the . . . book. Instead, everyone, including both sides’ experts, agreed that the book contained factual inaccuracies.”⁷⁷ Because the book was removed due to factual inaccuracies, and not a subjective dislike of the text itself, the court found there was no constitutional violation. This case demonstrates that *Pico* protects books from personal dislike of a petitioner, but not from a school board determining a book lacks educational value because of factual inaccuracies.⁷⁸ *Pico*, therefore, keeps the concept of educational suitability at the forefront of a court’s review for when a student’s First Amendment right has been violated.

D. A Student’s Right to Read: An International Perspective

The Convention on the Rights of the Child addresses the accessibility of children’s literature and is an important international treatise to consider when discussing a student’s right to read.⁷⁹ Article 17 encourages the development of mass media, including literature, to conform with the developmental needs of children.⁸⁰ In conjunction with Article 17, Article 13 specifically upholds the right of children to freedom of expression and “includes the freedom to seek, receive and impart information and ideas of all kind,” in any form of media.⁸¹ Furthermore, Article 14 of the CRC upholds the belief that children have a right to freedom of thought which includes parents and guardians providing direction to children to navigate their own personal growth into adulthood consistent with the freedom to their own judgements and beliefs.⁸² Finally, Article 31 enshrines that parties of the CRC shall promote children’s right to participate in cultural and artistic endeavors, and shall encourage such endeavors.⁸³

One overarching theme of the CRC includes construing actions concerning children in “the best interests of the child.”⁸⁴ This phrase indicates that “a larger weight must be attached to what serves the child best” and “the child” may

75. *Id.* at 875 (citing *Pico*, 457 U.S. at 872; *Barnette*, 319 U.S. at 642).

76. *Id.* at 876.

77. *ACLU of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd.*, 557 F.3d 1177, 1207 (11th Cir. 2009).

78. *Id.* at 1202.

79. See generally Shaver, *supra* note 18.

80. CRC, *supra* note 12.

81. *Id.*

82. *Id.*

83. *Id.*

84. *Id.*

actually be an identified group of children, such as public school students.⁸⁵ Therefore, in the context of the school board's desire to protect students from "obscene" literature versus a student's right to access diverse texts, what serves the child best is what should be given greater weight.⁸⁶ As will be discussed throughout Part IV, this Note argues that what is in the best interest of the child is their access to a wide range of literature, even if the substance may relate to adult themes, uncomfortable topics, or often overlooked viewpoints.⁸⁷

Another fundamental treaty to look at when considering what rights children hold at an international level is the International Covenant on Civil and Political Rights.⁸⁸ Article 19, while not particular to the rights of students or children, states that the right to freedom of expression, for which everyone has a right, includes freedom to seek and receive information about all ideas, regardless of their substance.⁸⁹ The only limitations proscribed are when it comes to respecting the rights or reputation of others or national security, including public order.⁹⁰

A recent judgment before the European Court of Human Rights shows how these treaties are used in the context of censoring children's literature.⁹¹ *Macatė v. Lithuania* was initiated by the author of a children's collection of fairytales portraying marginalized groups, such as LGBTQ+ individuals.⁹² The author brought the action as the distribution of the book was temporarily suspended after parents protested the same-sex couples depicted in the book, with the parents stating that inclusion of same-sex couples in the text was harmful to children and therefore against the Lithuanian Constitution as well as the Act on the Protection of Minors from Negative Effects of Public Information.⁹³ Those against the book argued that the depiction of same-sex couples expressly went against the definition of marriage in the Lithuanian Constitution, which states that marriage is between a man and a woman and can only be contracted between those of different sexes.⁹⁴

85. Eva Lievens, *The United Nations Convention on the Rights of the Child and What It Means for Online Services*, INFORMATION COMMISSIONER'S OFFICE, <https://ico.org.uk/for-organisations/uk-gdpr-guidance-and-resources/childrens-information/childrens-code-guidance-and-resources/how-to-use-our-guidance-for-standard-one-best-interests-of-the-child/the-united-nations-convention-on-the-rights-of-the-child/> [https://perma.cc/LNS9-QUF6] (accessed Aug. 8, 2024).

86. *Id.*

87. *See infra* Part IV.

88. G.A. Res. 2200A (XXI), International Covenant on Civil and Political Rights (Dec. 16, 1966) [hereinafter ICCPR].

89. *Id.*

90. *Id.*

91. *Macatė v. Lithuania*, App. No. 61435/19, 1 (Jan. 23, 2023), <https://hudoc.echr.coe.int/eng?i=001-222072> [https://perma.cc/BP8X-VQ8H].

92. *Id.* at 4.

93. *Id.* at 6.

94. *Id.* at 21.

The court went on to apply the concept of the best interests of the child, stating that ““there is no scientific evidence or sociological data at the Court’s disposal suggesting that the mere mention of homosexuality, or open public debate about sexual minorities’ social status, would adversely affect children.”⁹⁵ Further, the court stated that exposure to diversity, equality, and tolerance actually had a positive impact on children’s social behaviors.⁹⁶ In restricting a child’s access to books depicting same-sex relationships, and actively using domestic and international law to do so, those against the book were actually perpetuating the stigmatization of marginalized groups.⁹⁷ Ultimately, the court held that, without a legitimate reason for removing the text, removal on the basis of the same-sex relationships depicted in the book was not an adequate ground.⁹⁸ Although this case focuses specifically on same-sex relationships, the recency in which the case was issued as well as the language discussing the importance of promoting diverse ideas and tolerance to children through literature is valuable insight into how the European Court of Human Rights analyzes book bans from an international perspective.

Finally, organizations such as the International Literacy Association (“ILA”) have also created initiatives focused on thwarting pervasive book bans in their tracks, including the Children’s Rights to Read initiative.⁹⁹ Right 3 of the Children’s Rights to Read speaks specifically to the belief that children have a right to choose what they read.¹⁰⁰ Citing the 2017 Progress in International Reading Literacy Study, the ILA asserts that a student’s right to choose what they read is linked to higher test scores, better outcomes in learning objectives, and an increase in a student’s confidence in reading.¹⁰¹ In order for a child to have their right to choice fulfilled, as well as for legislation and private decisions concerning book censorship to be consistent with the best interest of the child standard, young students must have access to a diverse range of texts.¹⁰²

IV. WHY BOOK BANS MATTER

A. Underrepresentation of Marginalized Groups and Public Attitude

Recent censorship efforts in U.S. schools go against longstanding American values of free expression that have advanced progress over generations. These measures also infringe on the constitutional rights to free speech, equal

95. *Id.* at 37.

96. *Id.*

97. *Id.* at 53.

98. *Id.* at 70.

99. *Children’s Rights to Read*, INT’L LITERACY ASS’N, <https://www.literacyworldwide.org/get-involved/childrens-rights-to-read> [<https://perma.cc/G8ZC-EZTK>] (accessed Aug. 8, 2024).

100. *Id.* at 8.

101. *Id.*

102. *Id.*

protection, and nondiscrimination in education guaranteed by the First Amendment, Fourteenth Amendment, and Title IX.¹⁰³ The impact falls disproportionately on marginalized groups like people of color and LGBTQ+ students and teachers.¹⁰⁴

One marginalized group disproportionately impacted by book banning is LGBTQ+ students.¹⁰⁵ Through challenging and censoring books with LGBTQ+ themes, governments and school boards teach young LGBTQ+ adolescents to feel ashamed and isolated of their identity.¹⁰⁶ The capacity to express oneself in ways that align with one's identity is fundamental to human dignity and rights.¹⁰⁷ The freedom to engage in self-affirming expression that reflects one's self-identification is central to upholding the worth and rights of each individual, especially for children at a critical time when they need compassion and support.¹⁰⁸

National opinion polls demonstrate that most Americans disagree with the anti-public education agenda.¹⁰⁹ This agenda promotes discrimination and inequality by diverting funding away from public schools.¹¹⁰ Most Americans want teachers and students to have more influence on curricula.¹¹¹ They also want schools to be more welcoming of diversity and inclusion.¹¹²

According to Chad Heck of the Indiana Library Federation, school librarians in Indiana have started taking books dealing with LGBTQ+ topics, sex, race, and violence off the shelves.¹¹³ While all fifty states have obscenity laws banning dissemination of obscene materials to minors, which can carry heavy penalties, most states created exemptions for schools, libraries and museums in the 1960s through 1980s.¹¹⁴ According to research by the advocacy group EveryLibrary, these exemptions enabled educators to fully inform

103. Akilah Alleyne, *Book Banning, Curriculum Restrictions, and the Politicization of U.S. Schools*, AMERICAN PROGRESS (Sept. 19, 2022), <https://www.americanprogress.org/article/book-banning-curriculum-restrictions-and-the-politicization-of-u-s-schools/> [https://perma.cc/8EPL-HH6R].

104. *Id.*

105. Orion Rummeler, *Book Bans Internalize 'Shame' for Young LGBTQ+ People*, THE 19TH (Feb. 23, 2023), <https://19thnews.org/2023/02/book-bans-lgbtq-reading/> [https://perma.cc/8Q6H-WFLA].

106. *Id.*

107. Megan Young-Schlee, *The Right to "Take Part in Cultural Life" & the Censorship of Queer Media*, 33 IND. INT'L & COMP. L. REV. 361, 364 (2023), <https://journals.iupui.edu/index.php/iiclr/article/view/27375> [https://perma.cc/5MV2-73WJ].

108. *Id.* at 368.

109. Alleyne, *supra* note 103.

110. *Id.*

111. *Id.*

112. *Id.*

113. Hannah Natanson, *School librarians face a new penalty in the banned-book wars: Prison*, WASH. POST (May 18, 2023), <https://www.washingtonpost.com/education/2023/05/18/school-librarians-jailed-banned-books/> [https://perma.cc/4N2V-W5GV].

114. *Id.*

children about topics like biology, health, and sex education without risk of sanctions.¹¹⁵

People of color are another group disproportionately affected by book bans. According to PEN America, as of September 2022, 41% of banned books had main or secondary characters of color and 22% dealt with race and/or racism.¹¹⁶ Two Black authors, Jason Reynolds and Angie Thomas, are repeatedly found on the American Library Association's ("ALA") annual Top 10 List of most challenged books.¹¹⁷ One author, Ibram X. Kendi, whose novel *How to Be Antiracist* is often challenged, stated that "books challenging notions of Black inferiority are considered indoctrination, but books that don't say anything about Black people or don't reinforce notions of Black inferiority are considered education."¹¹⁸ When we ban books written by LGBTQ+ authors or authors of color, what message does this send to LGBTQ+ students and students of color?

B. The Psychological Effects of "Obscene" Content on Adolescents

There seems to be little consensus in the literature as some studies find that exposure to explicit material early in life may lead to risky sexual behavior. While there are some studies which find that reading books banned due to "edgy" content may have positive prosocial behavior effects on adolescents.¹¹⁹ It is possible that both may be true at the same time, with one study suggesting that reading banned books may not be the cause of worrisome psychological issues in children, but merely an indication of potential mental health problems.¹²⁰

Studies involving visual media have shown that young teenagers who are introduced to sexually explicit media are more likely to participate in risky sexual behaviors when they reach early adulthood.¹²¹ Sexually explicit media, or SEM, is prevalent and influential for young people as they may often perceive it to be an accurate representation of sexual acts.¹²² While not explicitly demonstrative of the percentage of adolescents exposed to SEM in literature, as many as 93% of young boys and 62% of young girls were exposed to SEM or

115. *Id.*

116. Maya Pottiger, *What Message Do Book Bans Send to Black Students?*, WORD IN BLACK (Sept. 20, 2022), <https://wordinblack.com/2022/09/what-message-do-book-bans-send-to-black-students/> [https://perma.cc/99GU-S7FZ].

117. *Id.*

118. *Id.*

119. Christopher J. Ferguson, *Is Reading "Banned" Books Associated With Behavior Problems in Young Readers?*, 8 PSYCH. OF AESTHETICS, CREATIVITY, AND THE ARTS 354, 360 (2014); see also Wen-Hsu Lin et al., *Exposure to Sexually Explicit Media in Early Adolescence is Related to Risky Sexual Behavior in Emerging Adulthood*, 15 PLOS ONE (2020).

120. Ferguson, *supra* note 119.

121. Wen-Hsu Lin, et al., *supra* note 119.

122. *Id.*

related content.¹²³ The influence on young people increases the objectification of “people” to “bodies primarily used for sexual gratification”, specifically the objectification of women.¹²⁴

Most prior research on the relationship between sexual media exposure and risky sexual behaviors has focused on Western countries like the United States, United Kingdom, and Europe.¹²⁵ There has been less research examining this relationship in more conservative societies, though a study published in the National Library of Medicine and conducted in Taiwan helps fill that gap by analyzing sexually explicit media and sexual risk-taking in a more conservative cultural context.¹²⁶

This study found strong evidence that exposure to sexually explicit media during early adolescence was closely linked to engaging in three risky sexual behaviors in late adolescence: having sex at an early age, unsafe sex, and having multiple partners.¹²⁷ The relationship observed between sexual media exposure and subsequent sexual risk-taking behaviors was close to causal.¹²⁸ However, it should be noted that this study specifically focused on visual modes of sexually explicit media such as internet and films, rather than literature, so it is not completely demonstrative of non-visual SEM consumption.¹²⁹ However, for arguments sake, there is the possibility that it could be considered illustrative of how children may respond to obscene literature.

There are very few studies concerning the link between banned books and behavioral issues in adolescents. Consequently, there are even fewer studies concerning books censored specifically for adult content and the effect of the literature on young readers. One study published in the American Psychological Association attempted to focus specifically on books banned for “edgy” content including violent and sexual content.¹³⁰ The study finds, though prefacing that causal attributions cannot be proven through a correlational study, “that reading challenging books may be ‘eye opening’ and move individuals to help others once they understand the difficulties some others may face.”¹³¹ The overall results suggest that reading banned books may have mostly positive influences.¹³²

123. Samantha Smith & Jamie LeSueur, *Pornography Use Among Young Adults in the United States*, BALLARD BRIEF (Jun. 2023), <https://ballardbrief.byu.edu/issue-briefs/pornography-use-among-young-adults-in-the-united-states> [<https://perma.cc/3ZCY-GKH6>].

124. Malachi Willis, et al., *Pornography Use, Gender, and Sexual Objectification: A Multinational study*, 26 SEXUALITY & CULTURE 1298 (2022), <https://doi.org/10.1007/s12119-022-09943-z> [<https://perma.cc/7G2G-VMYK>].

125. Wen-Hsu Lin, et al., *supra* note 119.

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. Ferguson, *supra* note 119.

131. *Id.* at 359.

132. *Id.* at 360.

These studies, though not entirely on point, certainly lend credence to the idea that some texts are removed from public schools for legitimate reasons. This Note does not use these case studies to demonstrate why all book bans are erroneous, but to further exemplify the complexity surrounding book removal. Certainly, there are legitimate reasons to ban books in public schools, but the desire to protect children from potentially harmful content is not always the foremost motivation behind modern-day book banning challenges and statutes, but a veil for otherwise discriminatory intent.

V. BALANCING LIBERTY, CONTROL, AND THE PROTECTION OF AMERICAN YOUTH

A. Why Existing Law Is Not Adequate

Legal scholars have argued that reading should be considered a legally protected human right, and that it already is through the intersection of more prominent human rights such as the freedom of expression.¹³³ While international treaties have come close to enshrining a child's right to read, it falls short of any sort of explicit framework for which book bans in public schools could be analyzed.¹³⁴ Further, the United States has not ratified this treaty.¹³⁵

While the United States is not legally bound by the CRC, the treaty has been ratified by 196¹³⁶ countries "making it the most widely ratified human rights treaty in the world."¹³⁷ The United States is now the only country in the world to not have ratified the CRC.¹³⁸ Although the United States government has signed the treaty, this is not the same as ratifying, as a signature signals only an *intent* to *possibly* ratify the treatise at some point in the future.¹³⁹ There seem to be two main concerns that have precluded the U.S. Government from ratifying, and these are the fear of infringing on parental rights and the concern that ratifying the CRC would set a precedent of undermining U.S. laws, like the Constitution, with international treaties.¹⁴⁰ Although it may seem odd that an

133. Shaver, *supra* note 18, at 5.

134. *Id.* at 2.

135. *Frequently Asked Questions on the Convention on the Rights of the Child*, UNICEF, <https://www.unicef.org/child-rights-convention/frequently-asked-questions> [https://perma.cc/65PZ-K4FS] (last visited Nov. 19, 2024).

136. *Id.*

137. *The United Nations Convention on the Rights of the Child*, CONGRESSIONAL RESEARCH SERVICE (Jul. 27, 2015), <https://crsreports.congress.gov/product/pdf/R/R40484/25> [https://perma.cc/2KBC-JDW6].

138. *Frequently Asked Questions on the Convention on the Rights of the Child*, *supra* note 135.

139. *Id.*

140. Kevin Moclair, *In America, Kids Come Last*, BROWN POLITICAL REV. (Apr. 24, 2022), <https://brownpoliticalreview.org/2022/04/in-america-kids-come-last/> [https://perma.cc/X6J4-ZUC5].

arguably progressive nation such as the United States has not ratified a treatise to protect the interests of the nation's children, the country's lack of ratification is certainly not a reason for recent book banning legislation. In fact, the ratification of the CRC, as evidenced by the percentage of worldwide book bans, does not necessarily promise a complete protection of a children's right to freedom of expression and knowledge; therefore, it is not enough to argue the United States should ratify the treaty.¹⁴¹

Domestic laws are similarly as inadequate as international ideologies. In the United States, the *Miller* test has been used since the 1970s, but the test lacks an objectivity that adequately protects the First Amendment from partisan or overtly personal morals. For one, the use of the word "prurient" in the test suggests a traditional value of chastity and further enforces the idea that interest in sexuality is shameful.¹⁴² This value is most often rooted in religious beliefs, making it objectively partisan.¹⁴³ Furthermore, the subjectivity of the prong "whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value," provides a mechanism for inappropriate censorship.¹⁴⁴ An argument could be made that almost any piece of literature lacks a subjective value of the kind listed previously, and those looking to censor literature due to personal or partisan morals will certainly argue to the fact in a myriad of ways.

B. Domestic Laws from a First Amendment Perspective

To pass strict scrutiny, laws should be clear in scope and not overly broad as "the State may not suppress exposure to ideas -- for the sole purpose of suppressing exposure to those ideas -- absent sufficiently compelling reasons."¹⁴⁵ Recent legislation such as HB 1467, HB 3826, HB 1205 (and more) may seem content-neutral on their face, but the application of such laws have been, and will continue to be, used in order to suppress certain viewpoints and diverse expression.¹⁴⁶ Content-based restrictions must undergo strict scrutiny and are assumed unconstitutional until ruled otherwise; despite this, obscenity is an exception to this analysis and often-times prohibited for their inherently harmful content.¹⁴⁷ This makes sense at first glance, but as these laws are applied in actuality, they disproportionately discriminate against BIPOC and LGBTQ+

141. Curcic, *supra* note 8.

142. *Miller*, 413 U.S. at 21.

143. Lena Bogdanska, *The Intimate Link Between Sexual Shame and Religiousness*, MINDWISE (Oct. 27, 2021), <https://mindwise-groningen.nl/the-intimate-link-between-sexual-shame-and-religiousness/> [https://perma.cc/5D5X-Q7MJ].

144. *Miller*, 413 U.S. at 16.

145. *Pico*, 457 U.S. at 877, 102 S. Ct. at 2813.

146. Friedman, et al. *supra* note 4.

147. David L. Hudson Jr., *Content Based*, FREE SPEECH CENTER (Aug. 10, 2023), <https://firstamendment.mtsu.edu/article/content-based/> [https://perma.cc/2E3R-ZCLP].

authors and audiences alike.¹⁴⁸ Because these laws are not narrowly tailored so as to achieve the government's interest in protecting students, along with the fact that these laws are oftentimes used to restrict specific viewpoints, they do not provide adequate safeguards for students' First Amendment rights and therefore do not pass strict scrutiny.¹⁴⁹

H.B. 1205 in North Dakota, for example, falls short of the strict scrutiny standard. The bill, which was passed on April 27, 2023 states that public libraries are prohibited from maintaining explicit sexual material.¹⁵⁰ The bill goes on to define sexually explicit material as, among other things, "any material which . . . is patently offensive to prevailing standards in the adult community in North Dakota . . ."¹⁵¹ North Dakota is one of the most conservative states in the U.S.¹⁵² With the overly broad scope of the act, simply defining "sexually explicit material" as that which offends the morals of the North Dakota population, it is no surprise that such a law has now been used to remove books discussing gender and sexual identity off the shelves.¹⁵³

Indiana's "Education Matters" Act, or HB 1447, was passed in May of 2023 by Republican Governor Eric Holcomb. This Act requires schools to implement procedures for which a parent or guardian of a student, or even a random member of the community, can submit a request to remove books from the school library concerning "obscene" material.¹⁵⁴ The most chilling effect of HB 1447 is that it no longer has an "educational suitability" exception in which school librarians can argue that a text which contains otherwise controversial topics is educationally valuable, and therefore it should remain on the shelves.¹⁵⁵ Educational suitability is often a primary defense for public school challenges to books; by taking away this defense, the Indiana legislation has created a far-reaching law which not only makes it easier for petitioners to challenge books for personal morals or beliefs, despite their educational value, but the law also imposes felony charges and mandatory jail time on librarians and educators who provide these challenged texts.¹⁵⁶

148. *The Discriminatory Impact of Book Bans and Educational Gag Orders on LGBTQ+ Expression*, PEN AMERICA (Feb. 14, 2024), <https://pen.org/the-discriminatory-impact-of-book-bans-and-educational-gag-orders-on-lgbtq-expression/> [<https://perma.cc/9XQ7-KGDH>].

149. *Id.*

150. H.B. 1205, 68th Leg. Assemb., Reg. Sess. (N.D. 2023), <https://ndlegis.gov/assembly/68-2023/regular/documents/23-0407-05000.pdf> [<https://perma.cc/KYW5-KEPQ>].

151. *Id.*

152. Frank Newport, *Wyoming, North Dakota and Mississippi Most Conservative*, GALLUP (Jan. 31, 2017), <https://news.gallup.com/poll/203204/wyoming-north-dakota-mississippi-conservative.aspx> [<https://perma.cc/ABX2-LQSD>].

153. Friedman, et al., *supra* note 4.

154. H.B. 1447, 123rd Gen. Assemb., Reg. Sess. (Ind. 2023) <https://iga.in.gov/pdf-documents/123/2023/house/bills/HB1447/HB1447.04.ENRS.pdf> [<https://perma.cc/K9WZ-MMHL>].

155. *House Bill Updates: Censorship and Indiana Libraries*, LAKE COUNTY PUBLIC LIBRARY, <https://www.lcplin.org/billupdates> [<https://perma.cc/W2G2-5F9U>] (last visited Aug. 15, 2024).

156. *Id.*

These two recent bills are examples of content-based restrictions which may utilize partisan or personal ethical beliefs to ban certain texts. The motivation for these removals, therefore, is not to ensure the educational suitability of certain texts, as overtly exemplified by HB 1447, but to remove ideas that the legislature or school boards disagree with, which has been unconstitutional in aforementioned caselaw.¹⁵⁷

As discussed previously¹⁵⁸, the majority of these bills define “obscene” as referring to sexual or profane material which also lacks “serious literary, artistic, political, or scientific value.”¹⁵⁹ The reliance of this factor, when considering if material is “obscene” is too broad to give an unbiased, workable framework for legislatures, school boards, students, and parents to utilize. These bills, using the outdated test from *Miller*, open the door to banning materials regarding topics such as sexual orientation and gender identity which are often already sensitive subjects for young students to engage in with their peers, mentors, and guardians.¹⁶⁰ The current definition of “obscene” is overly broad to the point where it can be used to easily abuse the new bills regarding censorship. This is clearly demonstrated as oftentimes these bills end up restricting access to material which probably did not fall under the original intent of the authors.

One way in which current legislature has clearly backfired is in the cases of schools banning the Bible or other religious texts. The Davis School District in Utah censored the Bible after a parental complaint that the text was overtly vulgar and violent.¹⁶¹ While a review committee did find that it did not fit the definition of “pornographic,” and thus it could stay on the shelves in high schools, it was nonetheless banned from elementary and middle schools.¹⁶² It is difficult to argue that the Bible itself lacks any serious literary merit or educational value, even from a nonreligious perspective. This ban goes to show that the vagueness of the new legislation makes every book subject for banning, regardless of its educational suitability or historical reverence.

One reason for the issues with the current legal framework surrounding literature censorship in schools is the fact that there is no standardized model or set procedure that school boards follow when deciding whether to ban books. Because of this, the door is open to overly restrictive legislation in different

157. *Case*, 908 F. Supp. at 875.

158. *See supra* Part III.C.

159. S.B. 197, 118th Cong. (2024) https://www.wvlegislature.gov/bill_status/bills_text.cfm?billdoc=sb197%20intr.htm&yr=2024&sesstype=RS&i=197 [https://perma.cc/YD8P-VYV4] (accessed Aug. 16, 2024); *see supra* note 150 (H.B. 1205); *see also supra* note 155 (H.B. 1447).

160. *The Discriminatory Impact of Book Bans and Educational Gag Orders on LGBTQ+ Expression*, PEN AMERICA (Feb. 14, 2024), <https://pen.org/the-discriminatory-impact-of-book-bans-and-educational-gag-orders-on-lgbtq-expression/> [https://perma.cc/4RH6-QTJV].

161. Sam Metz, *Utah District Bans Bible in Elementary and Middle Schools ‘Due to Vulgarly or Violence’*, AP NEWS (Jun. 2, 2023), <https://apnews.com/article/book-ban-school-library-bible-fc025c8ccf30e955aaf0b0ee1899608a> [https://perma.cc/M2E3-UPCR].

162. *Id.*

jurisdictions when it comes to censorship in schools as described earlier.¹⁶³ With texts from all ends of the spectrum, including the Bible, there seems to be little to no checks on what a school district can ban. While *Pico* is the most on-point case law for censoring books in school libraries, it is not binding precedent as a plurality decision; further, challenges to books should be met as they arise, not as a burden on our courts as a post-ban fix.

C. Domestic Laws from an International Perspective

From an international law analysis, to comply with the Convention on the Rights of the Child, legislation must be construed in the “best interests of the child.”¹⁶⁴ As discussed previously, very few studies have been conducted which consider the harmful effects of children reading books that contain “adult” themes.¹⁶⁵ In fact, the American Psychological Association has published a study which finds that reading such texts may lead to positive prosocial behavior in children, as exposure to diverse and difficult concepts may lead to more open-mindedness and empathy towards others.¹⁶⁶ Therefore, although it is certainly not conclusive, there is an argument that certain books which have been banned for being obscene may actually contribute to a well-rounded, emotionally intelligent and compassionate student.¹⁶⁷ Without conclusive studies or otherwise compelling data on if these controversial texts are harmful to a student’s development or psyche, however, proponents of these restrictive legislations discussed in this Note cannot argue that they are truly in the students’ best interests.

Further along the line of the best interests of the child, marginalized groups such as LGBTQ+ and BIPOC students have been disproportionately impacted by these modern book bans.¹⁶⁸ When the CRC speaks to the “best interests of the child,” it can be assumed that the convention does not qualify their statement by asserting that the “child” indicates only a specific group of children which disqualifies LGBTQ+ children and children of color from having their best interests considered as well. It is unclear how the systematic removal of books focusing on LGBTQ+ persons’ and people of colors’ experiences and existence from school libraries and classrooms can be deemed in the best interests of these children. To put it bluntly, the CRC does not state that laws and regulations should be in the best interest of middle class, white, heterosexual, cisgender children; such a qualifier would certainly go against the heart of the CRC itself.

163. Meehan et al., *supra* note 24.

164. CRC, *supra* note 12.

165. *See supra* Part IV.B.

166. Ferguson, *supra* note 119.

167. *Id.*

168. *See supra* Part IV.A.

Further, international law focuses on children's right to seek and receive information, regardless of its kind, from all modes of media.¹⁶⁹ Of course, this is not without certain contingencies. As the International Covenant on Civil and Political Rights states, there are some limitations to this ideology to protect the public.¹⁷⁰ Protecting children from sexual exploitation and nurturing a positive environment for them to grow psychologically are laudable goals. However, current legislation in the United States is simply not meaningfully reaching these goals for all the reasons discussed throughout this Note; nor are these bills and laws narrowly tailored to be in the best interests of the child, but instead they are meant to push partisan agendas centered around intolerance and the silencing of BIPOC and LGBTQ+ voices.¹⁷¹

D. Present Proposed Solutions

Rather than a wholly new right, the right to read is better conceived as a specific manifestation of broader human rights like free expression, education, minority rights, access to science and culture, and children's media rights. Legal scholars have argued the right to read is already implicit in these accepted human rights, but needs more explicit recognition and theoretical elaboration.¹⁷² While, in theory, a uniform international treaty of the right to read sounds like a perfect solution, this Note has discussed the ratification of the CRC in more conservative countries, where the freedom of expression and knowledge is still suppressed, and so it appears that international frameworks do not guarantee the following of the ideologies put forth in the treatises.¹⁷³

Other scholars have proposed that independent organizations, such as The United Nations Educational, Scientific and Cultural Organization ("UNESCO"), may be the key to combatting pervasive book banning across the globe.¹⁷⁴ Scholars have suggested that UNSECO, as a body founded to promote education and international issues, should draft a treaty to eradicate inappropriate book bans on an international scale.¹⁷⁵ The argument goes that since UNESCO is a body dedicated to fostering world peace through education, and that ignorance leads to war and violence, they are the most equipped non-governmental organizations ("NGO") to draft a treaty focusing on the right to

169. ICCPR, *supra* note 88.

170. *Id.*

171. *See supra* Part IV.A.

172. Shaver, *supra* note 18, at 5.

173. Steven J. Hoffman, et al., *International Treaties Have Mostly Failed to Produce Their Intended Effects*, 119 PNAS 1, 5 (Aug. 1, 2022), <https://www.pnas.org/doi/epdf/10.1073/pnas.2122854119> [<https://perma.cc/P3V6-HGP7>].

174. McKenna Deutsch, *Burned, Banned, and Censored: The Need for an International Framework that Addresses the Right to Read*, 39 WIS. INT'L L.J. 329, 359 (2022), https://wilj.law.wisc.edu/wp-content/uploads/sites/1270/2022/09/39.2_329-363_Deutsch.pdf [<https://perma.cc/53AP-PX5J>].

175. *Id.*

read.¹⁷⁶ While the drafting of an international convention by an organization such as UNESCO would certainly bring attention to the issue, it is unclear how the organization would enforce or regulate such a project.

VI. ADOPTING A UNIFORM MODEL

A. Utilizing Domestic Precedent and Values

Rather than categorical bans, public schools in the United States should use a uniform model to evaluate whether specific books are developmentally appropriate and have sufficient educational value before removing them. A national organization like the American Library Association (“ALA”) could design the model evaluation process. It should incorporate parent and student feedback but prevent partisan removal of material and be written in such a way in which educators could practically utilize the model to decide if a book should be removed from the school’s curriculum or even the school library. Furthermore, such a model would benefit from the review and enforcement by professional educators, such as teachers and librarians, to ensure the criteria reflects educational values and goals for young students.¹⁷⁷

From a domestic perspective, the ALA would be the best organization for developing a national uniform model for the United States. They already have resources on their website such as Guidelines for Curriculum Materials Centers and the Young Adult Library Services Association (“YALSA”) National Research Agenda.¹⁷⁸ By integrating core values such as understanding how libraries are formal and informal learning environments for children and teens as well as cultural competence, social justice, and equity, the ALA could structure a uniform model for book evaluation to ensure all schools evaluate challenged books with the same markers.¹⁷⁹ A uniform model for all educational institutions to follow that evaluates whether a text is part of the required curriculum or supplemental reading in a public library would be a first step to halting pervasive book bans in their tracks.

Using a uniform model following the logic of *Pico* and its subsequent influence will provide a national standard for what values and morals we wish to instill in our nation’s children, while also recognizing their First Amendment

176. *Id.* at 360.

177. Sherryl H. Swindler, *Censorship in the Public Schools: Why the Expert Testimony of Teachers Should Be Considered in Book-Banning Cases*, 6 U. FLA. J.L. & PUB. POL’Y 99, 103 (1993), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1167&context=jlpp> [<https://perma.cc/PCE9-CPHA>].

178. *Guidelines for Curriculum Materials Centers (“Guidelines”)*, AMERICAN LIBRARY ASSOCIATION (Jan. 2009), <https://www.ala.org/acrl/standards/guidelinescurriculum> [<https://perma.cc/P46S-BT3W>]; *YALSA National Research Agenda*, YOUNG ADULT LIBRARY SERVICES ASSOCIATION 1, https://www.ala.org/yalsa/sites/ala.org.yalsa/files/content/2017YALSA_NatlResearchAgenda_Print.pdf [<https://perma.cc/B2T5-7QJH>] (accessed Aug. 20, 2024).

179. *Guidelines*, *supra* note 178, at 1, 5.

right to consume information they choose. After using this uniform model, integrating the educator's opinion on each text and its educational value will ensure that book challenges are solved with current educational standards.¹⁸⁰ The model will provide guidelines for parsing out if the book lacks educational value, or if those opposed to the text simply dislike the topics or messages portrayed in the literature. Some questions that may be considered in this model include if there are factual inaccuracies, as discussed previously in the case *ACLU of Florida, Inc. v. Miami-Dade County School Board*, or if the book merely deals with difficult or controversial topics.¹⁸¹

Furthermore, these uniform models should consider the benefits of generally considered "obscene" literature as a critical tool for teaching not only sex education but also about real-world situations, past and present. To clarify, "obscene" material here does not mean gratuitous sexual content and explicit material for the sake of such content. Instead, the literature here is valuable educationally, not despite the adult themes within, but *because* of the themes. Take Toni Morrison's celebrated novel *Beloved* as an example. In the text, inspired by a true story, a now-free Black woman reflects on her memories of fleeing slavery, which includes scenes of unfathomable violence, including rape.¹⁸² Plenty of school districts have banned *Beloved* and other books by Toni Morrison, citing the graphic scenes of sex and violence.¹⁸³ Others have argued that removing these sorts of educational texts from schools because of their "obscene" nature infringes on the rights of parents and students to decide what literature is appropriate for them to consume.¹⁸⁴ Further, removing important historical texts such as these deprives students of a thorough and well-rounded education about their nation. A uniform model would consider the educational value of a text like *Beloved* and decide if the text is educationally invaluable or factually inaccurate, or if it simply portrays mature but educationally significant concepts, which may be beneficial for class discussions. Of course, the grade level of the class should be taken into consideration, and this is another instance in which a teacher or educator would have discretion.

While *Beloved* is an example of a novel which uses adult themes of sex and violence to describe what slaves fleeing the South endured, it is not the only example of texts which incorporate generally considered obscene material for educational purposes. *Gender Queer*, a memoir by Maia Kobabe, has been subject to numerous bans across America for including topics such as adolescent

180. *Id.*

181. *ACLU of Fla.*, 557 F.3d at 1177.

182. Toni Morrison, *Beloved* (Vintage 2007).

183. Olivia B. Waxman, *Why Toni Morrison's Books Are So Often the Target of Book Bans*, TIME (Jan. 31, 2022), <https://time.com/6143127/toni-morrison-book-bans/> [<https://perma.cc/Z92Q-S3DV>].

184. *Id.*

sexuality, asexuality, and multiple gender identities.¹⁸⁵ This text, unlike *Beloved*, is not using obscenity to tell the true stories of runaway enslaved Black Americans, but instead to tackle current issues many teens may face in their own lives. The adult themes of the graphic novel are therefore mostly educational for their sole purpose of teaching young adults about their own sexuality and the different ways it may manifest, as well as providing an opportunity for them to examine the lives of others in a way they may not have considered before. Studies have shown that young adult literature in the classroom, which is used to challenge stereotypes, increases empathy in students and specifically increases male students' engagement with gender diversity.¹⁸⁶ One caveat to this is that many books do not portray sexuality in a realistic light, which could lead to students internalizing false beliefs about sex.¹⁸⁷ Therefore, it is not only important for a uniform model to include the review of a book's educational themes in conjunction with adult themes, but it is also essential to ensure that the portrayal of such themes is accurate and does not perpetuate a false conception of sex or sexuality.

B. Utilizing International Standards and Values

International values promote freedom of expression, access to information, and the right to culture for not only adults but children as well.¹⁸⁸ These values need to be integrated into the concept of a uniform model to promote the developmental needs of children, while also ensuring that they retain their autonomy and ability to choose what they would like to read. Further, the uniform model needs to incorporate the standard of "the best interest of the child" as it is enshrined in the CRC.¹⁸⁹ To do this, the language of the uniform model should utilize that phrase at the forefront of the model, and define the term given what is known about how the right to read affects children developmentally and psychologically. The best interest of the child is not simply an ideological phrase; it is a fundamental legal principle, as well as a rule of procedure, which is utilized in international and domestic law to protect

185. Heather Hill, *The 50 Most Banned Books in America Right Now*, READER'S DIGEST (Nov. 4, 2023) (updated Oct. 8, 2024), <https://www.rd.com/list/banned-books/> [<https://perma.cc/M32R-9WF4>].

186. Margaret M. Palmer & Jennifer S. Hirsch, *Putting the "Comprehensive" in Comprehensive Sexuality Education: a Review Exploring Young Adult Literature as a School-based Intervention*, 19 SEX RES SOC POLICY 1867 (2022), <https://doi.org/10.1007/s13178-022-00699-7> [<https://perma.cc/5PQT-ZWA8>].

187. Eleanor Wood, *Pushing the Envelope: Exploring Sexuality in Teen Literature*, 1 J. RSCH. ON LIBRARIES & YOUNG ADULTS (Nov. 2, 2010), <https://www.yalsa.ala.org/jrlya/2010/11/pushing-the-envelope-exploring-sexuality-in-teen-literature/> [<https://perma.cc/U6M6-KPCJ>].

188. CRC, *supra* note 12; ICCPR, *supra* note 88.

189. CRC, *supra* note 12.

children's rights.¹⁹⁰ The best interest of the child standard is especially important for a uniform model regarding book bans in public schools because this standard is meant to keep children as active participants in choices which govern their lives, involve experts in child development and psychology, as well as balance the children's best interests versus that of the State or private entity.¹⁹¹

As discussed, there are little studies quite on point with how reading obscene or mature books affect children. However, given what research we do have, and putting that into context with the goal of the CRC and ICCPR to promote freedom of expression, access to information, and developing open-minded, well-rounded citizens, the best interest of the child should be considered to weigh against book bans unless the text is openly discriminatory, inaccurate, gratuitously sexual, or otherwise more likely than not to cause harm to a student's development. The incorporation of child psychologists and developmental experts into weighing these interests are a key factor for ensuring that a uniform model not only promotes the best interest of the child, but also ensures that school boards are actively putting this standard into practice.

C. What the Uniform Model Should Include

At the forefront, a uniform model needs to redefine the standard definition for what makes material "obscene" and strike the phrase "lacks serious literary, artistic, political, or scientific value."¹⁹² The subjectiveness of the phrase makes it so that any legislature, school board, or parent, regardless of the actual educational value of the text, could argue that a work is overly prurient and lacking some sort of literary value, without providing a clear test for how to meet (or fail) this prong. By striking this language and changing this to encompass more of the idea behind these new house bills when it comes to censoring children's literature, the uniform model would become more workable in the modern area after *Miller*. The language should be changed to become more consistent with the goals of the legislature, for example, to include a definition along the lines of: "For the purposes of reviewing and retaining literature in school libraries and curricula, 'obscene' shall be defined strictly as material that has been conclusively demonstrated through rigorous, peer-reviewed scientific studies to cause direct and significant harm to children's cognitive development, emotional well-being, or overall growth."

Further, the uniform model should include what "obscene" is not. Materials shall not be deemed obscene based on subjective moral judgments, personal opinions, or based on specific religious values. Any proposal to remove or restrict access to children's literature must be accompanied by multiple,

190. Federica Versea, *The Best Interest of the Child as Put Into Practice Worldwide*, HUMANIUM (Feb. 21, 2023), <https://www.humanium.org/en/the-best-interest-of-the-child-as-put-into-practice-worldwide/> [<https://perma.cc/QWB4-8SP7>].

191. *Id.*

192. Miller, *supra* at 16.

credible, longitudinal studies published in reputable academic journals that specifically demonstrate measurable negative impacts on children's critical thinking skills, emotional intelligence, or healthy development as a direct result of exposure to the material in question. Further, the uniform model must set out balancing criteria when considering if a specific text should be removed from the school, such as the educational value, literary merit, and potential to broaden student's understanding of the world from different viewpoints.

This uniform model should include the professional opinions of teachers and other educators, as they best understand the meaning and message of the texts and would keep with current educational standards.¹⁹³ Using teachers as a tool for examining books in light of their educational purpose has been examined before, as other legal scholars have noted that courts oftentimes do not have the time to evaluate each book individually, but teachers are experts on the texts they choose to keep in their classrooms.¹⁹⁴

Finally, the uniform model should include some general requirements in order to ensure it is procedurally sound. Placing into effect a supermajority clause, which would require the removal of certain texts from classrooms of libraries to be approved by 75% of the school board, would help ensure that the decision is carefully considered by all members of the board. However, it is not enough to ensure the school board itself is given ample opportunity to consider the challenge. The uniform model would set forth a public comment period, requiring proposed removals to be posted publicly to either the school's website or another appropriate forum, for which the community, including students, have the opportunity to comment on the proposed removal. Such a comment period should occur at least 60 days prior to any vote on whether to remove a challenged text. When a text has been removed from the shelves, a rigorous appeals process should be described in the uniform model for which an independent review board, which may include library associations, local liberties organizations, qualified educators, and any other relevant experts, is given the opportunity to review the decision for possible discriminatory motivations behind a removal. Finally, it is also important for the uniform model to detail what sanctions a school board may incur for inappropriate removals. Because our First Amendment rights are so fundamental to the idea of what it means to be an American citizen, sanctions should be exemplify this. Such sanctions should include a reduction in federal funding, or an internal investigation into the motivations of those in charge of deciding what is within the best interest of the students.

The school board, as well as each teacher within that school, should have a copy of this uniform model. The school board, as a whole, can use a model in

193. Sherryl H. Swindler, *Censorship in the Public Schools: Why the Expert Testimony of Teachers Should Be Considered in Book-Banning Cases*, 6 U. FLA. J.L. & PUB. POL'Y 99, 118 (1993), <https://scholarship.law.ufl.edu/cgi/viewcontent.cgi?article=1167&context=jlpp> [<https://perma.cc/PCE9-CPHA>].

194. *Id.*

conjunction with input from the school librarian in order to decide if a book should be taken off the shelves of the library, therefore affecting the school as a whole. Teachers would benefit from having the uniform model in their classrooms to decide if classroom libraries would be served by removing certain books from the shelves. By allowing teachers to utilize a uniform model for their own personal libraries within the classroom, they can also take into account the specific needs of that class in particular, and tailor any considerations of book removal to their practical day-to-day within the classroom.

Ultimately, a uniform model would be helpful in ensuring that children across the nation are allowed to consume the same types of literature and have the same discussions. By keeping one community from banning certain books while another does not, the young students in the community deprived of diverse texts may be at a disadvantage going forward in their education and into adulthood. While foundational schooling is certainly important for academics, it is also often the most important environment for socializing children and teaching them to be critical-thinking citizens outside of the classroom. The uniform model should allow educators to collaborate and develop their own criteria and strategies for mandating what each public-school library and classroom must provide to have an adequate collection of books and other media to meet the needs of all diverse students.

VII. CONCLUSION

Education on adolescent sexuality helps students make informed choices about relationships and their own identity, as well as introduce students to new ideas which foster empathy and an open-mind view of themselves and their peers.¹⁹⁵ Literature labeled obscene often provides insight on societal attitudes about gender, race, and sexuality. The adult themes throughout the text are part of those educational tools.¹⁹⁶ While age-appropriate discretion is certainly important to protect children from early exposure to overtly pervasive ideals, categorically banning books with controversial ideas restricts education and will ultimately undermine the educational goals of providing adolescents with the tools to make informed choices not only in school, but in their lives.

The impulse to shield children from challenging ideas is understandable. As this Note has discussed, the psychological damage on children who are exposed to sexual content or overtly adult themes too early in life is important to consider when evaluating texts for classrooms and libraries.¹⁹⁷ However, categorical book bans, as set forth by recent legislation, are an imprecise solution that deprives students of valuable literature and violates individual rights.

195. See Kylie Rymanowicz, *Children and empathy: Reading to learn empathy*, MICHIGAN STATE UNIVERSITY (Apr. 3, 2017), https://www.canr.msu.edu/news_children_and_empathy_reading_to_learn_empathy [<https://perma.cc/6H99-Q4QK>].

196. Wood, *supra* note 188.

197. See *supra* Part IV, B.

Developing standards to evaluate educational suitability, while recognizing that children and young adults may need the exposure to obscene material in a controlled setting, such as a classroom, to learn about the past, themselves, and others, provides a balanced approach. Access to books should be understood as both a constitutional and human right central to personal growth and academic freedom. This right would be best promoted through a uniform model for school boards to follow when considering whether a book should be removed from the school's library or curriculum; keeping books from being banned for partisan reasons and ensuring that educators and libraries do not participate in wholesale book bans in fear of being punished for their reading selections. By incorporating past precedent in the United States as well as international values and standards, this uniform model would be crucial for protecting the best interests of American students.

While children are certainly a protected class of people in the U.S. and other countries, they are just that: people. As technology and media advances, so will a child's ability to learn more quickly and easily about the realities of the world around them, and thus they may become aware of "mature" issues much earlier. Rather than shielding students from important, often uncomfortable, or typically mature topics, we should allow them to read, think about, and discuss difficult texts. This approach provides a controlled environment where they can develop into intelligent, empathetic, and critical-thinking adults. A final note to students, because at the heart, this issue is about *you*: "Read whatever they're trying to keep out of your eyes and your brain, because that's exactly what you need to know."¹⁹⁸

198. Leanne Loy, *Please, Keep Banning Those Books*, THE NEWS LEADERS (Mar. 26, 2022), <https://thenewsleaders.com/please-keep-banning-those-books/> [<https://perma.cc/NCB4-LEC6>].