THE FIRST AMENDMENT IN SCHOOL LIBRARIES: USING SUBSTANTIAL TRUTH TO PROTECT A SUBSTANTIAL RIGHT

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ABSTRACT

The First Amendment right to freedom of speech is that of a two-sided coin, as the right to speech goes hand in hand with the right to receive speech. Where an author's book is banned from a school library, the reader's right to freedom of speech is censored with it, interfering with the ability of school libraries to serve as the "marketplace of ideas" in education. The Supreme Court's plurality standard in Board of Education v. Pico *generally prohibits content-based censorship in public schools. However, in distinguishing censorship of content from censorship of factual inaccuracy in* ACLU v. Miami-Dade*, the Eleventh Circuit opened a route for school boards to bypass the First Amendment when seeking to ban books with which they do not agree. This Note asserts that, to more properly implement the* Pico *standard as a safeguard for both the right to speech and the right to receive speech, the Court should implement the additional First Amendment doctrine of substantial truth, ensuring stronger protection against content-based censorship.*

TABLE OF CONTENTS

INTRODUCTION 788
I. THE HISTORY AND CURRENT STATE OF BOOK BANNING 792
A. *Two Sides of a Coin: Freedom of Speech for Both the Writer and the Reader* 792
B. *The History and Current State of Book Banning* 794

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C. *Organizations Opposed to Book Banning*........................796
D. *The Blurry Line Between Fact and Opinion*....................799
II. THE FIRST AMENDMENT: SCHOOL LIBRARIES, SUBSTANTIAL TRUTH, AND THE MARKETPLACE OF IDEAS.........................801
A. *Book Banning in the Courts: The Evolution of the* Pico *Standard*...802
1. Pico *and* Hazelwood: *The Supreme Court's holdings on content-based censorship*.....................................802
2. T*he plurality prevails: How* Pico *became the standard in federal courts*...806
B. *The Marketplace of Ideas: Viewing the School Library as a Market*...808
C. *The Substantial Truth Doctrine: A Brief Look at Defamation Law*...810
III. *ACLU v. MIAMI-DADE*: *PICO* IS PUT TO THE TEST...................811
IV. *PICO*: THE PROPER STARTING POINT.......................................814
A. *The Need for Judicial Intervention to Implement the First Amendment*...814
B. *Substantive Due Process: The Difference Between Parental Rights and Book Banning*...816
C. Miami-Dade: *Educationally Unsuitable or Thematically Unsuitable?*..818
V. STRENGTHENING *PICO*: THE MERGING OF SUBSTANTIAL TRUTH...819
A. *The Substance, the Gist, the Sting of a Book*...................819
B. *Flipping Substantial Truth: Requiring Substantial Falsity to Ban Books Under* Pico...823
CONCLUSION..825

INTRODUCTION

George R.R. Martin put it best: "A reader lives a thousand lives before he dies. . . .The man who never reads lives only one."[1] Children derive many benefits from reading: healthy brain development, valuable vocabulary skills, and perhaps most importantly, the ability to "see[] things from a different

1. GEORGE R.R. MARTIN, A DANCE WITH DRAGONS 495 (2011).

perspective."[2] School libraries have long been "forums for information and ideas" that provide books "for the interest, information, and enlightenment" of people from all "origin[s], age[s], background[s], or views."[3] In accordance with their own curricular missions and agendas, libraries generally enjoy broad discretion for selecting their materials.[4] Such discretion, however, is not a shield for censorship, particularly in public school libraries, where the removal of a book based solely on its content may implicate the First Amendment.[5]

To censor is "to examine in order to suppress or delete anything considered objectionable."[6] Book banning, primarily an issue in children's literature, is "the most widespread form of censorship in the United States."[7] Whether the opposition is due to polemical themes in literary classics, exposure to different religions, or conflicting political views, parents have objected time and time again to the availability of controversial books in their children's school libraries.[8] Organizations that defend free speech and civil liberties have voiced their opposition to book banning, advocating against censorship's disruption of artistic expression and intellectual freedom amongst young readers.[9]

These issues were at the forefront of *American Civil Liberties Union of Florida, Inc. (ACLU) v. Miami-Dade County School Board*,

2. *Family Time: Reading Books Helps Kids Understand World Around Them*, MORE CONTENT NOW (OCT. 30, 2019, 1:01 AM), https://www.morecontentnow.com/lifestyle/20191029/family-time-reading-books-helps-kids-understand-world-around-them.

3. *Library Bill of Rights*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/intfreedom/librarybill (last visited Apr. 27, 2021).

4. Judith Haydel, *Libraries and Intellectual Freedom*, FIRST AMENDMENT ENCYC., https://www.mtsu.edu/first-amendment/article/1125/libraries-and-intellectual-freedom (last visited Apr. 25, 2021).

5. *Id.*

6. *Censor*, MERRIAM WEBSTER, https://www.merriam-webster.com/dictionary/censor (last visited Apr. 25, 2021).

7. Susan L. Webb, *Book Banning*, FIRST AMENDMENT ENCYC. (2009), https://www.mtsu.edu/first-amendment/article/986/book-banning.

8. *See* Jackie Farmer, *Banned Books Week: Explore Banned and Challenged Books*, FIRE (Sept. 25, 2017), https://www.thefire.org/banned-books-week-explore-banned-and-challenged-books/.

9. *See, e.g.*, *Banned Books*, AM. C.L. UNION, https://www.aclu.org/issues/free-speech/artistic-expression/banned-books (last visited Apr. 25, 2021).

a case decided by the U.S. Court of Appeals for the Eleventh Circuit that shed light on the uncertainties and complexities of First Amendment law in school libraries.[10] *Miami-Dade* centered around a school board's decision to ban a nonfiction book because it was filled with factual inaccuracies.[11] This was the board's stated motivation, but a long and detailed record painted a messy picture as to how much political opposition factored in as well.[12] Further, the court adamantly stated that its decision was not a "ban," but a "removal."[13] Applying the test derived from the Supreme Court's plurality decision in *Board of Education v. Pico*,[14] which asks whether the applicable school board's motivation is unconstitutional, the court sided with the board.[15]

Miami-Dade displayed several unresolved First Amendment issues in schools: (1) whether freedom of speech includes a right to receive information, (2) whether it is the job of federal courts, rather than parents and teachers, to make inherently local decisions about a book's educational suitability, and (3) whether the central *Pico* test has efficiently protected students' rights to speech in the form of artistic expression. This Note argues: (1) the right to give speech and the right to receive it are inextricably linked; (2) federal courts should intervene only when vital constitutional issues such as the First Amendment are at stake; and (3) the *Pico* test has efficiently protected

10. *See generally* Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009) (finding that Miami-Dade County School Board did not violate the First Amendment by removing a non-fiction book with factual inaccuracies from a school library because the board's removal of the book was not based on any unconstitutional motives).

11. *Id.* at 1188, 1207.

12. *Id.* at 1202.

13. *Id.* at 1218–21. Despite the court referring to the book "removal" rather than "ban," for purposes of this Note, the term "ban" is used more frequently and the two terms are generally treated synonymously. Key to this Note's argument is that a "removal" of a book that has already been placed in a library is a "ban" because the book was already there and then removed, in contrast to the school deciding not to place the book in the library in the first place.

14. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 872 (1982) ("[L]ocal 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.'").

15. *Miami-Dade*, 557 F.3d at 1230.

students' rights in some cases, but not others, as the test is missing essential components. The *Miami-Dade* court emphasized "educational suitability," which is certainly an important determination rightfully delegated to schools, but in doing so created an exception to *Pico* not defined in much detail.[16] While viewing the *Pico* plurality opinion favorably, this Note also argues, based on *Miami-Dade*, that *Pico* is not a strong enough First Amendment protection. If a school board asserts that fact, rather than opinion, was its basis for book banning, then the board should support its claim through an unrelated First Amendment concept: the substantial truth doctrine. Just as a plaintiff who sues for defamation must show that a statement was significantly libelous, so, too, should a defendant who bans a book show that the book was so significantly false in its central themes that it is educationally unsuitable for school libraries.

Part I of this Note details: (1) the relationship between creating and receiving speech in artistic expression, (2) both historic and modern book banning, (3) organizations that currently advocate against book censorship, and (4) the difficulty in distinguishing fact from opinion. Part II details the history of major court rulings on the marketplace of ideas, library book removal, and the substantial truth doctrine. Part III discusses the majority and dissenting opinions in *Miami-Dade*. Part IV analyzes the dispute between federal judicial intervention and school board discretion, concerns of parental substantive due process, and flaws in the *Pico* standard illustrated in the Eleventh Circuit's holding. Finally, Part V argues that, should the Supreme Court decide a book-banning case again, it should not only adhere to the *Pico* plurality opinion, but also insert the substantial truth doctrine as a means by which plaintiffs in such cases can ensure that school boards do not bypass the First Amendment.

16. *See id.* at 1227.

I. THE HISTORY AND CURRENT STATE OF BOOK BANNING

A. *Two Sides of a Coin: Freedom of Speech for Both the Writer and the Reader*

According to the National Children's Book and Literacy Alliance (NCBLA), books play incredibly important roles in the intellectual and emotional development of children.[17] Books enable young readers to learn about many different perspectives and how to connect with those from different backgrounds, experience elements of adulthood through their imaginations that help them to mature, and gain a strong understanding of themselves.[18] As the ACLU highlights, books serve their purpose through the power of the First Amendment: artistic expression, the freedom of individuals to decide "what to read, write, paint, draw, compose, see, and hear," is an absolutely essential element that is directly tied to freedom of speech.[19] Even when the government censors something for very good reason, this may merely serve as a stepping stone, or slippery slope: censoring one book puts another book into question.[20]

This right to artistic expression under the First Amendment is equally important to both the creator and the receiver—for books, the author and the reader. In fact, the United Nations deemed the rights of artistic expression and creation so fundamental as to warrant an entire report on the subject in 2013.[21] The report stated clearly: "All persons enjoy the right to freedom of artistic expression and creativity," both in terms of

17. *Why Do Kids Need Books?*, NAT'L CHILD.'S BOOK & LITERACY ALL., https://thencbla.org/advocacy/why-do-kids-need-books (last visited Mar. 25, 2021).

18. *Id.*

19. *Artistic Expression*, AM. C.L. UNION, https://www.aclu.org/issues/free-speech/artistic-expression (last visited Mar. 25, 2021).

20. *Id.*

21. *See* Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *The Right to Freedom of Artistic Expression and Creativity*, U.N. Doc. A/HRC/23/34 (Mar. 14, 2013).

expressing and enjoying the arts.[22] It extensively criticized censorship for stifling important functions of democracy and for being counterproductive, and recommended several measures by which member states needed to ensure their speech laws were in accordance with international human rights.[23] As these freedoms are recognized on an international scale, there can be little doubt that the arts are a core recipient of the protections that free speech provides.

Additionally, the concept of a constitutional right to receive information has First Amendment precedent.[24] Indeed, the Court has applied the right toward the distribution of Jehovah's Witnesses' handbills,[25] possession of obscene materials,[26] the public's right to access advertising,[27] citizens' right to attend criminal trials,[28] and the media's right to interview prisoners.[29] A current issue in legal scholarship is whether this right extends to filming the police,[30] which several federal courts have ruled that it does.[31] The right to receive information is therefore by no means a novel concept, as these cases illustrate that "the First Amendment interests extend beyond the rights of the speaker . . . ."[32] As other legal scholars have argued, "audience rights

22. *Id.* at 18.

23. *Id.* at 18–21.

24. *See* David L. Hudson, Jr., *First Amendment Right to Receive Information and Ideas Justifies Citizens' Videotaping of the Police*, 10 U. ST. THOMAS J.L. & PUB. POL'Y 89, 90–92 (2016) (detailing the history of Supreme Court rulings on the right to receive information).

25. *See* Martin v. City of Struthers, 319 U.S. 141, 142, 146–47 (1943).

26. *See* Stanley v. Georgia, 394 U.S. 557, 559, 564 (1969).

27. *See* Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, 425 U.S. 748, 757 (1976).

28. *See* Richmond Newspapers v. Virginia, 448 U.S. 555, 580 (1980).

29. *See* Houchins v. KQED, Inc., 438 U.S. 1, 15 (1978).

30. *See* Hudson, Jr., *supra* note 24, at 90.

31. *See* Fields v. City of Phila., 862 F.3d 353, 356 (3d Cir. 2017) ("Simply put, the First Amendment protects the act of photographing, filming, or otherwise recording police officers conducting their official duties in public."); Gericke v. Begin, 753 F.3d 1, 2–3 (1st Cir. 2014) (holding that, absent reasonably imposed restrictions, filming a police officer at a traffic stop is protected under the First Amendment); Smith v. City of Cumming, 212 F.3d 1332, 1333 (11th Cir. 2000) (holding that a private citizen has the right to film public police actions).

32. David L. Hudson, Jr., *Right To Receive Information and Ideas*, FIRST AMENDMENT ENCYC. (2017), https://www.mtsu.edu/first-amendment/article/1549/right-to-receive-information-and-ideas.

stem from speaker rights."[33] A limitation on what one person can say is a limitation on what another can hear, and vice versa; both, therefore, implicate the First Amendment.

B. *The History and Current State of Book Banning*

Book banning in the United States dates back to 1852, when Harriet Beecher Stowe's historic abolitionist novel *Uncle Tom's Cabin* caused uproar.[34] The book, considered by many to be a major factor in leading to the Civil War, was met with such anger in slave states that some made it illegal to read and slave owners throughout the South burned it.[35] Historians note the immense impact the book had on the American public.[36] Stowe wanted to use the book to portray the horrors of slavery to a wide audience.[37] *Uncle Tom's Cabin* is an example of just how much power an author can have on society.[38]

Throughout history, many of the most renowned and beloved classics have been challenged, banned, burned, and censored in schools and libraries for a wide variety of reasons. *Adventures of Huckleberry Finn* and *To Kill A Mockingbird* have been banned many times for containing racial slurs.[39] The *Gossip Girl* series and *The Perks of Being a Wallflower* have been banned for their LGBTQ content.[40] Religious groups often ban books such as *Harry Potter* and *Twilight* because of beliefs that these novels portray poor social values.[41] *The Catcher in the Rye* and *A*

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33. Jamie Kennedy, *The Right To Receive Information: The Current State of the Doctrine and the Best Application for the Future*, 35 SETON HALL L. REV. 789, 818 (2005).

34. *See* Robert McNamara, *Did Uncle Tom's Cabin Help To Start the Civil War?*, THOUGHTCO. (June 29, 2020), https://www.thoughtco.com/uncle-toms-cabin-help-start-civil-war-1773717.

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Banned Books*, FIRE, https://www.thefire.org/first-amendment-library/special-collections/banned-challenged-books (last visited Apr. 25, 2021).

40. *Id.*

41. *Id.*; *see also Top Ten Most Challenged Books Lists*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/top10 (last visited Apr. 25, 2021) [hereinafter *Top Ten Most Challenged Books Lists*].

Clockwork Orange have been banned for crude language and profanity, two other very common reasons for bans.[42] Most controversial, and arguably the most common reason for book banning, is sexual content, as seen in *Sophie's Choice* and *Fifty Shades of Grey*.[43] Although these are all prominent themes among challenges to books, one theme is more common than any other: most commonly banned books have nonetheless had significant literary impact; as author R.L. Stine said, "[u]npopular books seldom get banned."[44]

Book censorship remains an issue: these books and plenty of others are still challenged today.[45] Insofar as private schools are doing the book banning,[46] students do not have a First Amendment challenge to bring. However, public school districts continue to grapple with parents' and other groups' demands to remove books from curricula and libraries.[47]

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42. *Banned Books*, *supra* note 39.

43. *Id.*

44. Jen Doll, *The Banned Books We Have Loved*, ATLANTIC (Apr. 12, 2012), https://www.theatlantic.com/culture/archive/2012/04/banned-books-we-have-loved/329396 (quoting R.L. Stine).

45. Amy Brady, *The History (and Present) of Banning Books in America*, LITERARY HUB (Sept. 22, 2016), https://lithub.com/the-history-and-present-of-banning-books-in-america.

46. For instance, in September 2019, a Catholic school in Nashville removed the *Harry Potter* series from its library, concerned that the book's depiction of curses and spells posed the risk of "conjuring evil spirits" into the students reading them. Caitlin O'Kane, *Nashville School Bans "Harry Potter" Series, Citing Risk of "Conjuring Evil Spirits,"* CBS NEWS (Sept. 2, 2019, 5:32 PM), https://www.cbsnews.com/news/harry-potter-books-banned-nashville-catholic-school-bans-series-read-by-a-human-being-risk-conjuring-evil-spirits.

47. *See, e.g.*, Dorany Pineda, *In Burbank Schools, a Book-Banning Debate Over How To Teach Antiracism*, L.A. TIMES (Nov. 12, 2020, 8:00 AM), https://www.latimes.com/entertainment-arts/books/story/2020-11-12/burbank-unified-challenges-books-including-to-kill-a-mockingbird (discussing parents' requests to remove books such as *To Kill a Mockingbird* and *Roll of Thunder Hear My Cry* from Burbank school curricula); Dan Sweeney, *What Do You Think: As Parents Ask Schools to Ban Books, What Is Proper Content for High Schoolers?*, S. FLA. SUN SENTINEL (Jan. 25, 2020, 9:00 AM), https://www.sun-sentinel.com/news/sound-off-south-florida/fl-ne-sosf-book-banning-20200125-gqaba56pbbf2vixgz2xbddccdy-story.html (describing how the Florida Citizens Alliance lobbied the Florida Attorney General to remove from schools and school libraries a list of books including *Fifty Shades of Grey* and books meant to describe LGBT families to children).

C. *Organizations Opposed to Book Banning*

The ACLU's lawsuit in *Miami-Dade* was certainly not the organization's first book-banning legal battle.[48] Having been instrumental in opposition to censorship in many different forms, the ACLU has consistently fought throughout its history "to protect the right to access information and the right to make up your own mind."[49] Several other prominent organizations have advocated for these central First Amendment rights in schools and libraries, too. For instance, the ALA's Office for Intellectual Freedom (OIF) devotes an entire subsection of its website to shedding light on book banning.[50] To achieve its goal of "celebrating the freedom to read," the ALA created "Banned Books Week," where readers across the country have drawn national attention to censorship issues since its inception in 1982.[51] Each year, the OIF compiles a list of the previous year's most challenged/banned books, aiming to encourage individuals and communities to discuss hotly debated issues free of censorship.[52] Not only has the ALA created these lists every year since 2001, but it has also compiled larger lists of the top 100 most frequently challenged books for each of the past three decades.[53] Additionally, the ALA holds an annual "Dear

48. *Banned Books*, *supra* note 9. In 1926, the ACLU defended H.L. Mencken when his magazine *American Mercury* was banned. *Id.* The organization has played a large role in challenging dozens of different book bans. *Id.*

49. *Banned Books Week*, AM. C.L. UNION, https://www.aclu.org/issues/free-speech/infographic-banned-books-week (last visited Apr. 6, 2021).

50. *See Office for Intellectual Freedom*, AM. LIBR. ASS'N, http://www.ala.org/aboutala/offices/oif (last visited Mar. 25, 2021); *Top Ten Most Challenged Books Lists*, *supra* note 41.

51. *About*, BANNED BOOKS WK., https://bannedbooksweek.org/about/ (last visited Mar. 25, 2021). In September 2020, the theme of "Banned Books Week" was "Censorship is a dead end: Find your freedom to read!" *Id.*

52. *See id.* The most challenged book of 2019 was *George*, which depicted a transgender character. *Id.* Many of the other books on the list also depicted LGBT issues, while others were banned for different reasons, such as *Handmaid's Tale* for "vulgarity and sexual overtones" and *Harry Potter* for references to magic and witchcraft. *Id.*

53. *Frequently Challenged Books*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/ (last visited Mar. 25, 2021). The most challenged book of the 1990s was the *Scary Stories* series by Alvin Schwartz. *100 Most Frequently Challenged Books: 1990–99*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/decade1999

Banned Author Letter-Writing Campaign," where readers of banned books write to the authors to share appreciation of their stories.[54] Through all of these measures and more, the ALA brings many different types of book readers together to promote "the freedom to seek and to express ideas, even those some consider unorthodox or unpopular."[55]

In its "Kids' Right to Read Action Kit," the National Coalition Against Censorship (NCAC) provides a guide on book banning.[56] NCAC does an excellent job of acknowledging some of the reasons that controversies arise, while still advocating strongly against censorship; for instance, the literary classic *Of Mice and Men* has been frequently challenged for containing large amounts of profanity.[57] However, while parents certainly have an interest in monitoring young children's language, the novel is also renowned for how well it depicts the Great Depression and World War II-era struggles.[58] NCAC notes that "profanity is often used in literature to convey social or historical context, local dialect, or simply to better depict reactions to real-life situations."[59] Additionally, parents often

(last visited Mar. 25, 2021). The *Harry Potter* series took that honor in 2000–09. *Top Ten Banned/Challenged Books: 2000–2009*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/decade2009 (last visited Apr. 25, 2021). In the most recent decade, 2010–19, *The Absolutely True Diary of a Part-Time Indian* by Sherman Alexie was the most oft-banned book. *Top Ten Banned and Challenged Books: 2010–2019*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/frequentlychallengedbooks/decade2019 (last visited Mar. 25, 2021).

54. *Dear Banned Author Letter-Writing Campaign*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/dear-banned-author (last visited Mar. 25, 2021).

55. *Banned Books Week (September 27–October 3, 2020)*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/banned (last visited Mar. 25, 2021).

56. *See generally* NAT'L COAL. AGAINST CENSORSHIP, KIDS' RIGHT TO READ ACTION KIT, (2019) https://ncac.org/resource/book-censorship-toolkit. Parents are the most common challengers of books—they are responsible for 42% of challenged and banned books in schools and libraries. *See id.* at 2. NCAC firmly believes that "[t]he First Amendment guarantees our right to read whatever we choose," and that this right is largely burdened by content-based objections. *Id.* at 5. It recommends alternative reading lists, allowing parents to choose whether their own children should read a book without making that decision for others; consulting with librarians and teachers to weigh a child's interests against the book's pedological value; and differentiating between books that contain sexual content versus books that are obscene. *See generally id.*

57. *Id.* at 7.

58. *Id.*

59. *Id.*

challenge books because they feel that their children are "innocent and deserve to grow in a protected environment."[60] Although it is natural for parents to want to protect children from content they will not understand or behavior they should not imitate, NCAC argues that censoring based on these fears is counterproductive.[61] Education is most effective, according to NCAC, when it helps children to mature and learn to embrace different viewpoints.[62]

In 2017, the Foundation for Individual Rights in Education (FIRE) celebrated Banned Books Week by launching a Banned Books Archive within its First Amendment Library.[63] The archive, expanded annually, provides an extensive list of challenged books and details the reasons each book generated controversy.[64] Now including over a hundred of the most frequently banned books, the Archive tells many fascinating stories about the wide variety of different works, fiction and nonfiction, old and new, that people have tried to censor time and time again.[65] The Archive also includes statements from the books' authors on the harms of censorship and encourages children to use their freedom to read,[66] and includes notes on some of the more unusual instances of banned books.[67] FIRE

60. *Id.* at 10.

61. *Id.*

62. *Id.*

63. Farmer, *supra* note 8.

64. *See id.*

65. *Id.*

66. *See id.* When *Carrie* was banned, Stephen King told children, "hustle down to your public library, where these frightened people's reach must fall short in a democracy . . . ." *Banned Books*, *supra* note 39. In response to the banning of *I Know Why the Caged Bird Sings*, Maya Angelou said, "[m]any times I've been called the most banned. And many times my books are banned by people who never read two sentences." *Id.* Making light of the idea that the *Goosebumps* series was banned, R.L. Stine remarked, "[i]t is a badge of honor to have people try to ban your books from schools and school libraries, only because it means your books have become popular and are being noticed. Unpopular books seldom get banned." *Id.*

67. *Banned Books*, *supra* note 39. *A Wrinkle in Time* "has been challenged for both being too religious and not religious enough." *Id.* After Gloria Steinem strongly advocated for the banning of *American Psycho*, her step-son Christian Bale went on to star in the book's film adaptation. *Id.* *James and the Giant Peach* was banned because "a scene featuring a spider licking her lips could be taken in two ways, including sexual." *Id.*

created the Banned Books Archive with the hope that its readers would "feel[] inspired to pick up a book they normally would not consider—if only because we have the freedom to do so."[68]

D. *The Blurry Line Between Fact and Opinion*

While books in school libraries do not present an issue of technology, studies on the conflation of truth and opinion in the modern technological era are still applicable considerations when discussing book censorship. The evolution of social media has come with numerous modern complications, such as the rise of "fake news."[69] In March 2018, *Science* published the largest ever study on this phenomenon, analyzing 126,000 major contested news stories tweeted by three-million Twitter users over ten years.[70] Facts are constantly conflated with false statements, as the two are largely pooled together by data, leaving it to the individual to sort through them and distinguish their accuracy for him or herself.[71] Evidence does not indicate that people change their opinion when a fact-checking site rejects one of their beliefs, but rather that falsehoods actually seduce people into a confrontational online environment because "[t]he thrill of novelty is too alluring" to those looking for political advantage.[72] The *Science* study amplified this notion: fake news spread online significantly faster and wider than accurate news, emotion was a much more correlative factor than truth with the quick spread of news, and many accounts more predominant to fake news had less followers and tweets than accounts that tweet generally accurate information.[73] Thus, truth in the internet age is sometimes merely what the internet wants it to be.

68. Farmer, *supra* note 8.

69. Robinson Meyer, *The Grim Conclusions of the Largest-Ever Study of Fake News*, ATLANTIC (Mar. 8, 2018), https://www.theatlantic.com/technology/archive/2018/03/largest-study-ever-fake-news-mit-twitter/555104/.

70. *Id.* While Twitter made its data available for the study, Facebook did not. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

The Pew Research Center conducted a study in 2018 that surveyed 5,035 American adults on the distinction between fact and opinion.[74] In the study, the participants, all adults, were each presented with ten statements that consisted of five facts and five opinions.[75] Only 26% were able to correctly identify all five factual statements and just 35% correctly identified all five subjective opinions.[76] The majority of the survey participants correctly identified the factual statements in each set, but the results were only marginally better than they would have been had the participants randomly guessed.[77] Both Republicans and Democrats showed a higher likelihood to label something as factual if it comported with their political positions.[78] Further, lack of political awareness or digital savviness correlated with lower accuracy, and when factual statements were incorrectly labeled as opinions, the participants tended to disagree with those facts.[79] This study highlights that when people are bombarded with conflicting facts at a rapid pace and forced to sort through them using their own judgment, "even this basic task [of differentiating between fact and opinion] presents a challenge."[80]

Miami-Dade, decided over a decade ago, preceded the rise of "fake news" and the current level of immense polarization that leads citizens to assess factuality through their own personal filters.[81] Even when that case was decided, some of these concerns were argued in other legal scholarship much closer to

74. *See* Amy Mitchell, Jeffrey Gottfried, Michael Barthel & Nami Sumida, *Distinguishing Between Factual and Opinion Statements in the News*, PEW RSCH. CTR. (June 18, 2018), https://www.journalism.org/2018/06/18/distinguishing-between-factual-and-opinion-statements-in-the-news/.

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

80. *Id.*

81. *See generally* Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009) (relying partially on the distinction between facts and opinions to determine whether banning certain books from schools violates the First Amendment because they are unsuitable for education).

that time.[82] The court's decision in *Miami-Dade* largely depended on the distinction between fact and opinion,[83] a concept that, in the modern age, is anything but simple. The decade following *Miami-Dade* was a rather transformative one that invites a reexamining of that case's basic understanding of how information is disseminated. Given the aforementioned research supporting the notion of a continuously blurry line between fact and opinion, the need to reconsider how *Pico* is interpreted has only become more prevalent over time.[84] Under the precedent that the Eleventh Circuit set, school boards could easily pick and choose which nonfiction books are fact based on their own opinions and merely label the books they do not like as educationally unsuitable.[85] Even assuming that the book banned in *Miami-Dade* was indeed properly removed, the court did very little to establish standards that would distinguish when doing so is permissible. In light of the *Science* and Pew studies,[86] this very much calls into question how courts should interpret *Pico* in future cases.

II. THE FIRST AMENDMENT: SCHOOL LIBRARIES, SUBSTANTIAL TRUTH, AND THE MARKETPLACE OF IDEAS

For school libraries to efficiently serve their First Amendment function for students, libraries must operate as a form of the "marketplace of ideas." Incorporating this core element of free speech, which entails that ideas compete rather than be interfered with by a censor,[87] is an essential component of

82. *See* Katherine Fiore, Note, ACLU v. Miami-Dade County School Board*: Reading* Pico *Imprecisely, Writing Undue Restrictions on Public School Library Books, and Adding to the Collection of Students' First Amendment Right Violations*, 56 VILL. L. REV. 97, 126 (2011) (arguing that rather than the *Miami-Dade* approach, *Pico* should be read with a standard prohibiting book removal where substantial improver motivation has been shown, regardless of other potentially legitimate reasons for removing the book).

83. *See Miami-Dade*, 557 F.3d at 1227.

84. *See* Fiore, *supra* note 82, at 125.

85. *See Miami-Dade*, 557 F.3d at 1227.

86. *See* Meyer, *supra* note 69; *see also* Mitchell et. al, *supra* note 74.

87. David Schultz, *Marketplace of Ideas*, FIRST AMENDMENT ENCYC. (June 2017), https://www.mtsu.edu/first-amendment/article/999/marketplace-of-ideas.

strengthening the Supreme Court's *Pico* standard. The substantial truth doctrine, an unrelated First Amendment doctrine focused on preventing libel liability for accurate reporting,[88] provides a way for students to challenge book bans where educational suitability and content-based censorship are somewhat intertwined.

A. *Book Banning in the Courts: The Evolution of the Pico Standard*

1. Pico *and* Hazelwood*: The Supreme Court's holdings on content-based censorship*

Board of Education v. Pico is the Supreme Court's only decision to date regarding book banning in public school libraries.[89] The dispute arose when a group of parents, led by a politically conservative organization, objected at a conference to a list of nine books made available to their children in a New York public school district's libraries.[90] Characterizing the books as "anti-American, anti-Christian, anti-Semitic, and just plain filthy," the school board ordered the books removed from its libraries.[91] In their ensuing lawsuit, the students claimed that the board's actions infringed upon their First Amendment rights.[92] The district court did not agree, granted summary judgment for the board, and emphasized the importance of school boards having broad discretion, limiting federal court intervention to cases that "constitute a sharp and direct infringement" of First Amendment rights."[93] However, the U.S. Court of Appeals for the Second Circuit reversed and remanded, deeming summary judgment improper because a

88. *See* Time, Inc. v. Hill, 385 U.S. 374, 388–91 (1967).

89. *See* 457 U.S. 853 (1982); April Dawkins, *The* Pico *Case—35 Years Later*, OFF. FOR INTEL. FREEDOM, AM. LIBR. ASS'N: INTEL. FREEDOM BLOG (Nov. 7, 2017), https://www.oif.ala.org/oif/?p=11481.

90. *Pico*, 457 U.S. at 856.

91. *Id.* at 857–58.

92. *Id.* at 859.

93. Pico v. Bd. of Educ., 474 F. Supp. 387, 397–98 (E.D.N.Y. 1979).

genuine issue of fact existed as to whether the board's reasoning for its decision was "simply pretexts for the suppression of free speech."[94]

On appeal, the Supreme Court echoed the district court's sentiment that federal courts generally should not intervene in public education.[95] Nonetheless, the Court stated that school boards' broad discretion must still comport with the First Amendment, as "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate . . . .'"[96] The board's motivation is key: it is absolutely within a school's discretion to ban a book based on its "educational suitability," but when a school simply aims to suppress an opposing viewpoint (e.g., a Democratic school board banning a Republican book for partisan reasons or an all-white school board banning a Black author's book because of racial animus), the school violates the First Amendment.[97] With a genuine fact issue present as to the board's motivations, the Court affirmed and remanded to the district court for a trial on that issue.[98]

Pico produced a straightforward rule: school boards may not remove library books "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.'"[99] That rule, however, does not bind

94. Pico v. Bd. of Educ., 638 F.2d 404, 417 (2d Cir. 1980).

95. *Pico*, 457 U.S. at 863–64; *see also* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 507 (1969) (explaining that state and local officials have "comprehensive authority . . . to prescribe and control conduct in the schools").

96. *Pico*, 457 U.S. at 865 (quoting *Tinker*, 393 U.S. at 506). While courts have historically recognized the benefits of giving school boards broad discretion, they have also recognized when constitutional limits are implicated. *See* W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (noting that a public school cannot compel students to salute the flag because schools must "perform [their functions] within the limits of the Bill of Rights"); *Tinker*, 393 U.S. at 507–09 (describing that it is unconstitutional to suspend students for wearing black armbands to protest the Vietnam War, and that the First Amendment right of freedom to express opposing political views is "the basis of our national strength" and cannot be infringed upon merely for an "undifferentiated fear or apprehension of disturbance").

97. *Pico*, 457 U.S. at 870–72.

98. *Id.* at 875.

99. *Id.* at 872 (quoting *Barnette*, 319 U.S. at 642).

lower courts, as the central holding is that of a four-justice plurality, authored by Justice Brennan.[100] Justice Blackmun, in a concurring opinion, adhered to the plurality's condemnation of viewpoint suppression, but he viewed the principle from a narrower lens, discussing permissible scenarios where the First Amendment does not bar censorship of material for young children.[101] Justice White, too, concurred in the judgment, but he opined that the Court "should not decide constitutional questions until it is necessary to do so, or at least until there is better reason to address them than are evident here."[102]

The dissenting justices emphasized the importance of limiting federal intervention in education.[103] Chief Justice Burger criticized the plurality for allowing federal judges, rather than parents and teachers, to determine the validity of local school board actions.[104] Justice Powell negated the notion of a constitutional "right to receive ideas," calling it contradictory to acknowledge the broad discretion of local authorities in schools, yet deem it a constitutional violation when that authority is implemented.[105] Justice Rehnquist differentiated the government's role as educator from that of its role as sovereign, stating that the former does not raise the same First Amendment concerns.[106] Justice O'Connor noted her personal disagreement with the school board's decision, but deemed it outside the functions of the court to interject.[107]

Another Supreme Court decision is relevant to this discussion on content-based censorship. In *Hazelwood*, a high school principal withheld pages from the school newspaper featuring stories about student pregnancy and the impact of divorce on

100. *Id.* at 855. Justices Marshall and Stevens joined the plurality. Justice Blackmun joined except for Part II-A(1). *Id.*

101. *Id.* at 880 (Blackmun, J., concurring).

102. *Id.* at 884 (White, J., concurring).

103. *Id.* at 893 (Burger, C.J., dissenting).

104. *Id.*

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

106. *Id.* at 920 (Rehnquist, J., dissenting).

107. *Id.* at 921 (O'Connor, J., dissenting).

students, concerned about exposing the younger students to the sexual components of the stories.[108] Following a trajectory similar to *Pico*, the district court found this permissible, but the Eighth Circuit reversed.[109] On appeal, the Supreme Court distinguished cases that deal with a school's curriculum from cases where individual students express their viewpoints in school.[110] The *Hazelwood* students' First Amendment claims revolved around statements made in the school-sponsored newspaper, in contrast to cases such as *Tinker*, where the students who sued were generally expressing their individual viewpoints on the Vietnam War at school.[111] The former gives educators far more deference to censor student expression as it relates to the school's own standards and policies.[112] Emphasizing this distinction, the Court held that "educators do not offend . . . by [censoring] student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns."[113] Therefore, the Court ruled for the principal.[114]

Because both cases involve First Amendment lawsuits by students claiming school interference with speech, courts have weighed *Pico*'s plurality against *Hazelwood*.[115] As a majority opinion, *Hazelwood* is binding if applicable, but courts have

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108. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 263–64 (1988). *Hazelwood* is distinguishable in that it involved a school's decision to limit speech in regard to curriculum, rather than a decision to limit speech regarding a student's own views.

109. *Id.* at 264–65. The district court used the standard that school officials may restrain student speech so long as they act with "a substantial and reasonable basis." *Id.* at 264 (quoting Kuhlmeier v. Hazelwood Sch. Dist., 607 F. Supp. 1450, 1466 (E.D. Mo. 1985) (quoting Frasca v. Andrews, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979))). Viewing the school newspaper as a public forum, the Eighth Circuit held that censorship was prohibited except when "necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others." *Id.* at 265 (alteration in original) (quoting Kuhlmeier v. Hazelwood Sch. Dist., 795 F.2d. 1368, 1374 (8th Cir.1986) (quoting Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 511 (1969))).

110. *Hazelwood*, 484 U.S. at 270–71.

111. *Id.*; *see also Tinker*, 393 U.S. at 510–11.

112. *Hazelwood*, 484 U.S. at 271.

113. *Id.* at 273.

114. *Id.* at 276.

115. *See* Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 189 n.29 (5th Cir. 1995).

been hesitant to add libraries into the "school curriculum" category over which *Hazelwood* governs.[116]

2. *The plurality prevails: How* Pico *became the standard in federal courts*

Despite the fact that *Pico* is a plurality holding and *Hazelwood* is binding precedent, federal courts have adopted the *Pico* standard in subsequent book banning cases.[117] The Court of Appeals for the Fifth Circuit became the first court to apply *Pico* in 1995.[118] In *Campbell v. St. Tammany Parish School Board*, a parent objected to a book titled *Voodoo & Hoodoo*, which described an African tribal religion and depicted "spells," which the parent found inappropriate for her child.[119] After the parish's school board ordered the book removed from its libraries, another group of parents initiated a First Amendment lawsuit.[120] The district court granted summary judgment for the parents; upon appeal, the Fifth Circuit analyzed the case in light of *Pico*'s guidance, focusing on the school board's motivation to determine the constitutionality of its decision.[121] The court held that the factual record was insufficient to support summary judgment, remanding and leaving it to the fact-finder to determine whether the board's decision was motivated by factors deemed improper by *Pico*.[122]

The District Court of Kansas was the next to adopt *Pico* in *Case v. Unified School District No. 233*.[123] In *Case*, a gay rights

116. *Campbell*, 64 F.3d at 188.

117. *See id.* at 189; Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 876 (D. Kan. 1995); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 996 (W.D. Ark. 2003).

118. *See Campbell*, 64 F.3d at 189 (applying Justice White's concurrence in *Pico* because it provided "the narrowest grounds for the result in [*Pico*]"). *But see* Muir v. Ala. Educ. Television Comm'n, 688 F.2d 1033, 1045 n.30 (5th Cir. 1982) (declining to adopt *Pico* because it lacked "precedential value;" however, the court was analyzing a television station's removal of a program, rather than a library's removal of a book).

119. *Campbell*, 64 F.3d at 185.

120. *Id.* at 187.

121. *Id.* at 189.

122. *Id.* at 190.

123. *See* Case v. Unified Sch. Dist. No. 233, 908 F. Supp. 864, 875 (D. Kan. 1995).

organization donated copies of *Annie on My Mind*, a lesbian romance novel, to several schools in a Kansas school district.[124] The book generated controversy, leading to a board decision to remove it from the district's libraries.[125] Several of the board members explicitly stated that their decisions were based on distaste for the book's glorification of homosexuality.[126] The court found the board's motivations unconstitutional under *Pico*.[127] Although the board asserted its right to ban books based on "educational suitability," the court found this to be merely an alternate term for viewpoint discrimination.[128] Accordingly, the court ruled for the students.[129]

J.K. Rowling's beloved *Harry Potter* series has long been featured among the most frequently banned books in schools.[130] Such was the case in *Counts v. Cedarville School District*, where the District Court for the Western District of Arkansas used *Pico* to analyze a school board's restrictions of its students' access to the series.[131] The board members felt that the series promoted witchcraft, which they viewed as a religion to which they did not want their students being exposed; one of the board members explicitly stated that he would not object if the books promoted Christianity.[132] The court found that this blatant suppression of a different religion unquestionably invoked a First Amendment violation under *Pico* and granted summary judgment for the students.[133]

124. *Id.* at 866–67.

125. *Id.* at 869.

126. *Id.* at 870–71.

127. *Id.* at 876.

128. *Id.* at 875.

129. *Id.* at 876.

130. *See 100 Most Frequently Challenged Books: 1990–1999*, *supra* note 53 (number forty-eight on the list despite the first book not being released until 1997); *see also Top 100 Banned/Challenged Books: 2000–2009*, AM. LIBR. ASS'N, http://www.ala.org/advocacy/bbooks/frequentlychallenged books/decade2009 (last visited May 7, 2021) (number one most banned book series of the decade).

131. Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003).

132. *Id.* at 1004.

133. *Id.* at 1004–05.

In the limited case law available, *Pico* has been courts' preference for First Amendment claims involving library book banning because of the distinction between "the unique role of the school library" emphasized in *Pico* and the curricular activities in *Hazelwood*.[134] However, as discussed in Part IV, *Miami-Dade* shows that the *Pico* standard has missing components and must be strengthened to more efficiently protect students' First Amendment rights in schools.[135]

B. *The Marketplace of Ideas: Viewing the School Library as a Market*

The "marketplace of ideas" is a longstanding First Amendment principle that "refers to the belief that the test of the truth or acceptance of ideas depends on their competition with one another and not on the opinion of a censor . . . ."[136] In other words, it is the idea that the best ideas in the marketplace will rise to the top. This concept has been referenced time and time again by the Supreme Court, initially mentioned by Justice Holmes in his dissent in *Abrams v. United States*: "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution."[137] This notion is still invoked in the modern era. Concurring in *Reed v. Town of Gilbert*, Justice Breyer stated that by disfavoring one kind of speech, the government disrupts the "free marketplace of ideas" and the individual's ability to participate in societal discourse.[138] Further, Justice Alito referenced the doctrine in *Matal v. Tam*, emphasizing that "the public expression of ideas

134. Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 271 (1988).

135. *See infra* notes 201–202 and accompanying text. *See generally* Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009) (holding that removal of a book in the Miami-Dade County School District was a violation of the First Amendment).

136. Schultz, *supra* note 87.

137. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

138. Reed v. Town of Gilbert, 576 U.S. 155, 177 (2015) (Breyer, J., concurring).

may not be prohibited" just on the basis that the ideas are not agreeable to some hearers.[139]

A century after the doctrine's origins, the marketplace of ideas is still the matter of much public debate. Some feel that the doctrine is just as important and effective today and that courts have a duty to continually ensure minimal state interference with the marketplace of ideas.[140] Others feel that modern technological developments, such as social media and hyper-partisan cable media, have disrupted the free flow of the marketplace and have made the doctrine less effective than it once was.[141] However, the marketplace of ideas and free flow of ideas remains a tenet by which schools encourage children to read a wide variety of books to diversify their education. The "unique role of the school library" serves as the marketplace, where countless vastly different books are available for children to explore.[142] As the *Pico* court emphasized, "'students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.' The school library is the principal locus of such freedom."[143] The concept of the library as the marketplace is central to each of these holdings because there are few better places than libraries, especially for students, to exercise the First Amendment rights to both expression and reception of speech. Book bans, however, disrupt the market, preventing the free flow at the theory's core.[144]

139. Matal v. Tam, 137 S. Ct. 1744, 1763 (2017) (quoting Street v. New York, 394 U.S. 576, 592 (1969)). Justice Kennedy similarly adhered to the doctrine in his concurrence: "[b]y mandating positivity, the law here might silence dissent and distort the marketplace of ideas." *Id.* at 1766 (Kennedy, J., concurring).

140. *See* Brian Miller, *There's No Need to Compel Speech. The Marketplace of Ideas Is Working*, FORBES (Dec. 4, 2017, 3:44 PM), https://www.forbes.com/sites/briankmiller/2017/12/04/theres-no-need-to-compel-speech-the-marketplace-of-ideas-is-working/?sh=44c069ce4e68.

141. *See* Jared Schroeder, *'Marketplace of Ideas' Turns 100—It's Not What it Used to Be*, HILL (Nov. 9, 2019, 11:00 PM), https://thehill.com/opinion/judiciary/469715-as-marketplace-of-ideas-turns-100-truth-is-not-what-it-used-to-be. This debate largely delves into concerns of political polarization and other topics regarding freedom of speech that are outside the scope of this Note; as such, this Note does not take a position as to whether the doctrine as a whole still efficiently serves its purpose.

142. Bd. of Educ. v. Pico, 457 U.S. 853, 869 (1982).

143. *Id.* at 868–69 (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967)).

144. *See Pico*, 457 U.S. at 866–67.

C. *The Substantial Truth Doctrine: A Brief Look at Defamation Law*

Before delving into *Miami-Dade*, [145] a brief discussion is needed on the substantial truth doctrine. Substantial truth is an unrelated First Amendment concept regarding defamation that provides an appropriate standard for limiting content-based censorship under *Pico*.[146]

In defamation lawsuits, "truth is a complete defense"; i.e., defendants cannot be held liable for factual reporting.[147] A plaintiff must therefore show both a falsehood and "actual malice"—knowledge or reckless disregard of that falsehood—to recover damages for libel.[148] However, as to the question of falsity, libel law "overlooks minor inaccuracies and concentrates upon substantial truth."[149] The defendant need not prove the truth of every word; "irrespective of slight inaccuracy in the details,"[150] only "the substance, the gist, the sting" of the matter need be true.[151] This doctrine addresses the idea that truth may not always be a direct matter; defamation suits sometimes produce outcomes "at variance with the outcome that [courts] would desire if all speech were either demonstrably true or demonstrably false."[152] Therefore, in numerous libel suits, courts have applied the substantial truth doctrine to ensure that determinations of truth do not needlessly hinge on every last word.[153]

145. Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009).

146. *See Pico*, 457 U.S. at 872 ("[W]e hold 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.'" (quoting W. Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

147. Time, Inc. v. Hill, 385 U.S. 374, 383 (1967).

148. N.Y. Times Co. v. Sullivan, 376 U.S. 254, 280 (1964).

149. Masson v. New Yorker Mag., 501 U.S. 496, 516 (1991).

150. *Id.* at 517 (quoting 5 B. WITKIN, SUMMARY OF CALIFORNIA LAW § 495 (9th ed. 1988)).

151. *Id.* (quoting Heuer v. Klee, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936)).

152. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986).

153. *See* Cobb v. Time, Inc., 278 F.3d 629, 638–39 (6th Cir. 2002) (noting that the "sting" of the magazine's statement was that the boxer used an illegal drug before a match; whether it was marijuana or cocaine was not given much relevance); Nichols v. Moore, 396 F. Supp. 2d 783, 792 (E.D. Mich. 2005) (noting that the statement that the plaintiff was arrested in connection to the Oklahoma City bombing was substantially true; plaintiff was held as a material witness).

While the concept of substantial truth has been limited to defamation actions, it may serve more than one purpose for the First Amendment. In libel law, substantial truth prevents defendant reporters from being liable for reporting that was generally factual or perhaps too arbitrary to be clearly true or false.[154] In censorship law, the doctrine could be used to prevent defendant school boards from picking a few pages of a book with questionable facts to ban a book they find educationally unsuitable. The underlying principles are very much alike: a reporter's First Amendment right to freedom of the press should not be compromised because a ten-page report has a few disputed details, and an author or reader's First Amendment right to freedom of speech should not be compromised because a several-hundred-page book has occasional inaccuracies. Thus, substantial truth is similarly applicable in book-banning cases. As previously discussed, the issue of determining a book's accuracy is by no means a simple one, as the line is often very blurry between fact and opinion, and courts may need to determine "the substance, the gist, the sting" of a book's themes to make important First Amendment decisions.[155]

III. *ACLU v. Miami-Dade*: *Pico* Is Put to the Test

When Juan Amador, the father of an elementary school student, read *Vamos a Cuba*, one part of a series of young children's books depicting the lifestyles of children in different countries, a lengthy and complex dispute began.[156] Amador was outraged that the book was in his daughter's school library: "As a former political prisoner from Cuba, I find the material to be untruthful. It portrays a life in Cuba that does not exist."[157] Determined to have the book removed, Amador went through the school district's administrative review and appeal process, prompting a wide variety of conflicting opinions from several

154. *See supra* notes 148–51 and accompanying text.
155. *Masson*, 501 U.S. at 517 (quoting Heuer v. Klee, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936)).
156. *Id.* at 1182–83.
157. *Id.* at 1182.

different school committees and officials.[158] Ultimately, the conflict resulted in a board decision to remove not only *Vamos a Cuba*, but the entire series of books from all school libraries in the Miami-Dade school district.[159]

Shortly after the board's decision, the ACLU and the Miami-Dade County Student Government Association sued the school board in the District Court for the Southern District of Florida, claiming violations of their First Amendment rights to freedom of speech and access to information.[160] Deeming the plaintiffs likely to succeed on their claims, the district court issued a preliminary injunction, ordering that the board rescind its decision and return any of the books it had already removed to the school libraries.[161] The school district appealed to the Court of Appeals for the Eleventh Circuit.[162]

After determining that the plaintiffs had standing to challenge the removal of the single book,[163] the court turned to a de novo review of the First Amendment conclusions the district court had reached in granting the preliminary injunction.[164] The board argued that the district court's decision should be reviewed as a curricular matter under *Hazelwood*, but the court applied *Pico* instead, declaring that "the Board's motive is the ultimate fact upon which the resolution of the constitutional question depends."[165]

Miami-Dade is distinguishable from the other cases interpreting *Pico* in that the board decided to ban the series of books in question because of a factual inaccuracy, rather than to

158. *Id.* at 1184–88.

159. *Id.* at 1188.

160. *Id.* The plaintiffs also claimed violations of their Fourteenth Amendment rights to due process. *Id.*

161. *Id.* at 1189–90.

162. *Id.* at 1190.

163. The court held, however, that plaintiffs did not have standing to challenge the removal of the entire series. *Id.* at 1197–98.

164. *Id.* at 1198.

165. *Id.* at 1204.

censor a viewpoint.[166] The board's formal order gave its reasoning: because "the book is inaccurate and contains several omissions," its series should be removed and replaced "with a more accurate set of books that is more representative of actual life" in Cuba.[167] Indeed, the book was indisputably very inaccurate.[168] In the court's view, the book's plethora of falsehoods evidenced that the board was motivated by educational suitability, not a "desire to promote political orthodoxy."[169] The court therefore held that the board did not violate the First Amendment, vacated the preliminary injunction, and remanded.[170]

Circuit Judge Charles Wilson dissented from the majority opinion, as he was far more skeptical of the notion that factual inaccuracies, rather than viewpoint suppression, motivated the board's decision.[171] While the book was very factually inaccurate, Judge Wilson pointed to several instances in the school district's appeal process that amounted more to political

166. *Id.* at 1185. The Board chairman discussed his position:

> Censorship is when you want to stop somebody from giving another opinion, something that goes against what you believe in. In this particular case, when I read the book . . . it gives a lack of information, and it's in that lack of information that I think we as the Cuban community are offended.

Id. The Board vice-chair said:

> I don't think anyone here would support the presence of a math book in our libraries that taught that two plus two equals five . . . [or] a geography book in our libraries that says that Miami is boarded [sic] by the Pacific Ocean . . . . [S]o that's why I said that this is not about censorship or banning. This is about a book that is not accurate . . . .

Id. at 1186.

167. *Id.* at 1188.

168. *Id.* at 1227. The court listed several examples of the book's factual inaccuracies, which included: (1) the book claimed that a cave painting called *Mural de la Prehistoria* was created 1,000 years ago, but it was created in the 1960s; (2) the book discussed the types of clothing men and women wear to special festivals, but failed to reveal that the "'vast[] majority of Cubans lack adequate clothing' and cannot afford this type of outfit"; and (3) the book states that "people in Cuba eat, work, and go to school like you do," which, as the Court went into detail to explain, contrasts with the reality that "the people of Cuba live in a state of subjugation to a totalitarian communist regime with all that involves." *Id.* at 1211–13.

169. *Id.* at 1227.

170. *Id.* at 1230. The court also held that there was no Fourteenth Amendment violation. *Id.*

171. *Id.* at 1237 (Wilson, J., dissenting).

anger than to disputing inaccuracies.[172] Judge Wilson, therefore, would have deferred to the district court's distinction: the Cuban Americans disputing the book rightly showed disdain for an "oppressive totalitarian regime," but their position was nonetheless a viewpoint, and even a viewpoint of the utmost validity does not permit state-sponsored censorship.[173] According to Judge Wilson, such censorship violates the central freedom of speech rights that distinguish democracies from totalitarian regimes.[174]

IV. *PICO*: THE PROPER STARTING POINT

There are many different constitutional questions in *Pico* aside from its central First Amendment issues. Particularly, book-banning cases require courts to draw lines as to what role the judiciary serves in school board decision-making and to balance speech rights with substantive due process rights guaranteed to parents by the Fourteenth Amendment. *Pico* balanced these conflicting issues but did not create a strong standard for school boards to meet to remove a book from a library without violating the students' First Amendment rights.

A. *The Need for Judicial Intervention to Implement the First Amendment*

The dissenters in *Pico* were not necessarily wrong to emphasize the inherently local nature of educational policy.[175] The Department of Education's (ED) website states that "[e]ducation is primarily a State and local responsibility in the

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172. *Id.* at 1237–39. Judge Wilson particularly focused on how one of the Board members described several passages of the book as "distortions" and added his own comments labeled as "reality." *Id.* He agreed with the member's viewpoint, by no means disputing the truth about oppression in Cuba, but nonetheless stated "I find no support in the law for the state requiring a book to carry a political viewpoint." *Id.*

173. *Id.* at 1241.

174. *Id.* at 1252.

175. *See* Bd. of Educ. v. Pico, 457 U.S. 853, 885 (1982) (Burger, C.J., dissenting).

United States."[176] A substantial majority of public education's nationwide funding comes from state, local, and private sources, including 92% of the funding to elementary and secondary schools.[177] The ED therefore describes the limited role of the federal government as an "emergency response system," where federal intervention generally is only necessary "when critical national needs arise."[178] Otherwise, the department leaves it to states and other organizations to establish educational structures on a smaller scale, and to implement local policies in accordance with their particular needs.[179]

The *Pico* plurality, however, correctly recognized the need for courts to intervene in school board decisions where vital constitutional issues are implicated.[180] The dissenters in *Pico* were wrong to prioritize school boards' discretion over students' First Amendment rights. Federal judiciaries certainly should not be running the everyday affairs of schools across the country, but, as was famously stated in *Tinker*, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[181] *Pico* did not grant courts the power to override day-to-day decisions about how school boards, teachers, and parents operate their schools; rather, it merely made clear that broad discretion does not include the ability to bypass the First Amendment.[182]

Further, in *Campbell*, *Case*, and *Cedarville*, the courts properly applied the *Pico* standard instead of *Hazelwood*, as those cases regarded students' expression and reception of speech,[183] unlike in *Hazelwood*, where the speech at issue was in the school

176. U.S. DEP'T OF EDUC., *The Federal Role in Education*, https://www2.ed.gov/about/overview/fed/role.html (May 25, 2017).

177. *Id.*

178. *Id.*

179. *See id.*

180. *See Pico*, 457 U.S. at 864–65.

181. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1968).

182. *See Pico*, 457 U.S. at 864.

183. *See supra* Section II.A.2 (discussing the court's reliance on *Pico* in *Campbell v. St. Tammany Parish Sch. Bd.*, 64 F.3d 184 (5th Cir. 1995), *Case v. Unified Sch. Dist. No. 233*, 895 F. Supp. 1463 (D. Kan. 1995), and *Counts v. Cedarville Sch. Dist.*, 295 F. Supp. 2d 996 (W.D. Ark. 2003)).

newspaper and therefore part of its curriculum.[184] *Pico* laid the foundation for book-banning jurisprudence. Although the implementation of the *Pico* standard is not without potential issues, it should continue to be the standard upon which federal courts in book-banning cases rely. However, this standard also has missing components and must be built upon to ensure that school boards are not given the ability to "prescribe what shall be orthodox" in their libraries in an age where fact and opinion are easily conflated.[185]

B. *Substantive Due Process: The Difference Between Parental Rights and Book Banning*

Most of the aforementioned book-banning cases originated with parents objecting to schools providing children with books that the parents found objectionable. When asserting the right to control what their children read, parents invoke an issue dating back nearly a century to *Meyer v. Nebraska*, where the Court held that the Fourteenth Amendment right to due process "denotes not merely freedom from bodily restraint," but several other rights long recognized at common law as essential to freedom, among which was to "bring up children."[186] Upon declaring these rights in *Meyer*, the Court struck down a Nebraska statute that prohibited students of a certain age from being taught foreign languages.[187]

Shortly after, in *Pierce v. Society of Sisters*, the Court reiterated this concept of parental liberty, holding that an Oregon statute requiring children to attend public school was unconstitutional because it "unreasonably interfere[d] with the liberty of parents and guardians to direct the upbringing and education of children under their control."[188] This fundamental right has

184. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 262 (1988); *see also supra* text accompanying notes 108–16.

185. *Pico*, 457 U.S. at 872 (quoting W. Va. Bd. Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

186. Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

187. *Id.* at 403.

188. Pierce v. Soc'y of Sisters, 268 U.S. 510, 534–35 (1925).

remained prevalent throughout the past century and has been repeatedly invoked by parents seeking to prevent their children from exposure to other's speech. In *Brown v. Hot, Sexy & Safer Products*, for instance, parents asserted their substantive due process rights in arguing that a high school could not compel their children to attend sex education programs.[189] The First Circuit, however, stated that *Meyer* and *Pierce* were about the right of parents to choose where to send their children to school—not to dictate the content of the school's curriculum.[190]

The distinction articulated by the First Circuit shows the flaws in the substantive due process arguments advanced by plaintiffs in cases such as *Pico* and *Miami-Dade*.[191] Mr. Amador had every right under the Fourteenth Amendment to forbid his daughter to read *Vamos a Cuba*.[192] It was another issue entirely, however, to tell the school district to ban the book for all the other students.[193] This would essentially extend a parent's right to raise his or her children to a right to parent everyone else's children at the school and would actually infringe upon the substantive due process rights of all the other parents. The First Circuit correctly noted in *Brown* that "[i]f all parents had a fundamental constitutional right to dictate individually what the schools teach their children, the schools would be forced to cater a curriculum for each student whose parents had genuine moral disagreements with the school's choice of subject matter."[194] *Vamos a Cuba* unquestionably was filled with falsities,[195] but parents could have told their children not to read it, and the book would have just sat on the shelf. By instead having a school board remove the book from the shelf, the

189. *See* Brown v. Hot, Sexy & Safer Prods., 68 F.3d 525, 531 (1st Cir. 1995).

190. *See id.* at 533. To illustrate its point, the court discussed the difference between a state saying to a parent that "[y]ou can't teach your child German or send him to a parochial school," as opposed to "[y]ou can't teach my child subjects that are morally offensive to me." *Id.* at 534.

191. Bd. of Educ. v. Pico, 457 U.S. 853 (1982); Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177 (11th Cir. 2009).

192. *See Meyer*, 262 U.S. at 399; *Soc'y of Sisters*, 268 U.S. at 534–35.

193. *See Miami-Dade*, 557 F.3d at 1211.

194. *Hot, Sexy & Safer Prods.*, 68 F.3d at 534.

195. *Miami-Dade*, 557 F.3d at 1211.

parents sought to circumvent the First Amendment, rather than merely using their own rights under the Fourteenth Amendment.

C. Miami-Dade*: Educationally Unsuitable or Thematically Unsuitable?*

In and of itself, the holding the Eleventh Circuit reached in *Miami-Dade* was not necessarily improper. The record provided ample evidence of many stark falsehoods, making a very strong case for the board that *Vamos a Cuba* was inaccurate to offensive levels and was therefore not educationally suitable for children to read in the library.[196] For many of the members involved in the dispute, these falsehoods were what drove them to advocate against the book;[197] however, there were also several complaints that more closely teetered between fact and opinion, and, as the dissent pointed out, as valid as said opinions may have been, they were opinions nonetheless.[198] Taking into account all of the many factors in a long and convoluted dispute, the Eleventh Circuit likely could have ruled either way without raising serious constitutional concerns.

The Court's method of reaching its conclusion, however, was flawed. Although the *Pico* standard worked perfectly well in other cases such as *Case*[199] and *Cedarville*,[200] *Miami-Dade* showed that with a more complicated fact pattern, *Pico* is essentially a roadblock for a school board to go around, rather than a fully effective shield of students' rights to receive artistic expression.[201] To merely draw the line at "educational suitability,"[202] without a set standard for school boards to meet,

196. *See id.* at 1211–14.

197. *Id.* at 1237–39 (Wilson, J., dissenting).

198. *See id.* at 1207–17.

199. Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463, 1469 (D. Kan. 1995).

200. Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003).

201. *See Miami-Dade*, 557 F.3d at 1234–59 (Wilson, J., dissenting) (examining the objectivity of the School Board member's claims of inaccuracy, and whether those claims were merely pretextual).

202. Bd. of Educ. v. Pico, 457 U.S. 853, 871 (1982).

sets a weak precedent that allows boards to assert issues of factual accuracy that may sometimes substitute for suppressing an author's speech.

Perhaps the falsity of *Vamos a Cuba* was so drastic as to pass stricter judicial scrutiny, and perhaps not. Where, exactly, can the line be drawn? A book that is largely opinion-based may occasionally use disputable facts in its arguments, but if the book is banned for those inaccuracies, this does not necessarily mean an opinion is not being censored. Further, as the dissent pointed out in *Miami-Dade*, much of the decision to ban *Vamos a Cuba* was based on the many things about Cuba that the book failed to portray, but if omissions are equated with falsities, then by the same logic children's books about cars could be banned for not describing their carbon impacts.[203] Many nonfiction books are hundreds of pages, and surely school boards cannot merely have a true and false tally with exact thresholds that lean a book toward being educationally unsuitable. These considerations complicate the question of how inaccurate a book needs to be for banning the book to not violate *Pico*.

V. STRENGTHENING *PICO*: THE MERGING OF SUBSTANTIAL TRUTH

A. *The Substance, the Gist, the Sting of a Book*

Pico may be the correct basic standard that federal courts should follow in the meantime, but should the Supreme Court revisit the issue of book banning, it must strengthen that standard to ensure that school boards are not stripping away students' First Amendment rights. Where the line between fact and opinion is thin, as was the case in *Miami-Dade*, even courts choosing to apply the *Pico* standard can simply circumnavigate it, giving a censorship hall pass to any school board that can show factual disputes in a book. By combining *Pico* with

203. *Miami-Dade*, 557 F.3d at 1250 (Wilson, J., dissenting).

substantial truth, courts can more efficiently enforce the marketplace of ideas concept in school libraries while still respecting the discretion of local school boards.[204]

If school boards want to assert "educational suitability" as justification for banning a book, such as with books that are very factually inaccurate, then under *Pico* this would be perfectly constitutional.[205] However, just as a challenged publication cannot defame someone for mildly inaccurate statements, a challenged book should not be educationally unsuitable for these reasons, either. Therefore, when a board asserts educational suitability as its reason for banning a book, raising this defense should require using the substantial truth doctrine[206] in a different form. As a defendant may rebut a defamation claim by showing a story's substantial truth, a defendant rebutting a book-ban claim should have to do the very opposite: show that the book is substantially false, not merely in containing arguments and theories through research that can be disputed, but in portraying such clear and enormous falsehoods that, even under heightened judicial scrutiny, courts can conclude that the book's most central themes are not based in fact.

If "the substance, the gist, the sting"[207] of a book revolves mainly around someone's opinion and is not abundantly false in its most central components, then the book should receive *Pico*'s protections. As the Supreme Court has previously remarked, defamation suits would be much simpler if "all speech were either demonstrably true or demonstrably false."[208] This is a concept not limited to defamation, and for that matter, not limited to any one First Amendment doctrine. Courts could more easily handle libel actions if every defamatory statement

204. *See* Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting); *see also Pico*, 457 U.S. at 867.

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

206. *See supra* Section II.C.

207. Masson v. New Yorker Mag., 501 U.S. 496, 517 (1991).

208. Phila. Newspapers, Inc. v. Hepps, 475 U.S. 767, 776 (1986); s*ee also supra* text accompanying note 152.

brought before them could be instantly proved or disproved in the simplest "yes or no" fashion. They would equally benefit from being able to flip through a several-hundred-page nonfiction novel and check "true or false" any time the author says anything that may in any form constitute a fact. Of course, this is often not the case.

A creative example may help to illustrate this scenario. Suppose an Apple executive were to write a book about Steve Jobs that detailed his experiences working with Jobs. This book would perhaps make assertions, which, outside a select few leaders at Apple, ordinary people would not be able to verify. For example: Steve Jobs ate apples at 75% of the Apple board meetings that he ever attended. Hypothetically, this is simply true or false, but could this possibly be determined? This book could also include facts that are unquantifiable. For example: suppose it stated that Steve Jobs created the most economic growth of any major technology innovator from 2005 to 2009. Is there a method that can, with certainty, prove his net economic production over that of Bill Gates? The book might contain facts where data exists that both supports and opposes those facts. For example: suppose it stated that Steve Jobs was the fifth-most successful CEO of the 2000s. Suppose that there were disagreements between two different verified economic models about how to account for net income and inflation, and depending on which model, Jobs is at different spots on the list. How could the statement then be verified? A statement that "Steve Jobs did not wear glasses" is unquestionably false,[209] and a statement that "Steve Jobs wore a black shirt when he unveiled the iPhone" is unquestionably true.[210] Such simple statements, however, are not the kinds of statements that produce libel actions. Rather, the First Amendment often faces challenges from the gray area of the prior three statements:

209. Christina Binkley, *And Now You Can Own Steve Jobs' Quirky Eyeglasses*, WALL ST. J. (Nov. 9, 2011 3:12 PM), https://www.wsj.com/articles/BL-RB-9233.

210. *Steve Jobs Debuts the iPhone*, HISTORY (Aug. 29, 2012), https://www.history.com/this-day-in-history/steve-jobs-debuts-the-iphone.

asserted facts that can be contested and argued, and probably cannot be demonstrably proven or disproven.

As with all books, this biography would merely be another entry in the marketplace of ideas that *Pico* sought to protect.[211] In this hypothetical scenario, a school board's disagreement with the author's portrayal of Steve Jobs would not confer the ability to ban the book for being educationally unsuitable. As the Court stated in *Pico*, if students were not free to read books and form their own determinations as to what extent the book is of value or interest, "[i]t would be a barren marketplace of ideas that had only sellers and no buyers."[212] Maybe the biography is the worst and most inaccurate depiction of Steve Jobs ever written, or maybe it is the best and most accurate. In the absence of clearly demonstrated substantial falsehood, that decision of the book's merit is not one for the board, but for the student. Under the substantial truth doctrine, there would not be much merit to a libel suit claiming that Steve Jobs was defamed by being called the fifth-most successful CEO rather than number one. The point is clear: he was an immensely successful CEO, and the reader can analyze the logistics of the rest. By the same logic, substantial falsity should be the standard when courts determine the constitutionality of book bans. A school board would have to prove that the book thematically portrays a demonstrable falsity at its core, such as stating that Steve Jobs was an alien sent from space, or promoting a conspiracy that he was the leader of a celebrity pedophile ring. Otherwise, the student may read it as much as he or she pleases, and if the book is as atrocious as the board claims, students are free to reach that determination themselves.

211. *See Pico*, 457 U.S. at 867; *see also Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

212. *Pico*, 457 U.S. at 867 (quoting Lamont v. Postmaster Gen., 381 U.S. 301, 308 (1965) (Brennan, J., concurring)).

B. *Flipping Substantial Truth: Requiring Substantial Falsity to Ban Books Under* Pico

In his dissent in *Pico*, Chief Justice Burger demonstrated the importance of utilizing substantial truth when he stated that "'educational suitability' . . . is a standardless phrase" that would be used "in many—if not most—instances because of the decisionmaker's content-based judgment . . . ."[213] Even if the Court were trying to protect the marketplace of ideas, by holding that "educational suitability" was a "perfectly permissible" book-banning motivation, it left the door open for boards to find a way around the rule.[214]

As an additional component to *Pico*, substantial truth as it is known would be flipped. In defamation, "truth is a complete defense" that benefits publishers accused of libel.[215] However, in the book-banning context, substantial falsity would be the defense. The burden would be on the plaintiff to prove an unconstitutional suppression of ideas, while the board can raise substantial falsity as an affirmative defense. A board asserting that it banned a book because it was educationally unsuitable must then prove that, in the aggregate, the book was substantially false, just as a publisher in a libel suit would have to prove that a story was substantially true. There may be disputable facts, things with conflicting levels of research support, or statements that are very difficult to demonstrably prove or disprove. None of these things, however, would suffice for this standard's heightened judicial scrutiny, which would be primarily concerned with "the substance, the gist, the sting" [216] of the book's central themes. The substantial falsity standard favors the reader and presumes the board's motivation to be the unconstitutional "official suppression of

213. *Pico*, 457 U.S. at 890 (Burger, C.J., dissenting).

214. *Id.* at 871 (majority opinion).

215. Time, Inc. v. Hill, 385 U.S. 374, 383 (1967); *see also supra* text accompanying notes 147–53.

216. Masson v. New Yorker Mag., 501 U.S. 496, 517 (1991) (quoting Heuer v. Kee, 59 P.2d 1063, 1064 (Cal. Ct. App. 1936)).

ideas" not permitted by *Pico*,[217] shifting the burden to the board to establish substantial falsity.

Regarding *Miami-Dade*, *Vamos a Cuba* may very well have been substantially false. The Eleventh Circuit stated in plain terms: "it simply is not true, as *Vamos a Cuba* asserts, that the lives of children in Cuba are like those of children in this country."[218] Six expert witnesses testified at the preliminary injunction hearing, including three for each side in the dispute, and none of them stated that *Vamos a Cuba* is accurate.[219] These things considered, perhaps the Board may have been able to meet the heightened scrutiny of the substantial falsity standard. The dissent, however, found that many of the book's inaccuracies were inconsequential, such as the claim that a painting from the 1960s was a thousand years old—a false statement regarding that particular painting, but other Cuban caves do have prehistoric paintings.[220] Further, the dissent took issue with the notion of labeling omissions as inaccuracies, viewing this as a dangerous precedent that allows books to be banned because they did not say what boards wanted them to say.[221] These complications may have prevented the board from meeting the substantial falsity standard. However, whether the holding of *Miami-Dade* was correct is beyond the point; either way, the case showed holes in the *Pico* standard that need to be filled.[222] Even if the inaccuracies of *Vamos a Cuba* were extreme enough to warrant banning the book anyway, under the current

217. *See Pico*, 457 U.S. at 871.

218. Am. C.L. Union of Fla., Inc. v. Miami-Dade Cnty. Sch. Bd., 557 F.3d 1177, 1214 (11th Cir. 2009) (discussing the State Department's Human Rights Report on Cuba from 2006, which detailed the many human rights violations regularly harming Cuban citizens).

219. *Id.* at 1215–18.

220. *Id.* at 1249 (Wilson, J., dissenting).

221. *Id.* at 1249–50.

222. *See, e.g.*, *id.* at 1200 (majority opinion) ("With five different opinions, and no part of any of them gathering five votes from among the nine justices—only one of whom is still on the Court—*Pico* is a non-decision so far as precedent is concerned. It establishes no standard.").

Pico standard, many other books could be banned that fall into a much grayer area between fact and opinion.[223]

It is unclear when the Supreme Court may revisit *Pico* and *Hazelwood*. Additionally, it is admittedly difficult to draw the line as far as what is substantially true or substantially false in books that could be hundreds of pages, depending on the particular facts of a given case. However, the book-banning doctrine in its current limited form is not sufficient to encourage the marketplace of ideas in schools.[224] The *Pico* plurality standard, as courts have applied it in previous cases, should continue to be implemented, but must not rest upon a "standardless phrase" that merely allows school boards to circumnavigate the First Amendment.[225] It would therefore significantly strengthen *Pico* to require school boards to show substantial falsity when they ban books, leaving it to circuit courts to establish their own standards for what is so objectionable as to be deemed substantially false. This would ensure that "students do not 'shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.'"[226]

CONCLUSION

A school board cannot compel its students to say the pledge of allegiance or to stop wearing anti-war wristbands just because it does not agree with the message that students may convey.[227] No less can a school board compel its students not to read a book just because its stories or themes conflict with what

223. For example, *Gone with the Wind* is a work of historical fiction that contains a significant number of historical inaccuracies. *See generally* Kathryne Bevilacqua, *History Lessons from* Gone with the Wind, 67 MISS. Q. 99 (2014).

224. *See Pico*, 457 U.S. at 867.

225. *Id.* at 890 (Burger, C.J., dissenting) (discussing the majority's concession that "permissible factors [in choosing whether to retain or dispense books] are whether the books are 'pervasively vulgar' . . . or educationally unsuitable.").

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

227. *See, e.g.*, W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (holding it unconstitutional to compel public school students to salute the flag); *Tinker*, 393 U.S. at 506 (holding it unconstitutional to punish students for wearing a black armband as an anti-war protest).

that school may prefer.[228] Whether preventing student speech or stopping students from receiving speech, the school board implicates the First Amendment, and thus necessitates judicial interference with issues that are normally best left to local jurisdictions.[229] This is what *Pico* was about, and what *Pico* has, on a few occasions, prevented.[230] However, reading *Miami-Dade* in the modern age makes *Pico*'s stronghold on censorship law questionable. It has never been more difficult for a board of conflicting people with differing ideas to make common assertions of factual determinations. Therefore, if a school board attempts to ban books based on *Pico*'s permissible educational suitability standard, then the standard must be significantly altered to favor the authors and students whose speech may be affected.

Book banning remains, and likely will remain, the most prevalent form of censorship in the United States.[231] Combining the *Pico* standard with the substantial truth doctrine, however, will ensure that, in the public sphere, such censorship is met with greater scrutiny. If a book's thematic concepts in and of themselves are based significantly on abundantly apparent falsehoods, then under *Pico*, the school board's discretion prevails. On the other hand, if educational suitability is merely a stand-in for opposition, then students can rebut that notion by showing that a book in its totality is not defined by a few hand-

228. *See Tinker*, 393 U.S. at 509 ("In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.").

229. *Pico*, 457 U.S. at 863–64 ("The Court has long recognized that local school boards have broad discretion in the management of school affairs . . . . that, by and large, 'public education in our Nation is committed to the control of state and local authorities,' and that federal courts should not ordinarily 'intervene in the resolution of conflicts which arise in the daily operation of school systems." (quoting *Tinker*, 393 U.S. at 507)).

230. *See, e.g.*, Case v. Unified Sch. Dist. No. 233, 895 F. Supp. 1463, 1469 (D. Kan. 1995), *aff'd in part, rev'd on other grounds in part*, 157 F.3d 1243 (10th Cir. 1998) (finding that the board violated *Pico* by attempting to remove *Annie on My Mind*, a book about homosexuality); Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1002 (W.D. Ark. 2003) (finding that the school board violated *Pico* in removing the *Harry Potter* series by attempting to restrict access to materials believed to promote a religion with which its members disagreed).

231. *See* Webb, *supra* note 7.

picked statements of factual dispute. If Harry Potter really is so wicked, and Holden Caulfield's language really is so blasphemous, then students reading about them should be free to reach that conclusion on their own. The same should be true of any historical tale or biography. Ten students reading the same ten nonfiction books would not have the same conclusions and theories about those books' accuracy or meaning, likely not even half of them. That is why the First Amendment guarantees the right to read books, not just to write them.