

# Book Banning Goes Digital: Libraries Suspending Their E-Book Services and the Complications It Poses for First Amendment Doctrine

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## ABSTRACT

*Book banning predates the United States and has survived and thrived in a splintered twenty-first century political climate. As the fight for the minds of the public continues, state and local governments have ramped up their efforts to ban books in public and school libraries. Public libraries, as limited public forums, must ensure their restrictions on access to information are reasonable and viewpoint neutral. School libraries receive some reprieve under a slightly more deferential Pico test. However, e-book services present a unique set of challenges. Also known as digital libraries, e-book services provide digital access to thousands of books, magazines, and other titles. Frequently, libraries will contract with e-book services, allowing library patrons access to titles beyond what libraries have in physical copy.*

*However, a number of conservative states are attempting to restrict e-book services via legislation or blanket suspensions. This Note aims to make sense of e-book services and book banning against the backdrop of the First Amendment. Part I argues e-book services should be considered extensions of public libraries and public school libraries. It draws analogies from other, more established areas of law to propose e-book services are a part of the library under a nexus theory or another theory of government reliance. Part II argues banning or suspending a full e-book service is comparable to banning or suspending access to a whole section of the library to target one book—a violation of the First*

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*Amendment because it is politically motivated viewpoint discrimination. E-book services severely complicate First Amendment doctrine regarding book banning. This Note attempts to clarify the intersection between this new technology and longstanding Supreme Court precedent dictating state officials' right to ban books and patrons' right to read them.*

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## INTRODUCTION

*“Books won’t stay banned. They won’t burn. Ideas won’t go to jail.”*<sup>1</sup>

Banning books<sup>2</sup> is a tradition older than the United States itself. Indeed, the first book ban in what was to become the United States took place in 1637.<sup>3</sup> It is a practice that is contentious and has endured throughout American history.<sup>4</sup> At the center of the controversy surrounding book banning is the First Amendment right to information. The free speech clause of the First Amendment provides that “Congress shall make no law . . . abridging the freedom of speech, or of the press.”<sup>5</sup> While it does not expressly mention a right to information, the United States Supreme Court has found that the First Amendment’s speech protection extends to the dissemination and receipt of information—it is “inherent[ly] [a] corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution.”<sup>6</sup> The right to information receives its power from “the *sender’s* First Amendment right” to disseminate ideas or to speak.<sup>7</sup> Additionally, “the right to receive ideas is a necessary predicate to the *recipient’s* meaningful exercise of [their] own rights

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<sup>1</sup> ALFRED WHITNEY GRISWOLD, *ESSAYS ON EDUCATION* 96 (1954).

<sup>2</sup> Book banning, banned books, and book removal are all terms that this Note uses interchangeably for the removal or restriction of a book from the shelves of a school or library. See *Banned Books Week (October 1 - 7, 2023)*, AM. LIBR. ASS’N, <https://perma.cc/FAM9-ZTLR>.

<sup>3</sup> *Book Banning in the United States and Beyond*, HARV. GRADUATE SCH. OF EDUC. GUTMAN LIBR., <https://perma.cc/68XW-WLVL> (Sept. 18, 2023, 4:29 PM); see also Marisa Shearer, *Essay, Banning Books or Banning BIPOC?*, 117 NW. U. L. REV. ONLINE 24, 26 (2022); Matthew Taub, *America’s First Banned Book Really Ticked off the Plymouth Puritans*, ATLAS OBSCURA (Nov. 1, 2019), <https://perma.cc/3T7V-QX3R> (describing why the Puritans banned Morton’s book in Plymouth Colony).

<sup>4</sup> See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 855–56 (1982) (deciding “whether the First Amendment imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries” (footnote omitted)); see also *Chiras v. Miller*, 432 F.3d 606, 607 (5th Cir. 2005) (deciding appeal of dismissal of suit “alleging that the Texas State Board of Education violated the Free Speech Clause of the First Amendment when it refused to approve Chiras’ environmental science textbook for state funding”).

<sup>5</sup> U.S. CONST. amend. I.

<sup>6</sup> *Pico*, 457 U.S. at 867; see also *id.* at 866 (“Our precedents have focused ‘not only on the role of the First Amendment in fostering individual self-expression but also on its role in affording the public access to discussion, debate, and the dissemination of information and ideas.’” (quoting *First Nat’l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978))); *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>7</sup> *Pico*, 457 U.S. at 867.

of speech, press, and political freedom.”<sup>8</sup> Such objectives are central to the purpose of the First Amendment.

The right to information is fundamental to the existence of libraries, whose core purpose is the dissemination of and interaction with ideas, experiences, and stories. As such, the primary inquiry when evaluating a book ban is “whether the government’s ‘substantial motivation’ was to deny library users *access to ideas with which [the government] disagreed.*”<sup>9</sup> This is because the right to information “embraces the right to distribute literature, and *necessarily protects the right to receive it.*”<sup>10</sup> Thus, the government cannot “contract the spectrum of available knowledge” simply because it disagrees with or finds offensive the ideas portrayed in challenged literature.<sup>11</sup> This right extends beyond public library patrons to students, who do not “shed their constitutional rights to freedom of speech or expression at the schoolhouse gate.”<sup>12</sup> Indeed, “access [to ideas] prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members.”<sup>13</sup> Without the right to information, there would exist “a barren marketplace of ideas that had only sellers and no buyers.”<sup>14</sup>

The focus of this Note, however, is not merely the act of banning books in a traditional brick-and-mortar library. Rather, it contemplates a new kind of book ban: public and school libraries’ suspension of e-book services. Prior to the explosion of the Internet, the framework of a book ban was fairly simple to understand: an official or patron would have a criticism of a book that library officials believed made the book warranting of removal. The library would then remove the physical book from its shelves. The process was generally isolated to that book. Complicating this process immensely is the e-book service. Also sometimes known as a ‘digital library,’ e-book services offer access to

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<sup>8</sup> *Id.*

<sup>9</sup> Little v. Llano County, No. 1:22-CV-424-RP, 2023 WL 2731089, at \*7 (W.D. Tex. Mar. 30, 2023) (alteration in original) (emphasis added) (quoting Campbell v. St. Tammany Parish Sch. Bd., 64 F.3d 184, 190 (5th Cir. 1995)), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023).

<sup>10</sup> Martin v. City of Struthers, 319 U.S. 141, 143 (1943) (emphasis added) (citation omitted) (citing Lovell v. City of Griffin, 303 U.S. 444, 452 (1938)).

<sup>11</sup> Griswold v. Connecticut, 381 U.S. 479, 482 (1965).

<sup>12</sup> Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).

<sup>13</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 868 (1982).

<sup>14</sup> Lamont v. Postmaster General, 381 U.S. 301, 308 (1965) (Brennan, J., concurring).

thousands of books stored on an online database.<sup>15</sup> Libraries can purchase titles to offer to their patrons, usually by purchasing collections of books, rather than individual titles.<sup>16</sup>

Using a process sometimes known as “controlled digital lending,”<sup>17</sup> e-book services offer libraries the opportunity to license and circulate collections of books without having to own the paper copies.<sup>18</sup> Lending models vary. Some titles are available under the “[o]ne copy/one user” model, which allows a library to own the title permanently and loan it out to one user at a time, like a physical book.<sup>19</sup> Other titles operate more as a lease. Libraries can purchase the title for a number of checkouts or months, before their lease on the title expires.<sup>20</sup> Some libraries use a “simultaneous usage” model, which allows the library to purchase one title for multiple users for a set period of time and allows users to access the title concurrently without waiting lists.<sup>21</sup>

Regardless of the lending model, e-books have made access to literature far easier for library patrons.<sup>22</sup> However, libraries do not own the e-book in the way that they own the physical copy of a book. Rather, they have purchased some form of license, meaning the e-book service with which the library contracts can control to a degree what happens to the book or place conditions

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<sup>15</sup> See, e.g., OVERDRIVE, <https://perma.cc/MX7V-K23P> (“OverDrive is the leading digital reading platform for libraries and schools worldwide. We are dedicated to creating ‘a world enlightened by reading’ by delivering the industry’s largest catalog of ebooks, audiobooks and other digital media to a growing network of 88,000 libraries and schools in 109 countries.”).

<sup>16</sup> See *Explore Our Collection*, OVERDRIVE, <https://perma.cc/259L-RXVB>.

<sup>17</sup> *Controlled Digital Lending by Libraries*, CONTROLLED DIGIT. LENDING, <https://perma.cc/QK63-4GKA>.

<sup>18</sup> *Read with Libby*, OVERDRIVE, <https://perma.cc/732R-6X3Y> (“From the classics to The New York Times bestsellers, your library chooses which ebooks and audiobooks they’d like to provide in Libby. They select titles based on your community’s interests. Libby is only for digital content. It doesn’t include any physical materials from your library.”).

<sup>19</sup> Ilona Andrews, *OverDrive and Libraries: Everything You Wanted to Know*, ILONA ANDREWS BLOG (Aug. 7, 2023), <https://perma.cc/22JG-G5GW>.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*; see also DANIEL LISTON, CONN. GEN. ASSEMBLY OFF. OF LEGIS. RSCH., LIBRARIES’ ACCESS TO E-BOOKS, 2013-R-0153, at 4–5 (2013), <https://perma.cc/U5Y2-9QGP> (describing a “subscription” model allowing concurrent access for a fixed period of time).

<sup>22</sup> See, e.g., Daniel A. Gross, *The Surprisingly Big Business of Library E-Books*, NEW YORKER (Sept. 2, 2021), <https://perma.cc/Y8R6-7MDK> (“In the first days of the [COVID-19 pandemic] lockdown, the [New York Public Library] experienced a spike in downloads, which lengthened the wait times for popular books. In response, it limited readers to three checkouts and three waitlist requests at a time, and it shifted almost all of its multimillion-dollar acquisitions budget to digital content. By the end of March, seventy-four per cent of U.S. libraries were reporting that they had expanded their digital offerings in response to coronavirus-related library closures.”).

on the license.<sup>23</sup> Popular services like OverDrive frequently require libraries to purchase *collections*, rather than individual titles,<sup>24</sup> meaning libraries do not have full control over the titles available to their patrons.<sup>25</sup> Thus when confronted with an objectionable title, rather than relying on parental controls, a library without full control of the titles in their collection may suspend access to the e-book service altogether because they cannot simply remove the book from its digital shelf.<sup>26</sup>

E-book services have complicated the mechanics of loaning and banning books, but evaluating the constitutionality of these bans is even more convoluted. Perhaps the most famous book banning case is *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, in which the Supreme Court attempted to make sense of the First Amendment's limitations on state actors removing books from public school libraries.<sup>27</sup> A plurality held that library officials could not remove books from the library's shelves "simply because [local school boards] 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.'"<sup>28</sup> Essentially, the *Pico* test focuses on the school's motivation for banning the book: whether the school is focused on the *content* of the book or the *viewpoint* expressed within it.<sup>29</sup> The plurality found that when a school library removes a book on the basis of *content*, like if the school deems a book educationally unsuitable or "pervasively vulgar," that ban is "perfectly permissible."<sup>30</sup> If the school bans a book on the basis of the ideas expressed in its pages, also known as a *viewpoint*-based restriction, that ban is unconstitutional.<sup>31</sup> However, while lower courts have routinely treated *Pico* as

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<sup>23</sup> LISTON, *supra* note 21, at 2.

<sup>24</sup> See OVERDRIVE, *supra* note 16.

<sup>25</sup> See Complaint ¶¶ 2, 42, 79–84, Little v. Llano County, No. 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023).

<sup>26</sup> See, e.g., *id.* ¶¶ 79–86.

<sup>27</sup> Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 853 (1982).

<sup>28</sup> *Id.* at 872 (quoting W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943)).

<sup>29</sup> *Id.* at 871.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.* ("Our Constitution does not permit the official suppression of *ideas*. . . . If petitioners *intended* by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution." (footnote omitted)).

guidance when addressing book removal,<sup>32</sup> the fractured *Pico* court could not come to a consensus on an appropriate test for *how* to ban books in schools without offending the First Amendment beyond unfortunately vague terms like “educational suitability,” “pervasively vulgar,” and “political orthodoxy.”<sup>33</sup>

Thus, it is important to understand the kinds of government restrictions of speech that potentially offend the First Amendment.<sup>34</sup> The *Pico* court addresses two of the most egregious: the content-based restriction and the viewpoint-based restriction.<sup>35</sup> A content-based restriction “applies to particular speech because of the topic discussed or the idea or message expressed.”<sup>36</sup> Content-based restrictions focus specifically on the *content* of the questioned speech.<sup>37</sup> More sinister is the viewpoint-based restriction. Considered to be “the most contemptuous, democracy-threatening restriction[] on speech,”<sup>38</sup> a viewpoint-based restriction restricts on the basis of ideology.<sup>39</sup> Also sometimes at issue, though not relevant to this Note, is the content-neutral restriction, which limits speech without regard for the content of the message.<sup>40</sup>

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<sup>32</sup> See, e.g., *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992) (“*Pico* signifies that, consistent with other First Amendment principles, the right to receive information is not unfettered and may give way to significant countervailing interests.”); see also *Gonzalez v. Douglas*, 269 F. Supp. 3d 948, 972 (D. Ariz. 2017) (“The right is infringed if the state ‘remove[s] materials otherwise available in a local classroom unless [that] action[] [is] reasonably related to legitimate pedagogical concerns.’” (alteration in original) (quoting *Arce v. Douglas*, 793 F.3d 968, 983 (9th Cir. 2015))); *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000); *L.H. v. Indep. Sch. Dist.*, No. 4:22-cv-00801-RK, 2023 WL 2192234, at \*4–\*6 (W.D. Mo. Feb. 23, 2023).

<sup>33</sup> *Pico*, 457 U.S. at 871, 875.

<sup>34</sup> To understand the differences, consider the following hypothetical: A town decides to ban billboards. If that ban prohibits all billboards, regardless of what is on them, that ban is content-neutral. If that ban prohibits all political billboards, that ban is content-based. If the ban, on the other hand, specifically prohibits Socialist billboards, that ban is viewpoint-based because while it is targeting the content of the billboard, it is more specifically distinguishing on the basis of political viewpoint.

<sup>35</sup> See *Pico*, 457 U.S. at 871 (holding that bans motivated by the “suppression of *ideas*” violates the First Amendment but that bans motivated by the “educational suitability” of a book or a book being “pervasively vulgar” would be “perfectly permissible.”).

<sup>36</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015).

<sup>37</sup> *Id.*

<sup>38</sup> Maura Douglas, Comment, *Finding Viewpoint Neutrality in Our Constitutional Constellation*, 20 U. PA. J. CONST. L. 727, 727 (2018).

<sup>39</sup> See *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring) (noting viewpoint discrimination occurs when “the government has singled out a subset of messages for disfavor based on the views expressed” (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985))).

<sup>40</sup> Geoffrey R. Stone, *Content Regulation and the First Amendment*, 25 WM. & MARY L. REV. 189, 189 (1983).

Generally, where a library bans a book for content-based reasons, “specifically, for its educational suitability,” the removal does not offend students’ First Amendment rights.<sup>41</sup> However, if a library removes a book based on viewpoint, that removal is unconstitutional.<sup>42</sup> For example, banning books on critical race theory with the intent to prevent access to that political stance would be unconstitutional. More generally, book banning is frequently instigated “by public complaints about those materials and implemented by government officials mindful of the importance some of their constituents may place on religious values, moral sensibilities, and the desire to protect children from materials they deem to be offensive or inappropriate.”<sup>43</sup>

Also complicating book bans, specifically for school libraries, is the concept of educational discretion.<sup>44</sup> School boards have broad discretion to control conduct in schools, provided that officials behave in a manner consistent with students’ constitutional rights.<sup>45</sup> Because *Pico* allows for book bans where the books in question are considered educationally unsuitable for students,<sup>46</sup> a school board’s right to educational discretion and to exercise that discretion to remove books from library shelves is frequently in conflict with students’ First Amendment right to the information within those books. A school’s right to educational discretion cannot interfere with the “transcendent imperatives of the First Amendment.”<sup>47</sup> When considering the validity of a book ban within the walls of a public school library, it is vital to understand that there are competing rights: a school’s right to educational discretion and a student’s First

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<sup>41</sup> Ryan L. Schroeder, Note, *How to Ban a Book and Get Away with It: Educational Suitability and School Board Motivations in Public School Library Book Removals*, 107 IOWA L. REV. 363, 365 (2021) (internal quotations omitted).

<sup>42</sup> *Id.*

<sup>43</sup> *First Amendment and Censorship*, AM. LIBR. ASS’N, <https://perma.cc/P7YJ-3WL6> (Oct. 2021).

<sup>44</sup> See Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863–64 (1982).

<sup>45</sup> *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 507 (1969).

<sup>46</sup> *Pico*, 457 U.S. at 871.

<sup>47</sup> *Id.* at 864; see also *Meyer v. Nebraska*, 262 U.S. 390, 401 (1923) (“That the State may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally, is clear; but the individual has certain fundamental rights which must be respected.”); *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943) (“Boards of Education . . . have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.”).



Amendment right to information. However, libraries cannot infringe on the First Amendment on their way to exercise educational discretion.<sup>48</sup>

This Note argues that libraries that suspend access to e-book services violate their patrons' First Amendment right to information. Part I argues that e-book services should be considered extensions of libraries under what is known as the "nexus theory." This theory, taken from disability law jurisprudence, posits that websites offering the same or comparable service to a brick-and-mortar location should be subject to the same federal accessibility law requirements to which the physical location is subject.<sup>49</sup> This Note argues that e-book services offer the same core service as a brick-and-mortar library, meaning library patrons should have the same First Amendment right to the information available in the e-book service as they would a physical library. It also examines the added complication of drawing e-book services, which are private parties,<sup>50</sup> under the First Amendment. Part I concludes by arguing that banning or suspending an entire e-book service in order to exclude specific books is comparable to suspending access to a whole section of the library to target one book. Part II considers the implications of imposing additional First Amendment obligations on public libraries and public school libraries. First it argues that, while public libraries do have some editorial discretion, suspending access to whole parts of the library to target a handful of books that could be unprotected is neither reasonable nor viewpoint neutral. It then acknowledges that while school libraries have educational discretion and an interest in preventing children from having access to 'inappropriate' content, politically-motivated e-book bans still violate students' First Amendment right to information. Doing so suspends access to more content than could possibly be unprotected and prevents patrons from accessing content to which they may have a right. Ultimately, this Note outlines a way to protect library patrons' First Amendment right to information, including information on e-book services.

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<sup>48</sup> *Barnette*, 318 U.S. at 637 (noting Boards of Education have no duties "that they may not perform within the limits of the Bill of Rights").

<sup>49</sup> See discussion about the nexus theory *infra* Section I.B.2.

<sup>50</sup> See discussion about e-book services as private actors *infra* Sections I.B.1, I.B.3.

## I. WHAT IS THE RELATIONSHIP BETWEEN PUBLIC LIBRARIES AND E-BOOK SERVICES?

*“Not in their wildest dreams could anyone in the Founding generation have imagined Facebook, Twitter, YouTube, or TikTok.”<sup>51</sup>*

It almost goes without saying that the Founders of the United States could not have anticipated a twenty-first century society when they penned the First Amendment in the late eighteenth century. When they wrote “Congress shall make no law . . . abridging the freedom of speech,”<sup>52</sup> the Founders could not have imagined the existence of the internet, let alone online databases with tens of thousands of books. Neither the Constitution nor courts have addressed the issue of suspending access to e-book databases.<sup>53</sup> Thus, it is important to understand the nature of the relationship between these databases and the public and school libraries with which they contract.

This Part first attempts to clarify the parties involved in these conflicts—who they are and what rights or obligations they might have to each other. It then proposes that the nature of the relationship between communities and these e-book services inextricably links them to brick-and-mortar libraries. As such, e-book services are a digital wing of the library. Just as some circuits draw websites under the Americans with Disabilities Act (“ADA”) via a nexus theory requiring some connection between a service and a physical place,<sup>54</sup> e-book services should be considered an extension of or nexus to the library. Though not a perfect parallel, requiring courts to treat e-book services as extensions of a library could prevent heavy-handed e-book banning. However, requiring e-book services to comply with the First Amendment poses additional problems because e-book services are private entities, not state actors.<sup>55</sup> A potential solution is a one-way rule: e-book services do not have to suspend a challenged book when asked, but libraries cannot suspend the service because it is comparable to walling off a wing of the library. When considering the rights of library patrons, only states have First Amendment obligations.

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<sup>51</sup> *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1203 (11th Cir. 2022), *cert. denied*, 144 S.Ct. 69 (2023), *cert. granted in part sub nom.*, *Moody v. NetChoice, LLC*, No. 22-277, 2023 WL 6319654 (Sept. 29, 2023).

<sup>52</sup> U.S. CONST. amend. I.

<sup>53</sup> *Id.*

<sup>54</sup> See discussion about the nexus theory *infra* Section I.B.2.

<sup>55</sup> See discussion about state actor analysis under *Halleck* *infra* Section I.B.1.

### A. *Examining the Involved Parties and How They Interact*

What *Pico's* splintered opinion could not address was the unprecedented explosion of the Internet and online services. There is a breadth of information available at the push of a search button. Sources like OverDrive, Epic, and EBSCO offer hundreds of thousands of free or cheaply accessible books, allowing libraries to join the digital age and offer e-book services as an extension of the brick-and-mortar library.<sup>56</sup> Arguably, the breadth of information and the ease with which one can access it would render banning books a moot exercise, especially because the e-book services with which public libraries contract are private entities.<sup>57</sup> However, library officials and legislatures still attempt to ban books,<sup>58</sup> a process drastically complicated by the fact that they can no longer completely control the inventory of books available to the public.<sup>59</sup>

#### 1. *Understanding the Parties Involved and Their Rights and Obligations*

To address book bans in a digital world, it is first important to understand the parties—who they are, how they interact, and what rights and obligations each party has and to whom.

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<sup>56</sup> See, e.g., Jessica Duffin Wolf, *Check Out Libby*, LITERARY REV. OF CAN. (Jan.–Feb. 2020), <https://perma.cc/Y3B3-26T9> (“Today, patrons [of the Toronto Public Library] can browse over 180,000 [titles on Libby, OverDrive’s library-specific app] — often through catchy, thoughtfully curated lists.”). Additionally, libraries frequently offer a number of e-book services, further increasing the number of books available. For example, at the time of writing, my hometown of Farmington, Connecticut is home to two public libraries, which offer access to a number of databases. Including books, audiobooks, comics, magazines, music, and videos, the two libraries offer access to at least nine different online databases, available as long as a patron has a valid library card. *A-Z Resources*, FARMINGTON LIBRS., <https://perma.cc/K2G9-3KM9>.

<sup>57</sup> See discussion about e-book services as government actors and private entities *infra* Section I.B.1. Beyond potential First Amendment litigation, libraries who suspend e-book services could open themselves up to litigation for breach of contract with the e-book services themselves. While such litigation could offer an additional method of maintaining access to e-book services, the contract law discussion is beyond the scope of this Note.

<sup>58</sup> Adolfo Pesquera, *A Battle Is Brewing over Banned Books—And Lawyers Are Picking Sides*, TEX. LAW. (Apr. 27, 2022, 2:35 PM), <https://perma.cc/N3JN-4UQF>.

<sup>59</sup> See Joe Hernandez, *In a Lawsuit, A Group of Texas Library Patrons Says a Book Ban Amounts to Censorship*, NPR (Apr. 26, 2022, 2:01 PM ET), <https://perma.cc/9BZY-MTGR> (“Because they couldn’t control the titles on OverDrive, the Llano County Commissioners instead voted to suspend the use of OverDrive altogether in December, the suit says, even though it has a mechanism for parental controls.”).

*a. Library Patrons*

At the center of potential conflicts are the library patrons. Patrons do not have First Amendment obligations. Rather, school and public libraries have an obligation to their patrons not to restrict the free access to information. These libraries fail in that obligation when they ban books beyond those which can survive a viewpoint-neutrality and reasonableness inquiry or a *Pico* analysis.<sup>60</sup> This Note focuses on patrons' "penumbral right to receive information."<sup>61</sup> Patrons will always be at the center of book banning conflicts, because they are the consumers directly affected by bans. Digital or brick-and-mortar, banning a book may offend their First Amendment right to the information in that book.

*b. Libraries and Library Officials*

Public and school libraries and their officials are state actors, and thus have First Amendment obligations. Notably, "the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally *encompasses the positive right of public access to information and ideas.*"<sup>62</sup> As such, it is important to examine where public officials might offend this right by restricting access to books.<sup>63</sup> While librarians often vocally oppose book bans,<sup>64</sup> libraries and library officials may offend the right to information when they remove or restrict access to books based on a *sua sponte* evaluation, public pressure, or legislation.

School and public libraries are limited public forums, meaning forum doctrine comes into play when considering the validity of any kind of book ban.<sup>65</sup> Forum doctrine offers a state the right to designate government property

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<sup>60</sup> See *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992) (finding that libraries that restrict patrons' access violate the First Amendment); see also *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (finding viewpoint-based book bans in schools violate the First Amendment); *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 679 (2010) ("Any access barrier [in a limited public forum like a public library] must be reasonable and viewpoint neutral.").

<sup>61</sup> *Kreimer*, 958 F.2d at 1252 (internal quotations omitted).

<sup>62</sup> *Id.* at 1255 (emphasis added).

<sup>63</sup> For discussion of state legislatures' efforts to ban books on a state-wide level, see discussion *infra* Section I.A.1.d.

<sup>64</sup> See, e.g., Erika Hayasaki, *How Book Bans Turned a Texas Town Upside Down*, N.Y. TIMES MAG., <https://perma.cc/3ZDY-8W29> (Sept. 9, 2022).

<sup>65</sup> *Kreimer*, 958 F.2d at 1259.

for specific uses.<sup>66</sup> As such, “the [l]ibrary is obligated only to permit the public to exercise rights that are consistent with the nature of the [l]ibrary and consistent with the government’s intent in designating the [l]ibrary as a public forum.”<sup>67</sup> The Supreme Court held in 2010 that a library’s restriction on free speech—and by extension, the freedom of information—as a limited public forum must be reasonable and viewpoint-neutral.<sup>68</sup> This Note’s analysis hinges largely on whether such e-book bans are viewpoint-neutral in determining if they violate library patrons’ First Amendment rights.

*c. Pro-Book Ban Politicians and Groups*

There are a number of lobbying groups and politicians staunchly in support of book bans, and who frequently spearhead the efforts to ban books to which they object. For example, former Texas State Representative and chair of the Texas House’s General Investigating Committee, Matthew Krause compiled and distributed a list of 850 books that “might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex.”<sup>69</sup> School district officials removed a number of titles on this list,<sup>70</sup> despite the lack of any legal obligation to do so. Similarly, the right-wing group Moms for Liberty has successfully led book banning efforts in a number of conservative states by distributing lists of books they oppose and rallying representatives to pressure school boards and library officials to remove those books.<sup>71</sup> While these actors are not directly offending the First Amendment, their influence on state legislatures and library officials cannot be overlooked.

*d. State Legislatures*

State and local governments, particularly in conservative states, pose additional challenges in the fight for access to information.<sup>72</sup> In 2018, the Board

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<sup>66</sup> See *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 800 (1985).

<sup>67</sup> *Kreimer*, 958 F.2d at 1262.

<sup>68</sup> See *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 669 (2010).

<sup>69</sup> Shearer, *supra* note 3, at 30 (quoting Bill Chappell, *A Texas Lawmaker Is Targeting 850 Books That He Says Could Make Students Feel Uneasy*, NPR (Oct. 28, 2021, 1:00 PM EDT), <https://perma.cc/7MFN-WLZN>).

<sup>70</sup> Hayasaki, *supra* note 64.

<sup>71</sup> *Id.*

<sup>72</sup> Hannah Natanson, *The Next Book Ban: States Aim to Limit Titles Students Can Search for*, WASH. POST (May 10, 2022, 7:26 AM EDT), <https://perma.cc/7LTN-WTUP> (discussing a

of Utah Education Network revoked student access to EBSCO K12 databases, Utah public schools' e-book service of choice, after a "self-described concerned parent" alleged that pornography was available on the database.<sup>73</sup> However, when state officials could not locate these allegedly inappropriate materials, Utah reinstated access to EBSCO.<sup>74</sup> Utah state officials then passed H.B. 38, requiring "digital resources, provided by [Utah Education and Telehealth Network Board ("UETN")] to Utah's public schools, to block obscene or pornographic material" and requiring UETN "to enter into contracts with digital resource providers that comply with the provisions of [H.B. 38]."<sup>75</sup> The "School Technology Amendments" bill defines "obscene or pornographic material" as material that:

- (a) an average person, applying contemporary community standards, finds that, taken as a whole, appeals to prurient interest in sex;
- (b) is patently offensive in the description or depiction of nudity, sexual conduct, sexual excitement, sadomasochistic abuse, or excretion; and
- (c) taken as a whole does not have serious literary, artistic, political, or scientific value.<sup>76</sup>

Similar laws are at issue in Minnesota, Oklahoma, Tennessee, and several other states.<sup>77</sup>

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number of proposed, passed, and defeated state legislation, all of which attempt to regulate access to e-book services).

<sup>73</sup> *A Win for Utah Students and Teachers – EBSCO Access Reinstated*, EVERYLIBRARY (Oct. 23, 2018), <https://perma.cc/HWF4-4UJ5>. It is important to note that "[t]he 'concerned parent' who initially complained is, in fact, a conservative blogger who had already been working with parents, and with Family Watch International, in Colorado to ban EBSCO from schools." *Id.* Politically hot topics are at the center of the banning book debate, and allegedly "sexually explicit," "inappropriate," or "obscene" content exists most frequently in books containing depictions of queer stories and discussing critical race theory. *See, e.g., Top 10 Most Challenged Books Lists*, AM. LIBR. ASS'N, <https://perma.cc/YBV6-5XQU> (containing an aggregated list of the top ten most frequently banned books and their reason for being banned going back to 1990).

<sup>74</sup> EVERYLIBRARY, *supra* note 73.

<sup>75</sup> H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021); *see also* UTAH CODE ANN. § 53B-17-109 (West 2023).

<sup>76</sup> H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021); *see also* UTAH CODE ANN. § 53B-17-101.5 (West 2023).

<sup>77</sup> Natanson, *supra* note 72; *see also* H.B. 2454, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022).

*e. E-Book Services*

E-book services are the new entity complicating the existing First Amendment doctrine surrounding book bans. The framework of a book ban prior to e-book services used to be relatively simple: state legislation, public outcry, or some other pressure would cause library officials to remove a book from their shelves, depriving physical access to their patrons. However, this new relationship between library patrons, e-book services, and libraries is more complicated. Libraries contract with e-book services to provide digital library access to patrons.<sup>78</sup> Generally, this means library patrons must have library credentials to access the e-book service.<sup>79</sup> Patrons do not need a separate account to access the e-book library, nor do they need to pay for e-book services directly.

If e-book services are private entities with their own First Amendment rights,<sup>80</sup> then library or state officials likely cannot force an e-book service to remove a book. If they are private entities, rather than a service completely under the library's control or some form of state actor,<sup>81</sup> this prompts a number of currently unanswered questions. Do patrons still have a First Amendment right to information offered on an e-book service if it is not owned by the library in the way that physical books are? Can libraries restrict their patrons' access to the books on another platform because an e-book service is not a part of the public library? This Note addresses these questions in turn below.

Additionally important is questioning the nature of the relationship between libraries and e-book services and whether that relationship can be interpreted in such a way that a court could protect patrons' access to e-book services. States forcing e-book services to remove or host content might have contractual complications. However, such arguments are beyond the scope here. This Note is concerned specifically with the *rights of library patrons*. The framework for considering the rights of patrons, rather than e-book services or libraries, is best exemplified by the ongoing case *Little v. Llano County*, in which

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<sup>78</sup> See, e.g., *Public Libraries*, OVERDRIVE, <https://perma.cc/6WF2-UX5S> ("An OverDrive digital collection allows libraries to extend beyond their physical walls and offer anytime, anywhere access to ebooks, audiobooks, magazines and more . . .").

<sup>79</sup> *Id.*

<sup>80</sup> See *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 365 (2010) ("[T]he Government may not suppress political speech on the basis of the speaker's corporate identity.").

<sup>81</sup> See *infra* notes 121–31 and accompanying text (discussing case in which the Supreme Court held that a private entity could have First Amendment obligations if it performed a traditional and exclusively public function).

library patrons sued a public library in part for suspending access to an e-book service, claiming that it violated their First Amendment right to information.<sup>82</sup>

## 2. *The Conflicts Begin: Little v. Llano County*

Despite a rise in book bans in recent years,<sup>83</sup> no court has yet determined if a school or public library violates the First Amendment when it suspends access to an e-book service in order to restrict access to certain books.<sup>84</sup> Additionally, while multiple conservative states have attempted to restrict access to books in school libraries, no court has addressed the suspension the e-book service of a more broadly accessible *public* library. Thus, *Little v. Llano County* appears to be a case of first impression and awaits final disposition in the Fifth Circuit.

*Little v. Llano County* involves the Llano County Library System, in Llano County, Texas.<sup>85</sup> In 2021, library officials responded to complaints about “pornographic filth” in the children’s books sections, including books purportedly about “child grooming,” critical race theory, LGBTQ+ stories, and other “inappropriate” books.<sup>86</sup> In December of 2021, state officials closed Llano County libraries for three days to review the library catalog and check the shelves for “inappropriate books.”<sup>87</sup> Officials did not define “appropriate”

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<sup>82</sup> *Little v. Llano County*, No. 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023).

<sup>83</sup> For example, “2020 marked a precipitous increase in requests for book bans relating to race, racial justice, and more generally, stories of ‘Black, Indigenous, or people of color,’ or ‘BIPOC.’ This revival of book bans corresponds with the increased public awareness of social justice movements and critical race theory following the murder of George Floyd in May 2020.” Shearer, *supra* note 3, at 28 (footnote omitted); see also Hannah Natanson, *School Book Bans and Challenges, at Record Highs, Are Rising Again*, WASH. POST, <https://perma.cc/6Y6S-5DAG> (Sept. 19, 2022, 2:31 PM EDT) (noting “681 attempts to ban or restrict access to 1,651 different books in schools between Jan. 1 and Aug. 31 of [2022]”).

<sup>84</sup> See generally *Llano County*, 2023 WL 2731089. To the author’s knowledge, this is the only e-book ban to reach a federal court. However, at the time of writing, the Brevard County school system has also suspended access to the Epic app previously available to its students, claiming “it didn’t want kids to have access to material its own school librarians hadn’t vetted.” David Ingram, *Conservative Parents Take Aim at Library Apps Meant to Expand Access to Books*, NBC NEWS (May 12, 2022, 9:00 AM EDT), <https://perma.cc/83Z3-7B2Z>. No lawsuit had been filed at time of writing.

<sup>85</sup> *Llano County*, 2023 WL 2731089, at \*1.

<sup>86</sup> *Id.* at \*2–\*3; see also discussion about Maurice Sendak’s *In the Night Kitchen* and books about bodily functions *infra* Sections II.A.2.a, II.A.2.b.

<sup>87</sup> *Id.* at \*3 (internal quotations omitted).



versus “inappropriate.”<sup>88</sup> Officials removed books identified as inappropriate by people like former Texas Representative Matthew Krause, who distributed a list of roughly 850 books he deemed to be inappropriate.<sup>89</sup> By that time, Llano County officials had also voted unanimously to suspend access to OverDrive, Llano County’s e-book service of choice, because two books at issue—*Bow* by Jonathan Evison and *Gender Queer* by Maia Kobabe—were still accessible to library patrons though OverDrive.<sup>90</sup>

In April of 2022, a number of Llano County residents sued members of the Llano County Commissioners Court, the Llano County Library Board, and Llano County Library System Director Amber Milum alleging violations of their First Amendment rights.<sup>91</sup> The plaintiffs wish to “exercise their First Amendment rights to access and receive information in the ebooks and audiobooks on OverDrive.”<sup>92</sup> They allege that Llano County’s public officials improperly relied on the pretext of “a hunt to eradicate ‘pornographic’ materials” from its shelves as a means to restrict access to books where the officials disagree with the political viewpoints present in the work or dislike the book’s content.<sup>93</sup> Notably, plaintiffs allege that Llano County public officials “permanently terminated access to over 17,000 digital books because [public officials] could not censor and ban two specific ebooks that they disliked from the County’s digital book collection.”<sup>94</sup> According to the challengers, the community, particularly elderly patrons “who struggle to read books in print and listen to audiobooks instead,” relied heavily on OverDrive prior to its suspension.<sup>95</sup> Llano County officials initially attempted to remove the two books from OverDrive and, realizing OverDrive had no individual removal or restriction mechanism, suspended access to the entire service for adults and children indefinitely.<sup>96</sup> Parental controls would filter the two books at issue, and OverDrive informed officials as such.<sup>97</sup> However, Llano County never reinstated OverDrive.<sup>98</sup> The challengers

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<sup>88</sup> *Id.*

<sup>89</sup> Hayasaki, *supra* note 64.

<sup>90</sup> *Llano County*, 2023 WL 2731089, at \*2–\*3.

<sup>91</sup> *Id.* at \*1, \*3.

<sup>92</sup> Complaint, *supra* note 25, ¶ 137.

<sup>93</sup> *Id.* ¶ 4.

<sup>94</sup> *Id.* ¶ 2.

<sup>95</sup> *Id.* ¶ 29.

<sup>96</sup> *Id.* ¶¶ 78–79, 86, 88, 95.

<sup>97</sup> *Id.* ¶¶ 81, 83.

<sup>98</sup> *Id.* ¶¶ 88, 95.

alleged Llano County public officials' actions amount to viewpoint discrimination in violation of the patrons' First Amendment rights.<sup>99</sup>

On March 30, 2023, the United States District Court for the Western District of Texas entered judgment on Llano County's motion to dismiss and plaintiffs' motion for a preliminary injunction.<sup>100</sup> Although the district court dismissed plaintiffs' claims regarding OverDrive, it did so only based on a deficiency in pleadings, not due to an unresolved claim.<sup>101</sup> The district court did *not* dismiss the OverDrive-related pleadings because Bibliotheca, the service with which officials replaced OverDrive, is a "comparable" service, like Llano County officials allege.<sup>102</sup> Rather, it dismissed the claims because plaintiffs did not specify *which* books were unavailable on the new service.<sup>103</sup> As such, the district court could not determine the motivations for and subsequent constitutionality of replacing OverDrive with Bibliotheca and whether patrons had a First Amendment right to the information available in the specific books not available on the new service.<sup>104</sup> The district court noted that the "[p]laintiffs' injury appears to be the violation of their right to access information through the online book database OverDrive," suggesting that the district court itself is convinced that there may be some right to the information offered on this privately-operated service.<sup>105</sup> However, the order does not offer a clear rule for libraries. While the district court noted that "the evidence shows that the County replaced OverDrive with a comparable online service," it is not clear based on the short order *what* a comparable service is, whether a comparable service is sufficient to avoid a First Amendment violation, or indeed if library patrons have a First Amendment right to information on e-book services at all.<sup>106</sup>

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<sup>99</sup> *Id.* ¶¶ 142–47.

<sup>100</sup> Little v. Llano County, No. 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023).

<sup>101</sup> *Id.* at \*6.

<sup>102</sup> *See id.* at \*5.

<sup>103</sup> *Id.* at \*6.

<sup>104</sup> *See id.* ("Without allegations regarding specific books, and given that some of the books at issue are available through Bibliotheca, the Court cannot find, based on the pleadings, that Bibliotheca does not sufficiently replace OverDrive database.").

<sup>105</sup> *Id.*

<sup>106</sup> *Id.*

The district court granted plaintiffs' motion for a preliminary injunction, ordering Llano County officials to return physical books to the library shelves.<sup>107</sup> However, because of the deficient pleadings, the district court dismissed the OverDrive-related claims.<sup>108</sup>

Llano County appealed the order to the United States Court of Appeals for the Fifth Circuit, which stayed all district court proceedings until the Fifth Circuit had "sufficient time to consider Appellants emergency motion for [a] stay" of the preliminary injunction.<sup>109</sup> It is important to note that "as early as March 2022, [Llano County officials] were trying to remove books they had already purchased through Bibliotheca, due to concerns about their appropriateness."<sup>110</sup> Llano County officials have not stopped trying to ban e-books while this issue remains unresolved.

Because this is an issue of first impression and the district court dismissed based on deficient pleadings, rather than lack of standing or failure to state a claim, it is still not clear how a court would handle this question. Introducing a third-party service requires additional examination beyond the traditional *Pico* analysis for a school library or the reasonableness and viewpoint neutrality inquiry for public libraries. To analyze whether a library has violated its patrons' First Amendment rights, a court must first determine if those patrons have a First Amendment right to information available on a third-party service offered through a library.

### B. *E-Book Services as an Extension of the Physical Library*

There exists a significant relationship between the library and its chosen e-book service. Libraries that offer an e-book service, particularly those that have advertised it, have backed themselves into a legal corner because both patrons and administrators perceive the e-book service as a library offering.<sup>111</sup> Public schools that offer free access to online services face the same issues.<sup>112</sup> This

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<sup>107</sup> *Id.* at \*13 ("Defendants must therefore be prevented from removing the books, and the books at issue be made available for checkout through the Library System's catalogs.").

<sup>108</sup> *Id.*

<sup>109</sup> Order of USCA, *Little v. Llano County*, No. 1:22-CV-424-RP (W.D. Tex. Mar. 30, 2023), ECF No. 176.

<sup>110</sup> *Llano County*, 2023 WL 2731089, at \*12.

<sup>111</sup> See *infra* text about nature of relationship between patrons and e-book services accompanying notes 146–54.

<sup>112</sup> See *infra* text about nature of relationship between students and e-book services accompanying notes 155–61.

Section examines the complicated nature of the relationship between e-book services and libraries. First, it discusses whether a court could consider e-book services a state actor under the seminal case *Manhattan Community Access Corp. v. Halleck*.<sup>113</sup> That analysis will contemplate whether e-book services, and by extension libraries, offer a traditional and exclusive public function. Finding that they do not, and thus do not satisfy the *Halleck* standard, this Section argues that courts should allow patrons to sue state officials for suspending access to privately-operated e-books by invoking a theory presented in ADA jurisprudence, known as the nexus theory. Under this framework, the relationship between physical libraries and online e-book services is so significant that the former confers First Amendment obligations to the latter. Such a relationship is essential to establishing the nexus necessary to find e-book services are an extension of a public library and are therefore subject to the same protections of the First Amendment.

#### 1. *Are E-Book Services State Actors Under Halleck?*

A favorable finding using an analysis under *Halleck* would be the easiest route to finding that patrons have a right to information available on e-book services. Under *Halleck*, private services that perform public services can sometimes be treated as public entities, binding them by the same constitutional obligations to which the government is bound.<sup>114</sup> If a court found that an e-book service is the kind of actor bound by *Halleck*, patrons could easily argue that libraries *and* e-book services violate their First Amendment rights when depriving patrons of access to information available on the services. However, the nature of e-book services are such that they likely fail *Halleck*. In considering the nature of the relationship between e-book services and libraries, an analysis under *Halleck* could dispose of the question of whether a library patron has a First Amendment claim when they lose access to the e-book service by finding that e-book services temporarily act as state actors in their contracts with public and school libraries.<sup>115</sup> If they are state actors, then e-

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<sup>113</sup> *Manhattan Cmty. Access Corp. v. Halleck*, 139 S.Ct. 1921 (2019).

<sup>114</sup> *Id.* at 1928 (“Under this Court’s cases, a private entity can qualify as a state actor in a few limited circumstances—including, for example, (i) when the private entity performs a traditional, exclusive public function; (ii) when the government compels the private entity to take a particular action; or (iii) when the government acts jointly with the private entity.” (citations omitted)).

<sup>115</sup> *See id.*

book services would have the same First Amendment obligations to their patrons that public libraries have. However, as discussed below, e-book services cannot pass a *Halleck* test and cannot be treated as state actors.

*Halleck* involved New York City's decision to delegate the operation of its public access cable stations to the private, nonprofit corporation Manhattan Neighborhood Network ("MNN").<sup>116</sup> MNN temporarily suspended plaintiffs Halleck and Melendez from producing content for MNN following Halleck and Melendez's production of a documentary criticizing MNN's alleged neglect of the East Harlem community.<sup>117</sup> The hosts and network had several additional disagreements, after which MNN permanently suspended both plaintiffs.<sup>118</sup> The plaintiffs then brought suit alleging that MNN violated their First Amendment rights in suspending them.<sup>119</sup> MNN argued they were not a state actor and thus did not have a duty to carry their speech under the First Amendment.<sup>120</sup>

The Supreme Court found in favor of MNN. The opinion introduced a new inquiry: "whether the activity in question constitutes 'a traditional, exclusive public function.'"<sup>121</sup> A traditional, exclusive public function involves "powers traditionally exclusively reserved to the State."<sup>122</sup> Importantly,

[i]t is not enough that the federal, state, or local government exercised the function in the past, or still does. And it is not enough that the function serves the public good or the public interest in some way. Rather, to qualify as a traditional, exclusive public function within the meaning of our state-action precedents, the government must have traditionally *and* exclusively performed the function.<sup>123</sup>

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<sup>116</sup> *Id.* at 1927.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> *Id.*

<sup>120</sup> *Id.*

<sup>121</sup> Graham L. Fisher, Case Note, *Lights, Camera, State Action: Manhattan Community Access Corp. v. Halleck*, 77 CARDOZO L. REV. DE•NOVO 165, 181 (2020).

<sup>122</sup> *Halleck*, 139 S.Ct. at 1928 (quoting *Jackson v. Metro. Edison Co.*, 419 U.S. 345, 352 (1974)).

<sup>123</sup> *Id.* at 1928–29; *see also id.* at 1929 ("The relevant function in [*Halleck*] is operation of public access channels on a cable system. That function has not traditionally and exclusively been performed by government.").

Ultimately, “when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the First Amendment because the private entity is not a state actor.”<sup>124</sup>

Here, the relationship between e-book services is more “analogous to a government license [or] a government contract” than a traditional, exclusive function.<sup>125</sup> A government contract does not make that private entity a state actor unless the entity satisfies *Halleck*.<sup>126</sup> E-book services have contracts with school and public libraries but do not perform a service *exclusively* relegated to public entities. The standard model adopted by public libraries that offer free access to online books does so by offering free access to a privately operated e-book service with whom the library has a contract.<sup>127</sup> More broadly, libraries themselves are not a service that has been traditionally and exclusively offered by the state. While there are over 120,000 libraries in the United States, that number as of May 2023 includes over 22,000 private school libraries, over 3,000 college and university libraries (both public and private), and nearly 5,000 “special” libraries, including corporate, medical, law, and religious libraries.<sup>128</sup> Indeed, some of the most famous libraries in the country are privately owned. The Folger Shakespeare Library, for example, is owned by a private trust and operated by Amherst College.<sup>129</sup> Similarly, the John Carter Brown Library, located on Brown University’s campus, is independently funded.<sup>130</sup> While libraries are majority public-funded, they are not exclusively or traditionally a public function.<sup>131</sup>

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<sup>124</sup> *Id.* at 1930.

<sup>125</sup> *Id.* at 1931.

<sup>126</sup> *Id.*

<sup>127</sup> *About ALA eEditions E-Books*, AM. LIBR. ASS’N, <https://perma.cc/B6XE-DHBV>. Indeed, in researching this Note, not a single contrary example—a library offering its own publicly operated e-book service or a publicly-run e-book service—could be located.

<sup>128</sup> *Library Statistics and Figures: Number of Libraries in the United States*, AM. LIBR. ASS’N., <https://perma.cc/F7SY-D3W9> (May 3, 2023, 2:56 PM).

<sup>129</sup> *Our Story*, FOLGER SHAKESPEARE LIBR., <https://perma.cc/3JDK-E76K>.

<sup>130</sup> *About*, JOHN CARTER BROWN LIBR., <https://perma.cc/6LBW-2XZY>.

<sup>131</sup> *Halleck* has been criticized for being too narrow and establishing precedent that allows private actors to avoid liability. A major criticism is that it allows the government to contract with private entities to avoid obligations owed to patrons—“a government entity could contract out work in fields that are not traditional and exclusive public functions to avoid facing repercussions for actions that may not comply with constitutional requirements.” Fisher, *supra* note 121, at 191. However, the effects of *Halleck* more broadly on state actor doctrine as a whole is beyond the scope of this Note.

Even a broad reading of *Halleck* that might consider an entity a state actor if it offers the digital equivalent of a traditionally and exclusively public function would still not be sufficient. E-book services do not offer the digital equivalent of a traditionally and exclusively public function. If a patron tried to bring a claim against the e-book service using a *Halleck* rationale, the claim would fail—the *service itself* has no First Amendment obligations because it is not a state actor.

However, what if the *library's* First Amendment obligations extended to its offering of this privately-operated service? A plaintiff-patron could pursue an alternative cause of action to successfully argue that they have a right to the information on the e-book service. While a *Halleck* analysis would not solve the issue, it is still possible to ensure library patrons are guaranteed access to their libraries' e-book services. The cause of action simply needs to be against the state actors.

## 2. *The Nexus Theory: How Courts Have Handled the ADA and How It Is Analogous*

No court has yet detailed how best to deal with e-book services and book banning. If looking to ensure library patrons have a First Amendment claim against state officials when those officials suspend an e-book service, courts must look to other areas of law. When contemplating this question, courts should consider the framework some circuits use when dealing with websites and Title III of the Americans with Disabilities Act (“ADA”), also known as the “nexus theory.” Though not a perfect fit, as the ADA applies to private actors, the principles are informative. The theory could offer First Amendment protections for patrons where the *Halleck* rationale would fail them. A *Halleck* analysis offers a cause of action against the private entity, but the nexus theory would guarantee patrons a cause of action against the *state*, an entity bound by the First Amendment, when state officials suspend access to e-book services by treating e-book services as part of the library.

The Ninth and Eleventh Circuits have held that the ADA covers websites when there exists “some connection between the good or service complained of and an actual physical place.”<sup>132</sup> Where a website impedes access to “the full

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<sup>132</sup> Earll v. eBay, Inc., 599 F. App'x 695, 696 (9th Cir. 2015) (quoting Weyer v. Twentieth Century Fox Film Corp., 198 F.3d 1104, 1114 (9th Cir. 2000)); see Haynes v. Dunkin' Donuts LLC, 741 F. App'x 752, 754 (11th Cir. 2018) (“It appears that the website is a service that facilitates the use of Dunkin' Donuts' shops . . . .”); see also Robles v. Domino's Pizza, LLC, 913 F.3d 898, 905 (9th Cir. 2019) (“The alleged inaccessibility of Domino's website and app impedes access to the goods and services of its physical pizza franchises . . . .”).

and equal enjoyment of goods and services” offered in physical locations, that website violates Title III of the ADA.<sup>133</sup> Courts treat the website as an extension of the brick-and-mortar building because the website offers the same services or an extended service to that of the physical location. Where the purpose of the website and the physical location are the same, despite the fact that the ADA does not mention websites, courts have found that the digital service offered by the brick-and-mortar location is also subject to federal law.<sup>134</sup> The general principle—that physical locations offering online services should not escape scrutiny in the digital sphere when that service is significantly related to the service offered in person—applies easily to the relationship between e-book services and physical libraries.

People frequently seek out the same or similar services online and in person.<sup>135</sup> For example, a restaurant that serves pizza may allow patrons to order a pizza at the restaurant or to order it on the app the restaurant provides.<sup>136</sup> Both the digital and in-person service are the same, and thus are subject to the same scrutiny under the ADA because the digital service has a sufficient nexus to the physical location.<sup>137</sup>

Now consider the role of a public or school library. While libraries have a number of secondary social functions, this Note is focused with the core purpose of a library: the dissemination of and interaction with literature. Libraries, both school and public, are “place[s] dedicated to quiet, to knowledge, and to beauty.”<sup>138</sup> Student and public patrons alike “must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding.”<sup>139</sup> And at the center of the “worthy mission[] of facilitating learning and cultural enrichment”<sup>140</sup> are the books, magazines, periodicals, and other resources for the “interest, information, and enlightenment of all people

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<sup>133</sup> Nat'l Fed'n of the Blind v. Target Corp., 452 F. Supp. 2d 946, 956 (N.D. Cal. 2006).

<sup>134</sup> See, e.g., *Domino's Pizza*, 913 F.3d at 904–06.

<sup>135</sup> See *id.*

<sup>136</sup> *Id.* (comparing the services offered in-person at Domino's and on their app, ultimately holding in part that those services are the same).

<sup>137</sup> See *id.*

<sup>138</sup> Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 868 (1982) (quoting *Brown v. Louisiana*, 383 U.S. 131, 142 (1966)).

<sup>139</sup> *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

<sup>140</sup> *United States v. Am. Libr. Ass'n, Inc.*, 539 U.S. 194, 203 (2003).



of the community the library serves.”<sup>141</sup> In short, a library is the “quintessential locus of the receipt of information.”<sup>142</sup>

Thus, although a brick-and-mortar library may offer a number of secondary functions, like serving as a social hub, the fact remains that a library’s primary purpose is to provide the public with access to books.<sup>143</sup> E-book services serve the same purpose.<sup>144</sup> Indeed, OverDrive intends to create “a world enlightened by reading.”<sup>145</sup> In offering a service meant to serve as an extension of the traditional brick-and-mortar library, the e-book service furthers the primary goal of a library. At their core, the purpose of a library and an e-book service are the same—to facilitate the dissemination of ideas through literature. Thus, when considering that core purpose, it becomes easy to argue that an e-book service is an extension of or nexus to a physical library.

Beyond working towards a common goal, both school and public libraries have the same kind of significant relationship between the e-book service and the library that exists in the ADA nexus line of cases. In other words, beyond having the same core purpose, e-book services and libraries have the same sorts of functions necessary to find a nexus between them. These services “have become part of the basic digital infrastructure at many schools and public libraries.”<sup>146</sup> Tellingly, OverDrive describes itself as a public library service.<sup>147</sup> Most importantly, patrons need a library card to access the service—the strongest indication that this is the same service offered in person.<sup>148</sup> Public library patrons perceive e-book services as an extension of the library’s services—patrons “check out” e-books with the service in the same way one

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<sup>141</sup> *Id.* at 203–04 (quoting *Am. Libr. Ass’n, Inc. v. United States*, 201 F. Supp. 2d 401, 420 (E.D. Pa. 2002)).

<sup>142</sup> *Sund v. City of Wichita Falls*, 121 F. Supp. 2d 530, 547 (N.D. Tex. 2000) (quoting *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992)).

<sup>143</sup> See *Pico*, 457 U.S. at 868.

<sup>144</sup> *Public Libraries*, OVERDRIVE, <https://perma.cc/XA74-TB3Z> (“Your library provides a critical service to the community, offering an invaluable reading and learning resource to users of all ages. Expand your reach and engagement even further with a digital collection. An OverDrive digital collection allows libraries to extend beyond their physical walls and offer anytime, anywhere access to ebooks, audiobooks, magazines and more . . .”).

<sup>145</sup> OVERDRIVE, *supra* note 15.

<sup>146</sup> Ingram, *supra* note 84.

<sup>147</sup> *Id.* (“‘Over 20 years, there’s not really been any history of a sustained challenge like this to our public library service,’ said Steve Potash, the founder and CEO of OverDrive . . .”).

<sup>148</sup> Complaint, *supra* note 25, ¶ 29 (“Prior to the events giving rise to this lawsuit, the Llano County Library System provided *library cardholders* with a digital catalog called ‘OverDrive,’ which gave library patrons access to a curated collection of over 17,000 digital ebooks and audiobook titles.” (emphasis added)).

does in a physical library<sup>149</sup> and consider physical and e-books together.<sup>150</sup> Elderly patrons and patrons with disabilities are particularly reliant on these services, and often can only use the digital e-book service in place of the physical library.<sup>151</sup>

Additionally, administrators treat e-book services in the same way they treat library books. In Llano County, administrators targeted e-books and paper books with the same goal: to remove them entirely from the library.<sup>152</sup> The difference in the result was not that e-books are somehow a separate service from the library, but rather that the medium is different. Administrators intended to remove the offending titles from the service in the same way that one would pull a book of the shelf, not ban OverDrive altogether.<sup>153</sup> Although “e-reader apps [have not] replaced printed books,” they have become inextricably linked to the public libraries who offer their services.<sup>154</sup> The service being offered—access to literature—is the same. There is the same significant relationship and parallel service required to draw the e-book services under the First Amendment that exists in the ADA nexus line of cases.

Similarly, e-book services have become inextricably linked to school libraries in a way that parallels the requirements of the nexus theory. Particularly important here is how parents and students perceive their access to e-book databases. In the height of the COVID-19 pandemic, many schools turned to e-book services to be able to continue educating their students and to preserve the students’ ability to access books they were assigned.<sup>155</sup> Schools often pre-install access to the online library before providing children with school-funded technology.<sup>156</sup> Moreover, “digital libraries . . . allow learners of

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<sup>149</sup> *Id.* ¶ 30 (“Many Plaintiffs also checked out ebooks and audiobooks on OverDrive before Defendants permanently terminated access to it.”).

<sup>150</sup> *Id.* ¶ 42 n.1 (“Hereafter, all print titles that Defendants physically removed from library shelves, as well as the two digital titles that resulted in Defendants’ permanent termination of OverDrive, will be collectively referred to as the ‘Banned Books.’”).

<sup>151</sup> *Id.* ¶ 29 (“[OverDrive] was widely and heavily used by the Llano community, particularly by elderly patrons who struggle to read books in print and listen to audiobooks instead, as well as by patrons with physical disabilities that make accessing a physical library location difficult.”).

<sup>152</sup> *See id.* ¶¶ 72, 79, 97.

<sup>153</sup> *See id.* ¶ 97.

<sup>154</sup> Ingram, *supra* note 84.

<sup>155</sup> *Id.*

<sup>156</sup> *See id.* (“Kimberly Hough, a parent of two children in Brevard Public Schools, said her 9-year-old noticed immediately when the Epic app disappeared a few weeks ago because its collection had become so useful during the pandemic.”).

all types to share resources, time and energy, and expertise to their mutual benefit[s].”<sup>157</sup> Students use digital access to conduct research for assigned projects in the same way they would a physical library.<sup>158</sup> E-book services allow students more robust access to information without being hindered by a paywall.<sup>159</sup> This kind of full access to information is vital to students’ preparation to engage fully with society.<sup>160</sup> Teachers’ main concern when confronted with a potential suspension or ban of e-books is that their students who rely on the service will not have the same kind of access to information that their libraries had previously granted them.<sup>161</sup> The nexus theory concerns itself with whether the service offered in-person and online are essentially the same, so patrons’ perceptions of and reliance on e-book services as inextricably linked with brick-and-mortar libraries only serves to support finding that necessary nexus.

Schools and government officials treat e-book services as an extension of the school library. Conservative elected officials argue that these services must be subject to the same scrutiny as the physical books available to students.<sup>162</sup> In Utah, opposition to the suspension of EBSCO was so strong that approximately ninety-five percent of emails sent to the school board were in favor of restoring access.<sup>163</sup> Ultimately, “[t]ech can enable a young person to feel part of a larger and broader community, or tech can feel very restrictive and assumptive in the way it portrays information.”<sup>164</sup> Here again, the service being offered is the same in the digital sphere as it is in person.

More importantly, the nature of the reactions on either side of the issue—to suspend or not to suspend—would indicate a significant relationship between the e-book service, the library, and its patrons. There is once again the

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<sup>157</sup> Gary Marchionini & Hermann Maurer, *The Roles of Digital Libraries in Teaching and Learning*, 38 COMM’N. ACM 67, 69 (1995).

<sup>158</sup> *Id.* at 68.

<sup>159</sup> Natanson, *supra* note 72.

<sup>160</sup> *Id.*

<sup>161</sup> *Id.* (“These databases mean that any of my students, without regard for their economic background, can have access to the same intellectual and practical information,” Bergson-Michelson said. “My concern is that, ultimately, my students will find themselves in a position where they can’t access things that they care about.”).

<sup>162</sup> A Florida law, for example, requires that each book available to students be selected by a school district official. Ingram, *supra* note 84. This law resulted in a Florida school district’s decision to suspend access to an e-book service because they did not have the same curation power and considered it the same kind of offering as that of a physical library book. *Id.*

<sup>163</sup> EVERYLIBRARY, *supra* note 73.

<sup>164</sup> Ingram, *supra* note 84.

same significant relationship and parallel service required to draw a nexus between e-book services and the libraries that was necessary to draw a nexus to a website in the ADA cases.

As such, while there is no cause of action against e-book services, applying the nexus theory could offer patrons relief against sweeping e-book bans. By underscoring the significant relationship between e-book service and library, it becomes far more plausible that a patron has the right to the information offered by the library's e-book service of choice. The nexus theory would expand a patron's right to information by including the e-book service as information to which the patron has a First Amendment right.

### 3. *Implications of Applying the Nexus Theory*

There are potential complications in establishing a significant relationship between private actors and states when considering how to apply federal law. The Fourteenth Amendment extended First Amendment restrictions to state and local governments.<sup>165</sup> Subjecting public and school libraries to the First Amendment is a longstanding tradition.<sup>166</sup> However, in establishing that e-book services are essentially a part of a library, there exists a danger that people will improperly conflate *private* e-book services and *public* libraries, and begin to treat these private actors as state actors because of their significant relationships with these state actors. E-book services retain the right as private actors to decide not to offer a book, including those that are controversial or routinely banned.<sup>167</sup> In such a case, in addition to suing the library, patrons unhappy with a decision to restrict offerings might sue the e-book service itself, claiming a violation of the right to information seen in library jurisprudence.<sup>168</sup> If a court considers that e-book service to be subject to the same First Amendment obligations as those of a public library, e-book services might stop

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<sup>165</sup> See, e.g., *Edwards v. South Carolina*, 372 U.S. 229, 237 (1963) ("The Fourteenth Amendment does not permit a State to make criminal the peaceful expression of unpopular views.").

<sup>166</sup> See, e.g., *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 864 (1982) ("[W]e have necessarily recognized that the discretion of the States and local school boards in matters of education must be exercised in a manner that comports with the transcendent imperatives of the First Amendment.").

<sup>167</sup> See discussion about e-book services as private actors *infra* Sections I.B.1, I.B.3.

<sup>168</sup> See, e.g., *Pico*, 457 U.S. at 867 ("[The] right [to receive information and ideas] is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution . . .").

contracting in states where book bans are rampant. This could dramatically reduce access to literature and information in mostly conservative states. As such, courts need to be careful in how they approach the relationship between e-book services and the libraries so that, in their consideration of a library's potential offending of the First Amendment, the court does not chill e-book services' willingness to serve the patrons relying on the services.

4. *Response to the Complications: Only the Government Can Offend the Right to Information, Not Private Actors*

E-book services and libraries come together to offer services to patrons, but that does not mean that the e-book services as private actors can or should be subject to the constitutional requirement to comply with the First Amendment right to information. As private actors, e-book services do not have to comply with a library's desire to ban a book. However, libraries should not be able to suspend that e-book service for not cooperating unless the library replaces that e-book service with one that provides comparable access to information. The impetus to protect the right to receive information rests on government actors, not the private entities with whom they contract.

Only the government can offend the right to receive information—the right at issue in book banning jurisprudence.<sup>169</sup> The First Amendment extends beyond prohibiting government censorship to a right to information and ideas, including the right to “some level of access to a public library”<sup>170</sup> or school library.<sup>171</sup> In order to protect the exchange of “novel and unconventional ideas,” the First Amendment must “embrace[] the right to distribute literature and necessarily protects the right to receive it.”<sup>172</sup> Only the *government* can violate a member of the public's First Amendment right to information.<sup>173</sup> Libraries treating e-book services as an extension of their physical location *does*

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<sup>169</sup> See, e.g., *Sheck v. Baileyville Sch. Comm.*, 530 F. Supp. 679, 685–86 (D. Me. 1982).

<sup>170</sup> *Kreimer v. Bureau of Police for Morristown*, 958 F.2d 1242, 1255 (3d Cir. 1992).

<sup>171</sup> *Schroeder*, *supra* note 41, at 374 (“That right to information ensured that students would be able to meaningfully participate in a democratic society upon leaving school. Justice Brennan maintained that the ‘special characteristics of the school *library*’ made that space a well-suited place for students to explore their First Amendment rights.” (footnotes omitted) (quoting *Pico*, 457 U.S. at 868)); see also *Kreimer*, 958 F.2d at 1255 (“*Pico* signifies that, consistent with other First Amendment principles, the right to receive information is not unfettered and may give way to significant countervailing interests.”).

<sup>172</sup> *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943) (citation omitted) (citing *Lovell v. City of Griffin*, 303 U.S. 444, 452 (1938)).

<sup>173</sup> See, e.g., *Stanley v. Georgia*, 394 U.S. 557, 564 (1969) (“It is now well established that the Constitution protects the right to receive information and ideas.”).

*not make e-book services government actors*, especially because they are not state actors under *Halleck*.<sup>174</sup> For example, an e-book service's decision to stop providing the service to the library or to provide a mechanism that enables a library to suspend access to a single book should not be considered the same as the library choosing to stop providing the service or banning a book. Protecting the right to information is critical, but in applying a nexus-style theory, courts cannot posit that e-book services have some obligation under the First Amendment to contribute to the right to receive information to which libraries are beholden.

## II. BALANCING E-BOOK BANNING AND THE FIRST AMENDMENT

*"I hate it that Americans are taught to fear some books and some ideas as though they were diseases."*<sup>175</sup>

Once established as an extension of the library, state and local governments' treatment of e-book services becomes subject to the First Amendment protections afforded to its patrons. This Section will deal with *sua sponte* evaluations and decisions to ban books—decisions from local officials, legislation, and the libraries themselves.

Government restrictions of speech potentially offending the First Amendment typically fall into three categories: content-neutral, content-based, and viewpoint-based distinctions or restrictions.<sup>176</sup> Restrictions that are content-neutral limit speech without regard for the content of the message.<sup>177</sup> For example, libraries that prohibit yelling restrict speech, but the ban does not interest itself with what is being yelled.<sup>178</sup>

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<sup>174</sup> See *Georgia v. Public.Resource.Org, Inc.*, 140 S. Ct. 1498, 1508 (2020) (holding, in this fair use case, that annotations of statutes prepared by LexisNexis for the Georgia state government became that of the government when merged with the official statutes, but did not hold that LexisNexis was a government actor based on the work-for-hire agreement, and thus lost the same copyright privileges taken from the Georgia government).

<sup>175</sup> HERBERT N. FOERSTEL, *BANNED IN THE U.S.A: A REFERENCE GUIDE TO BOOK CENSORSHIP IN SCHOOLS AND PUBLIC LIBRARIES* xxiv (2002) (quoting Kurt Vonnegut).

<sup>176</sup> Shearer, *supra* note 3, at 31–32 (discussing content-neutral and content-based restrictions); Joseph Blocher, *Viewpoint Neutrality and Government Speech*, 52 B.C. L. REV. 695, 696–97 (2011) (addressing viewpoint-based distinctions); see also *supra* notes 34–40 and accompanying text.

<sup>177</sup> Stone, *supra* note 40, at 189–90 (addressing the difference between content-based and content-neutral distinctions).

<sup>178</sup> *Id.*

More often at issue in book banning is the content-based or viewpoint-based restriction.<sup>179</sup> Viewpoint-based restrictions happen when “the government has singled out a subset of messages for disfavor based on the views expressed.”<sup>180</sup> Such restrictions are “the most contemptuous, democracy-threatening restrictions on speech: ‘censorship in its purest form.’”<sup>181</sup> A content-based restriction “applies to particular speech because of the topic discussed or the idea or message expressed.”<sup>182</sup> Content-based restrictions focus specifically on the content of the questioned speech, rather than the overarching ideology in question.<sup>183</sup> Content-based restrictions begin by asking if the restriction targets an unprotected category of speech.<sup>184</sup> Such categories include “express incitement, false statements of fact, obscenity, commercial speech, fighting words, and child pornography.”<sup>185</sup> If the court finds that it does, it will inquire as to the speech’s relative value, the risk of inadvertently chilling high-value speech by allowing the restriction to stand, and other balancing factors.<sup>186</sup> However, determining which test applies is more complicated than merely applying some level of scrutiny. Different tests apply to different categories based on what the government claims to be regulating.<sup>187</sup> Within the context of book banning, three of those categories are usually at issue:<sup>188</sup> express incitement,<sup>189</sup> “defamatory falsehood,”<sup>190</sup> and obscenity.

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<sup>179</sup> Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 871 (1982) (addressing content-based versus viewpoint-based restrictions in the context of a public school library).

<sup>180</sup> See *Matal v. Tam*, 582 U.S. 218, 248 (2017) (Kennedy, J., concurring) (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 806 (1985)).

<sup>181</sup> Douglas, *supra* note 38, at 727 (quoting *Perry Educ. Ass’n v. Perry Local Educators’ Ass’n*, 460 U.S. 37, 62 (1983) (Brennan, J., dissenting)).

<sup>182</sup> *Reed v. Town of Gilbert*, 576 U.S. 155, 163, 171 (2015).

<sup>183</sup> Douglas, *supra* note 38, at 730–31.

<sup>184</sup> Shearer, *supra* note 3, at 31–32.

<sup>185</sup> *Id.* at 32 (quoting Stone, *supra* note 40, at 194–95 (footnotes omitted)). Importantly, the Supreme Court held in 2010 that a new category of unprotected speech only exists where the Court finds a longstanding history, tradition, and custom of treating it as low-value. See *United States v. Stevens*, 559 U.S. 460, 468–72 (2010).

<sup>186</sup> Stone, *supra* note 40, at 195.

<sup>187</sup> *Id.*

<sup>188</sup> Shearer, *supra* note 3, at 32.

<sup>189</sup> *Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969) (finding a state may prohibit advocating for force or illegal acts “where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”).

<sup>190</sup> *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 345–46 (1974) (“For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.”).

Most important here is obscenity, which must survive the *Miller v. California* test.<sup>191</sup> *Miller* establishes that something is obscene based on:

- (a) whether “the average person, applying contemporary community standards” would find that the work, taken as a whole, appeals to the prurient interest;
- (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and
- (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.<sup>192</sup>

The First Amendment protects pornography if it is neither obscenity<sup>193</sup> nor child pornography.<sup>194</sup> It additionally protects other sexually explicit or inappropriate speech as long as it is not obscene.

When considering these distinctions in line with the existing legislation and pending court cases dealing with e-book suspension, this second Section addresses questions not yet answered by federal courts: how exactly does banning e-books implicate the First Amendment? How do those restrictions shift when dealing with school libraries versus public libraries?

#### A. *Understanding the Titles and Viewpoints at Issue*

When applying the relevant tests to public and school libraries, a library’s decision to suspend a whole e-book service to target some allegedly offensive books cannot survive a First Amendment challenge. In the case of public libraries, suspending the whole service for both adults and minors in order to target certain books allegedly inappropriate to minors is not reasonable nor viewpoint-neutral. School libraries present additional complications: *Board of Education, Island Trees Union Free School District No. 26 v. Pico* is not as clear cut a test, and requires balancing students’ right to information with the state’s right to educate as it sees fit.<sup>195</sup> However, because most recent bans seen in

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<sup>191</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>192</sup> *Id.* at 24 (citation omitted) (quoting *Kois v. Wisconsin*, 408 U.S. 229, 230 (1972)).

<sup>193</sup> *Id.*

<sup>194</sup> *New York v. Ferber*, 458 U.S. 747, 764 (1982).

<sup>195</sup> *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853 (1982).



schools appear to be similarly politically motivated, they also cannot survive a *Pico* challenge.

1. *An Aside on Romer v. Evans: What About Animus?*

Before delving into the application of the competing legal tests, it is important to note that it could be argued that neither kind of restriction could survive rational basis review because it could be construed as animus against minority groups, particularly Black stories, queer stories, and the stories of other marginalized groups. The *Pico* court announced that it would have found a First Amendment violation of its proposed balancing test if “an all-white school board, *motivated by racial animus*, decided to remove all books authored by [Black authors] or advocating racial equality and integration.”<sup>196</sup> While it has not yet been applied to the free speech context, *Romer v. Evans* held that an alleged government interest is not legitimate if it is motivated by animus towards a specific group.<sup>197</sup>

In the case of recent book bans, the government’s purported goal or interest has routinely been to protect children from allegedly obscene, pornographic, or inappropriate material when they choose to regulate or suspend e-book services.<sup>198</sup> However, the books that public officials select as obscene, pornographic, or otherwise inappropriate are overwhelmingly books about critical race theory,<sup>199</sup> as well as books celebrating queer stories and sex-positive literature.<sup>200</sup> These stories are not obscene,<sup>201</sup> rarely contain material that comes close to being pornographic, and are usually written to introduce to

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<sup>196</sup> *Id.* at 871 (emphasis added).

<sup>197</sup> *Romer v. Evans*, 517 U.S. 620, 632 (1996) (“[T]he amendment seems inexplicable by anything but animus toward the class it affects; it lacks a rational relationship to legitimate state interests.”); *c.f.* *Trump v. Hawaii*, 138 S. Ct. 2392, 2421 (2018) (“[B]ecause there is persuasive evidence that the [anti-Muslim] entry suspension has a legitimate grounding in national security concerns, quite apart from any religious hostility, we must accept that independent justification.”). There are clear similarities between the tests offered in *Romer* and *Pico*, but the Supreme Court has not heard another book banning case since *Pico*, nor has it applied *Romer* in the free speech or information context. As such, how they interact, if at all, remains unclear and undecided.

<sup>198</sup> *See, e.g.*, H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021); H.B. 2454, 112th Gen. Assemb., Reg. Sess. (Tenn. 2022).

<sup>199</sup> Shearer, *supra* note 3, at 26.

<sup>200</sup> Hayasaki, *supra* note 64; *see also* Natanson, *supra* note 83.

<sup>201</sup> *See* discussion about application of the *Miller v. California* test to some contested literature *infra* Section II.A.3.

younger audiences difficult, but arguably appropriate topics.<sup>202</sup> Criticisms of critical race theory, for example, include the false theories that it incites violence or is obscene in some way<sup>203</sup>—theories motivated by animus, rather than a concern for what minor patrons’ potential exposure to truly inappropriate or harmful content.<sup>204</sup> The stories being targeted are meant to expose communities, including children *and adults*, to diverse perspectives, to educate them on the more sordid and deeply racist aspects of United States history, to teach children about their bodies in a way that is empowering and keeps them safe, and to promote tolerance for people with different identities.<sup>205</sup> Given the nature of the targeted works and political ideologies of states which frequently ban them, it is likely that these restrictions are motivated by animus towards marginalized communities and are an attempt to restrict access to stories featuring those perspectives.<sup>206</sup>

If a court were to extend *Romer v. Evans* to the free speech context, it is possible that these bans could not survive rational basis review, much less any

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<sup>202</sup> See Hayasaki, *supra* note 64.

<sup>203</sup> Shearer, *supra* note 3, at 36–38, 40–41; see also discussion questioning legitimacy of categorizing various kinds of books as obscene *infra* Sections II.A.2–II.A.3.

<sup>204</sup> See Shearer, *supra* note 3, at 41.

<sup>205</sup> See Kayla Kaufman, *Banned Books Week: Access to Stores Can Open Hearts and Minds*, AMS. UNITED FOR SEPARATION OF CHURCH & STATE (Sept. 21, 2022), <https://perma.cc/SGM8-68XX>.

<sup>206</sup> See, e.g., Hannah Natanson, *Objection to Sexual, LGBTQ Content Propels Spike in Book Challenges*, WASH. POST, <https://perma.cc/Z94L-VV6J> (June 9, 2023, 6:15 PM EDT) (“A stated wish to shield children from sexual content is the main factor animating attempts to remove LGBTQ books, The Post found. The second most common reason cited for pulling LGBTQ texts was an explicit desire to prevent children from reading about lesbian, gay, bisexual, transgender, nonbinary and queer lives.” (emphasis added)); Scott McFetridge et al., *School Library Book Bans Are Seen as Targeting LGBTQ Content*, AP NEWS (Mar. 20, 2023, 11:23 AM EST), <https://perma.cc/3YXK-PSHP> (reporting arguments that “those seeking to remove books take passages out of context and unfairly focus on books about LGBTQ or racial justice issues”). This “stated purpose” extends beyond solely removing books from libraries and into establishing legislation restricting access to e-books. See, e.g., H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021); UTAH CODE ANN. § 53B-17-109 (West 2023). The legislation in Utah has not yet been challenged, and Utah libraries retain access to EBSCO. See EVERYLIBRARY, *supra* note 73. However, consider the requirement that e-book services that contract with Utah libraries restrict access to materials that appeal to the “prurient interest in sex” in juxtaposition with Utah’s conservative values and general anti-LGBTQ+ stance. H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021); UTAH CODE ANN. § 53B-17-109 (West 2023). Similar to the issues raised regarding conservative states’ treatment of critical race theory, it would be easy for conservative states to make the argument that someone’s prurient interest in sex extends to their interest in reading queer stories.

heightened level of scrutiny to which public or school libraries' decisions to ban books are subject.<sup>207</sup>

## 2. *A Closer Examination of Contested Works*

In order to evaluate whether book bans are politically-motivated viewpoint discrimination in violation of both limited public forum doctrine and *Pico*, it is first important to understand the kinds of published materials at issue. States differ in whether they invoke *Miller v. California* to claim the First Amendment does not protect contested works.<sup>208</sup> This Note is not specifically concerned with whether the specific works at issue are obscene, as its inquiry is into *viewpoint*-based discrimination, not content-based discrimination. Nevertheless, it is important to understand the kinds of contributions to literature challenged in book bans to more broadly understand if libraries are suppressing viewpoints. Examples of contested works generally fall into four groups.

### a. *Nudity*

Perhaps one of the most contested books is the graphic novel children's book *In the Night Kitchen* by Maurice Sendak, which features, in part, a nude toddler, who falls into a dream in which he assists a baker in the creation of a cake that needs to be ready by morning.<sup>209</sup> Critics of the book argue that the nudity is without purpose, or that the milk bottles that feature prominently are a phallic endorsement of the author's "openly homosexual lifestyle."<sup>210</sup>

### b. *Bodily Functions and Sex Education*

In cases of book banning, including the list at issue in *Little v. Llano County*, there are two notable children's book series to which people frequently

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<sup>207</sup> See *Romer v. Evans*, 517 U.S. 620, 632 (1996).

<sup>208</sup> *Miller v. California*, 413 U.S. 15 (1973); see, e.g., H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021). The bill invokes language from *Miller v. California* to define the "obscene or pornographic material" that the legislation prohibits. *Miller*, 413 U.S. at 24; H.B. 38, 64th Leg., 2021 Gen. Sess. (Utah 2021); see also UTAH CODE ANN. § 53B-17-101.5 (West 2023).

<sup>209</sup> See generally MAURICE SENDAK, *IN THE NIGHT KITCHEN* (1970).

<sup>210</sup> Laura Cattrysse, *Sendak's In the Night Kitchen: Unusual History of Censorship*, MINN. ENG. J. (Apr. 30, 2015), <https://perma.cc/D9Y3-SU7M>; see also, e.g., *Case Study: In the Night Kitchen*, COMIC BOOK LEGAL DEF. FUND (Aug. 27, 2020), <https://perma.cc/24A5-8A3A>; *It's Perfectly Normal and In The Night Kitchen Removed from Llano County Library in Texas | Updated*, NAT'L COAL. AGAINST CENSORSHIP, <https://perma.cc/QP7R-NBQK> (Apr. 12, 2023).

object.<sup>211</sup> *I Need a New Butt!* and its related series by Dawn McMillian and Ross Kinniard “described butts in various colors, shapes and sizes.”<sup>212</sup> *It’s Perfectly Normal: Changing Bodies, Growing Up, Sex and Sexual Health* by Robie Harris is a sex-education book intended for readers ages ten and up, that provides “an unassuming, coherent, comprehensive explanation of sex in all its complicated glory” and does include explicit drawings.<sup>213</sup> The book has been routinely challenged because it portrays “nudity, sex education, [and] sexually explicit [material] unsuited to [the] age group.”<sup>214</sup> Critics of the book also allege that it promotes “abortion” and “homosexuality” in a way contradictory to some “religious viewpoint[s].”<sup>215</sup>

### c. *Queer Stories*

Stories meant to affirm and support queer individuals suffer heavily under book bans, and challenges are mainly couched in religious objections. One such title at issue in Llano County is *The Fight for LGBTQ+ Rights* by Devlin Smith.<sup>216</sup> The book, geared toward grades seven to twelve,<sup>217</sup> describes the fight for LGBTQ+ civil rights in the United States, including the legal affirmation of marriage equality, passing of anti-discrimination laws, and repeal of anti-LGBTQ+ military practices.<sup>218</sup> Also routinely challenged is the memoir *Being Jazz: My Life as a (Transgender) Teen*, including in Llano County.<sup>219</sup> The book features the story of fourteen-year-old trans teen Jazz Jennings, and the accompanying children’s picture book *I Am Jazz* has also come under fire for LGBTQIA+ content, for a transgender protagonist, and for confronting a topic that is “sensitive, controversial, and politically charged.”<sup>220</sup>

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<sup>211</sup> Little v. Llano County, No. 1:22-CV-424-RP, 2023 WL 2731089, at \*2 (W.D. Tex. Mar. 30, 2023), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023); Complaint, *supra* note 25, ¶¶ 44, 46, 49; Hayasaki, *supra* note 64.

<sup>212</sup> Maria Cramer & Isabella Grullón Paz, *An Educator Read ‘I Need a New Butt!’ to Children. Then He Was Fired*, N.Y. TIMES (Mar. 11, 2022), <https://perma.cc/V7SE-TRRB>.

<sup>213</sup> Kitty Flynn, *Happy Anniversary: It’s Perfectly Normal*, HORN BOOK (Oct. 24, 2019), <https://perma.cc/BVL6-KACF>.

<sup>214</sup> AM. LIBR. ASS’N, *supra* note 73.

<sup>215</sup> *Id.*

<sup>216</sup> DEVLIN SMITH, *THE FIGHT FOR LGBTQ+ RIGHTS* (2020); see Hayasaki, *supra* note 64 (noting Smith’s book was on the “Krause list”).

<sup>217</sup> *The Fight for LGBTQ+ Rights*, BOOKSOURCE, <https://perma.cc/KS4B-SQQ4>.

<sup>218</sup> See generally SMITH, *supra* note 216.

<sup>219</sup> Complaint, *supra* note 25, ¶¶ 67, 70.

<sup>220</sup> AM. LIBR. ASS’N, *supra* note 73.

d. *Violence Against Marginalized Groups*

Finally, officials routinely ban books depicting the stories of or violence against marginalized groups. For example, a library in Nampa, Idaho banned *The Kite Runner* by Khaled Hosseini, a “critically acclaimed, multigenerational novel,” likely “because it includes sexual violence and was thought to lead to terrorism and promote Islam [and homosexuality].”<sup>221</sup> Officials likely similarly banned *The Handmaid’s Tale* by Margaret Atwood because it contained profanity, “vulgarity and sexual overtones”<sup>222</sup> and *The Absolutely True Diary of a Part-Time Indian* by Sherman Alexie because it contained “sexual references and use of a derogatory term” as well as “profanity, violence, gambling, and underage drinking, and [an objectionable] religious viewpoint.”<sup>223</sup> Critical race theorists are frequent targets.<sup>224</sup> The list from Representative Krause included *Between the World and Me* by Ta-Nehisi Coates,<sup>225</sup> a National Book Award winner and Pulitzer Prize finalist that critiques the United States’ racist history.<sup>226</sup> Similarly, *The New Jim Crow: Mass Incarceration in the Age of Colorblindness* by Michelle Alexander was on the “Krause list” and inquires as to whether “the U.S. criminal justice is some kind of tool of racial control” operating behind an official policy of colorblindness as it explores the continued violence the United States justice system exhibits towards Black people in particular in contemporary society.<sup>227</sup>

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<sup>221</sup> *Id.* (internal quotations omitted); see Hayasaki, *supra* note 64.

<sup>222</sup> AM. LIBR. ASS’N, *supra* note 73; see Hayasaki, *supra* note 64.

<sup>223</sup> AM. LIBR. ASS’N, *supra* note 73; see Hayasaki, *supra* note 64.

<sup>224</sup> See Shearer, *supra* note 3, at 26.

<sup>225</sup> Hayasaki, *supra* note 64.

<sup>226</sup> Ta-Nehisi Coates’ website describes *Between the World and Me*. Ta-Nehisi Coates, *Between the World and Me*, <https://perma.cc/3SDF-NGHK> (“In a profound work that pivots from the biggest questions about American history and ideals to the most intimate concerns of a father for his son, Ta-Nehisi Coates offers a powerful new framework for understanding our nation’s history and current crisis. Americans have built an empire on the idea of “race,” a falsehood that damages us all but falls most heavily on the bodies of black women and men—bodies exploited through slavery and segregation, and, today, threatened, locked up, and murdered out of all proportion. What is it like to inhabit a black body and find a way to live within it? And how can we all honestly reckon with this fraught history and free ourselves from its burden?”).

<sup>227</sup> Hayasaki, *supra* note 64; MICHELLE ALEXANDER, *THE NEW JIM CROW: MASS INCARCERATION IN THE AGE OF COLORBLINDNESS* 227 (10th Anniversary ed. 2020).

### 3. *The Interplay of Obscenity, Viewpoint-Discrimination, and the Targeted Works*

Courts focus on viewpoint neutrality in evaluating public and school library book bans,<sup>228</sup> and viewpoint-based restrictions “‘are prohibited,’ seemingly as a *per se* matter.”<sup>229</sup> Despite that, the *Miller v. California* test and obscenity (and variations on obscenity like “vulgarity” or “pornographic material”) frequently make appearances when state officials try to justify book bans.<sup>230</sup> Indeed, one only need to examine the *Little v. Llano County* book bans to spot the kind of language at issue in *Miller*.<sup>231</sup> Llano County officials removed books because “because they believed these books were obscene and promoted ‘grooming’ behavior” or because they contained nudity and “pornographic filth.”<sup>232</sup> Relying heavily on words that call to mind the *Miller* factors allows state officials to make the argument that, as these works are somehow “obscene,” they are unprotected by the First Amendment.<sup>233</sup> Yet, commentators note that such obscenity-related criticisms are often accompanied by explicit calls to quiet marginalized stories.<sup>234</sup> If state officials are merely using obscenity to obfuscate viewpoint-based discrimination, then they are violating the First Amendment by preventing access to these kinds of stories.

Further supporting the theory that these obscenity claims are insincere is the fact that the works most frequently at issue are *not obscene*. Notably, none of the categories of books discussed above attempt to elicit a sexual reaction from the audience.<sup>235</sup> Nor were any of the targeted books, including those

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<sup>228</sup> See discussion about viewpoint neutrality *infra* Section II.B.1.

<sup>229</sup> *NetChoice, LLC v. Att’y Gen. of Fla.*, 34 F.4th 1196, 1224 (11th Cir. 2022) (quoting *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1885 (2018)), *cert. denied*, 144 S.Ct. 69 (2023), *cert. granted in part sub nom.*, *Moody v. NetChoice, LLC*, No. 22-277, 2023 WL 6319654 (Sept. 29, 2023).

<sup>230</sup> *Miller v. California*, 413 U.S. 15, 24 (1973).

<sup>231</sup> *Little v. Llano County*, No. 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023).

<sup>232</sup> *Id.* at \*2.

<sup>233</sup> *Miller*, 413 U.S. at 23–24 (holding that obscenity is not protected by the First Amendment).

<sup>234</sup> Natanson, *supra* note 206 (“A stated wish to shield children from sexual content is the main factor animating attempts to remove LGBTQ books . . . . The second most common reason cited for pulling LGBTQ texts was an explicit desire to prevent children from reading about lesbian, gay, bisexual, transgender, nonbinary and queer lives.”).

<sup>235</sup> *Mishkin v. New York*, 383 U.S. 502, 508–09 (1966) (finding obscene material where the

depicting some form of nudity, written to appeal to the intended group's "prurient interest in sex."<sup>236</sup> For example, while *It's Perfectly Normal* contains images and descriptions of what sexual intercourse is and may look like, it does not pander to the prurient interest of the young teens it attempts to educate.<sup>237</sup> Instead, it addresses only their interest in what sex is. It is more comparable to the example posited in *Miller*: "medical books for the education of physicians and related personnel necessarily use graphic illustrations and descriptions of human anatomy."<sup>238</sup>

Additionally, those that contain some sexual material still provide "serious literary, artistic, political, or scientific value."<sup>239</sup> More aptly put, material is obscene only when it is "utterly without redeeming social value."<sup>240</sup> This is not the case with a great number of the books at issue. Rather, the literary community holds them in high esteem. For example, *The Handmaid's Tale* was shortlisted for the Booker Prize in 1986.<sup>241</sup> *The Kite Runner* was listed on *The New York Times* bestseller list for two years.<sup>242</sup> *Between the World and Me* hit the top of *The New York Times* bestseller list, was named to the Ten Best Books of the Year list, and received accreditation from publications ranging from *The Washington Post* to *People* and *Entertainment Weekly*.<sup>243</sup> These contested books have the literary merit to receive accreditation and awards from prestigious literary institutions and widely read magazines—more than enough to survive *Miller*.<sup>244</sup>

However, and most importantly, a great number of these books are banned for reasons that fail to create even a whiff of obscenity because they involve none of the elements required to satisfy the *Miller* test. Books discussing anti-

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"Appellant instructed his authors and artists to prepare the books expressly to induce their purchase by persons who would probably be sexually stimulated by them").

<sup>236</sup> *Hamling v. United States*, 418 U.S. 87, 89–90 (1974) ("[E]vidence of pandering can be relevant in determining obscenity . . .").

<sup>237</sup> See Flynn, *supra* note 213.

<sup>238</sup> *Miller*, 413 U.S. at 26.

<sup>239</sup> *Id.* at 24.

<sup>240</sup> *Hamling*, 418 U.S. at 99.

<sup>241</sup> *The Handmaid's Tale*, BOOKER PRIZES, <https://perma.cc/AQU6-63JZ>.

<sup>242</sup> NYPL Staff, *Read It, See It: 'The Kite Runner' on Broadway*, N.Y. PUB. LIBR. (June 29, 2022), <https://perma.cc/A73P-T2AP>.

<sup>243</sup> Coates, *supra* note 226.

<sup>244</sup> *C.f.* *Little v. Llano County*, No. 1:22-CV-424-RP, 2023 WL 2731089, at \*9 (W.D. Tex. Mar. 30, 2023) ("[T]he evidence shows Defendants targeted and removed books, including well-regarded, prize-winning books, based on complaints that the books were inappropriate."), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023).

Black violence, promoting queer stories, and talking about basic bodily functions are not, nor have they ever been, obscene.<sup>245</sup> Without valid obscenity claims, the state officials' bans here likely rise to the point of viewpoint-based discrimination, actions of the "the most contemptuous, democracy-threatening" form.<sup>246</sup> Merely cloaking viewpoint discrimination in obscenity claims cannot cure it.

*B. E-Book Bans in Public Libraries Are Neither Reasonable Nor Viewpoint Neutral*

Claiming that books are "obscene" or harmful to minors is not a sufficient justification for the kinds of bans at the center of this issue because they are not viewpoint-neutral. When restricting speech in a limited public forum, the government's restriction must be reasonable and viewpoint-neutral.<sup>247</sup> While much of the jurisprudence and scholarship surrounding the issue of restricting speech in libraries has been with regard to *expressive conduct*, rather than pure speech, "speech and expressive-association rights are closely linked."<sup>248</sup> As such, the Supreme Court precedent from that line of cases is instructive here.

*1. Reasonableness and the Viewpoint-Neutrality Inquiry*

Any assessment of the restriction of speech in a public library happens in two parts. First, the Court will inquire into the reasonableness of the restriction.<sup>249</sup> Reasonableness is a very low bar—much like rational basis review, courts will consider most state restrictions in a limited public forum to be reasonable. A state's restriction "need not be the most reasonable or the only reasonable limitation."<sup>250</sup> Nor does it need to "anticipate and preemptively close off every opportunity for avoidance or manipulation."<sup>251</sup> However, and

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<sup>245</sup> See discussion about contested works and their inability to satisfy the *Miller* test *supra* Section II.A.3; see also *Miller v. California*, 413 U.S. 15, 24 (1973) (requiring the prurient interest and some sexual conduct).

<sup>246</sup> Douglas, *supra* note 38, at 727.

<sup>247</sup> See *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 669 (2010).

<sup>248</sup> *Id.* at 680 (citing *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984)).

<sup>249</sup> *Id.* at 685.

<sup>250</sup> *Id.* at 692 (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 808 (1985)).

<sup>251</sup> *Id.* at 693.



most important in the case of book bans, states may not restrict speech where “its distinction is not *reasonable in light of the purpose served by the forum*.”<sup>252</sup> While a limited public forum offers states leeway in restrictions of speech, the state cannot unreasonably restrict speech related to the purpose of the forum.<sup>253</sup>

Because reasonableness is a low bar, it is unlikely that a court would find any book ban to be unreasonable. The widely accepted purpose of a library is to provide access to information.<sup>254</sup> Libraries provide myriad opportunities to access information, ranging from engaging with various cultures and differing viewpoints to conducting professional and recreational research.<sup>255</sup> Indeed, “the search for relevant information and its subsequent use in productive activity may be an integral characteristic of the construction of contemporary public culture in the emergent twenty-first century.”<sup>256</sup> The public library is “a key site of both cultural consumption and production and a facilitator of civil society in a way that other public places are not.”<sup>257</sup>

A restriction of speech in a limited public forum may be unreasonable when considering the forum’s purpose.<sup>258</sup> When considering the accepted purpose of the public library, suspending patrons’ access to thousands of titles is unreasonable to some degree. Banning an e-book service would certainly be an action directly adverse to the core tenet of a library. However, even though suspending access to tens of thousands of books to prevent patrons from accessing a handful of potentially harmful books is not the most reasonable solution to the alleged problem, a state’s restriction need not be the most reasonable option available.<sup>259</sup> While there are any number of better

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<sup>252</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (emphasis added) (internal quotations omitted) (quoting *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 804–06 (1985)).

<sup>253</sup> *Christian Legal Soc’y*, 561 U.S. at 685 (“Once it has opened a limited [public] forum . . . the State must respect the lawful boundaries it has itself set. . . . The State may not exclude speech where its distinction is not reasonable in light of the purpose served by the forum . . .” (alteration in original) (quoting *Rosenberger*, 515 U.S. at 829)).

<sup>254</sup> *Public Libraries Support Personal Productivity and Cultural Engagement*, AM. LIBR. ASS’N (Feb. 28, 2012), <https://perma.cc/R4HF-JLR6>.

<sup>255</sup> *Id.*

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

<sup>258</sup> *Christian Legal Soc’y*, 561 U.S. at 685.

<sup>259</sup> *Id.* at 692.

solutions,<sup>260</sup> a patron challenging the ban on reasonableness grounds would likely fail.

The second step is inquiring about the government's viewpoint neutrality.<sup>261</sup> "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant" than if the government discriminated solely on the basis of content.<sup>262</sup> A challenger alleging viewpoint discrimination must thus show the government is "regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."<sup>263</sup> The First Amendment prohibits viewpoint discrimination "*even when the limited public forum is one of its own creation.*"<sup>264</sup> Viewpoint discrimination offends an almost unanimously understood tenet of the First Amendment: the government cannot regulate private citizens' viewpoints.<sup>265</sup> The First Amendment "flatly prohibits the government from engaging in viewpoint discrimination, *even within classes of speech that could otherwise be completely proscribed.*"<sup>266</sup> Importantly, a government discriminates on the basis of viewpoint not only when it "totally forbids the expression of a disfavored viewpoint," but also when "the private viewpoint is partially stifled."<sup>267</sup> Additionally, the "exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one."<sup>268</sup> States may never "restrict speech or association simply because it finds the views expressed by any group to be abhorrent."<sup>269</sup>

While the government may not single out a viewpoint when regulating within a limited public forum, the restriction mechanism is important. State action that has a disparate impact on a certain viewpoint, but does not "target [speech] on the basis of its expressive content," does not constitute viewpoint discrimination.<sup>270</sup> For example, choosing to withhold subsidies to certain groups

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<sup>260</sup> See discussion about solutions *infra* Sections II.B.2, II.C.2.

<sup>261</sup> *Christian Legal Soc'y*, 561 U.S. at 694.

<sup>262</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (citing *R.A.V. v. City of St. Paul*, 505 U.S. 377, 391 (1992)).

<sup>263</sup> *Id.* (citing *Perry Educ. Ass'n v. Perry Loc. Educators' Ass'n*, 460 U.S. 37, 46 (1983)).

<sup>264</sup> *Id.* (emphasis added).

<sup>265</sup> Blocher, *supra* note 176, at 702.

<sup>266</sup> *Id.* (emphasis added).

<sup>267</sup> *Id.* at 705.

<sup>268</sup> *Rosenberger*, 515 U.S. at 831.

<sup>269</sup> *Healy v. James*, 408 U.S. 169, 187–88 (1972).

<sup>270</sup> *Christian Legal Soc'y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 696 (2010) (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 390 (1992)).

unless they comply with the restrictions attached to funding that places “only indirect pressure” on the viewpoints of said group is not viewpoint discrimination.<sup>271</sup> The Supreme Court in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez* noted that a state “wielding the stick of prohibition” rather than “dangling the carrot of subsidy” is more likely to be engaging in viewpoint discrimination.<sup>272</sup> In other words, where the state actively prohibits, rather than incentivizes the exclusion of, certain viewpoints it finds abhorrent or otherwise objectionable, the state more clearly engages in viewpoint discrimination.

Because restrictions need only be reasonable and *viewpoint* neutral, relying on language in *Miller v. California* and other *content-based* cases to justify suspending e-book services merely cloaks the actual issue.<sup>273</sup> The main example of a public library, rather than a school library, suspending an e-book service, is *Little v. Llano County* and Representative Matthew Krause’s list of 850 allegedly dangerous books.<sup>274</sup> In the letter prompting Llano County library officials to suspend patrons’ access to OverDrive, Krause considered books that contained any of the following information to be dangerous and patrons should not have access:

human sexuality, sexually transmitted diseases, or human immunodeficiency virus (HIV) or acquired immune deficiency syndrome (AIDS), sexually explicit images, graphic presentations of sexual behavior that is in violation of the law, or contain material that might make students feel discomfort, guilt, anguish, or any other form of psychological distress because of their race or sex or convey that a student, by virtue of their race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously.<sup>275</sup>

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<sup>271</sup> *Id.* at 682.

<sup>272</sup> *Id.* at 683.

<sup>273</sup> *Miller v. California*, 413 U.S. 15 (1973).

<sup>274</sup> *Little v. Llano County*, No. 1:22-CV-424-RP, 2023 WL 2731089 (W.D. Tex. Mar. 30, 2023), *appeal filed*, No. 23-50224 (5th Cir. Apr. 4, 2023), *argued*, No. 23-50224 (5th Cir. June 7, 2023); Danika Ellis, *All 850 Books Texas Lawmaker Matt Krause Wants to Ban: An Analysis*, BOOKRIOT (Nov. 5, 2021), <https://perma.cc/KN6M-TYRY>.

<sup>275</sup> Letter from Matt Krause, Chairman of the Tex. House Comm. on Gen. Investigating, to Lily Laux, Deputy Comm’r of Sch. Programs, Tex. Educ. Agency, and School Superintendents (Oct. 25, 2021) (on file with author); *see also* Complaint, *supra* note 25, ¶ 58.

Nearly fourteen percent of the titles listed referenced trans people, and over half of the books referenced the LGBTQ+ community in some way.<sup>276</sup> Numerous titles featured people of color or racial issues.<sup>277</sup> Finally, the list targeted books covering reproductive rights and “[a]t least [eleven] of the books focus on the landmark *Roe v. Wade* ruling.”<sup>278</sup> Many popular books featuring violence, including *The Hunger Games* by Suzanne Collins featuring violence against children, are not on the list.<sup>279</sup>

Consider the kinds of topics Representative Krause has singled out: the LGBTQ+ community, racism, critical race theory, reproductive rights, and sex and gender education, positivity, and equality. These are topics at the core of political, religious, and social debates, and they are topics for protection or attack by almost any candidate for political office. EveryLibrary Executive Director John Chrastka has noted that “[i]f somebody with an anti-gay, anti-trans agenda wants to censor, the first thing you have to be able to do is point to a law that says, well, issues of sexuality are off-limits for children.”<sup>280</sup> Richard Corcoran, the Florida education commissioner, said it was “important to ‘police’ teachers to make sure they are not indoctrinating students with a liberal agenda,” including firing a teacher with Black Lives Matter flags and decorations.<sup>281</sup> Given the rhetoric of some fellow conservatives, as well as the piecemeal and targeted nature of his list, Representative Krause’s list and Llano County’s subsequent e-book ban cannot be seen as anything other than “totally forbid[ding] the expression of a disfavored viewpoint.”<sup>282</sup> Indeed, Representative Krause admitted in 2021 that he had not read any of the books on his list.<sup>283</sup> Suspending e-book services to prevent patrons from accessing those books, regardless of age or maturity, amounts to intentionally excluding

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<sup>276</sup> Ellis, *supra* note 274 (finding 13.9% of titles on Rep. Krause’s list reference trans people in some capacity).

<sup>277</sup> Hannah Getahun, *Meet Matt Krause, the Man Who Critics Say Helped Make Texas a National Leader in Book Bans*, BUS. INSIDER (Sept. 18, 2022, 6:19 AM PDT), <https://perma.cc/YW7J-VTAE>.

<sup>278</sup> Chappell, *supra* note 69; *see also* Ellis, *supra* note 274.

<sup>279</sup> Ellis, *supra* note 274.

<sup>280</sup> Natanson, *supra* note 72.

<sup>281</sup> Laura Meckler & Hannah Natanson, *New Critical Race Theory Laws Have Teachers Scared, Confused, and Self-Censoring*, WASH. POST (Feb. 14, 2022, 6:00 AM EST), <https://perma.cc/PU56-D8TZ>.

<sup>282</sup> Blocher, *supra* note 176, at 705.

<sup>283</sup> Getahun, *supra* note 277 (positing that Rep. Krause had compiled his list by making keyword searches, rather than based on intimate knowledge of the selected works).

heavily politicized topics that a sub-group of conservatives find abhorrent—something the Supreme Court has routinely prohibited.<sup>284</sup> Llano County violated its patrons’ First Amendment right, even as a limited public forum, because the decision to suspend access to OverDrive was fundamentally viewpoint-based. A decision cannot be viewpoint neutral if it is motivated by the suppression of hotbed political topics and wholesale applies to patrons regardless of age or maturity.

Additionally, Llano County’s suspension of OverDrive is not a neutral restriction that happens to have a disparate impact on a certain viewpoint as an unintended consequence. Suspending OverDrive means suspending access to all the titles hosted on the service, not just those considered objectionable. However, as discussed by the Court in *Christian Legal Society Chapter of the University of California, Hastings College of the Law v. Martinez*, Llano County “wield[s] the stick of prohibition” of certain viewpoints rather than incentivizes the exclusion of certain viewpoints.<sup>285</sup> As with *Christian Legal Society*, intent is important: a state targeting speech because of its viewpoint, regardless of the breadth or seeming neutrality of the mechanism, is illegal.<sup>286</sup> Even if suspending an e-book service suspends access to more than just one viewpoint on a contested topic,

exclusion of several views on that problem is just as offensive to the First Amendment as exclusion of only one. It is as objectionable to exclude both a theistic and an atheistic perspective on the debate as it is to exclude one, the other, or yet another political, economic, or social viewpoint.<sup>287</sup>

Suspending access to e-book services to target traditionally liberal ideas or topics also suspends access to more moderate or conservative authors covering the same topics. It prevents readers from engaging with a number of perspectives to develop their own opinions and approaches to the world. It chills individual thought and expression. At its core, it fundamentally contradicts First Amendment principles.

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<sup>284</sup> See, e.g., *Christian Legal Soc’y Chapter of the Univ. of Cal., Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 696 (2010).

<sup>285</sup> *Id.* at 683.

<sup>286</sup> *Id.* at 696 (“The Law School’s policy aims at the *act* of rejecting would-be group members without reference to the reasons motivating that behavior . . .”).

<sup>287</sup> *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 831 (1995) (emphasis added).

Ultimately, suspending access to an e-book service is debatably reasonable and definitively not viewpoint-neutral. Viewpoint discrimination is “presumed impermissible when directed against speech otherwise within the forum’s limitations.”<sup>288</sup> As such, government actors violate library patrons’ First Amendment rights to the information available on e-book services when they restrict access to the e-book service because the decision to suspend access is not viewpoint neutral.

## 2. *Balancing the Protection of Minors and the Right to Information*

In an ideal world, book banning would not be an issue. Legal scholars would not need to balance an interest in restricting access to information with an interest in protecting access to information. A public library’s decision to continuously offer an e-book service to its patrons means that it relinquishes the right to suspend that service when attempting to prohibit access to certain viewpoints, even if those viewpoints may be harmful or inappropriate for minors. However, there is understandable and legitimate concern about young children having access to content that may be inappropriate for them. A public library’s patrons come in all ages, and they want to manage content appropriately for each age group. Fortunately, two solutions already exist.

First, the e-book services at issue—EBSCO, OverDrive, and Epic, for example—all offer some form of parental control or filtering software that can be turned on or off based on the kind of account.<sup>289</sup> Utah libraries employ this kind of filtering software in their use of EBSCO, and while the filters do not get at everything Utah conservatives challenging the service find to be objectionable, it is a much more narrowly tailored solution than preventing children from having access to the kinds of material that raised alarm in the first place.<sup>290</sup> While filtering does not get at everything, turning on some sort of filtering for minors who have library cards prevents them from getting at most of the allegedly dangerous material. Such filtering protects minors from inappropriate or mature material without allowing the libraries to engage in rampant viewpoint discrimination or violate every patrons First Amendment

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<sup>288</sup> *Id.* at 830.

<sup>289</sup> *Epic Help Center*, EPIC!, <https://perma.cc/YM5U-Z86U>; Marjorie Cortez, *Board Votes to Restore Utah Public Schools’ Access to Educational Database*, KSL.COM (Oct. 23, 2018, 4:09 PM), <https://perma.cc/8F34-FA88>; Complaint, *supra* note 25, ¶ 81.

<sup>290</sup> Cortez, *supra* note 289.

right to information by suspending access to an entire service to target views with which they disagree.

Libraries could additionally contract with another service that provides stricter or more readily available parental controls. This does not guarantee the library total control over their patrons' access to the e-book offerings, but libraries must comport with the First Amendment right to information.<sup>291</sup> In the same way that a library could not lock the door to a section of the library for all patrons because one book that may be inappropriate for minors may be shelved there, a library that has routinely relied on an e-book service and established it as a part of the services offered to its patrons cannot suspend an e-book service for all its patrons to prevent minors from accessing potentially inappropriate materials.

Ultimately, suspending access to e-book services as currently attempted violates patrons' First Amendment right to information because it is neither reasonable nor viewpoint neutral. Public libraries have other solutions at their disposal to protect minors, as is their purported goal, without engaging in flagrant viewpoint discrimination in violation of even the less restrictive limited public forum doctrine.

*C. Public Schools Have Educational Discretion, Which Expands Authority and Further Complicates Evaluating Public Schools' E-Book Bans*

School libraries present a different analysis when considering their relationship to the e-book services they offer and their students' First Amendment rights to information. The Supreme Court has historically left public school governance and educational discretion to the states.<sup>292</sup> In considering a local government's ability to remove books from a *school* library, the *Board of Education, Island Trees Union Free School District No. 26 v. Pico* court established an unclear balancing test:

Our Constitution does not permit the official suppression of *ideas*. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners *intended* by their

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<sup>291</sup> *Stanley v. Georgia*, 394 U.S. 557, 564 (1969).

<sup>292</sup> *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 863 (1982) ("The Court has long recognized that local school boards have broad discretion in the management of school affairs."); *see also* *Pierce v. Soc'y of Sisters*, 268 U.S. 510, 534 (1925).

removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision, then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy [this Court] unequivocally condemned . . . .<sup>293</sup>

A school board violates the First Amendment under *Pico* where it removes a book based on the ideas expressed in the book in an attempt to cultivate a "prescribed orthodoxy" or impose its own beliefs on its students.<sup>294</sup> A court must examine the substantive evidence of intent to enforce such an orthodoxy and the procedural evidence of the intent.<sup>295</sup> Justice Brennan noted in the *Pico* plurality that, on the other hand, a school board preserves the right to remove a book based on "educational suitability."<sup>296</sup> As such, it is important to examine the phenomenon of e-book banning in the context of this more deferential test.

### 1. Applying *Pico*: What Are the Results?

Applying *Pico* to the books at issue could come out with varied results. Given the likelihood that these bans are motivated by a desire to prescribe a politically conservative orthodoxy to students,<sup>297</sup> a court could reasonably conclude that suspending e-book services offered by public libraries fails *Pico*. For example, in Idaho, following legislators' ban on critical race theories in school, the Nampa school board removed twenty-four books from shelves, including *The Kite Runner*, *The Handmaid's Tale*, and *The Absolutely True Diary of a Part-Time Indian*, which Moms for Liberty, a right-wing conservative group, had flagged as objectionable or harmful to minors.<sup>298</sup> However, there are

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<sup>293</sup> *Pico*, 457 U.S. at 871 (footnote omitted).

<sup>294</sup> Glenn Kubota, Comment, *Public School Usage of Internet Filtering Software: Book Banning Reincarnated?*, 17 Loy. L.A. ENT. L.J. 687, 714 (1997) (quoting *Pico*, 457 U.S. at 871).

<sup>295</sup> *Id.*

<sup>296</sup> *Pico*, 457 U.S. at 871 (quoting Transcript of Oral Argument at 53, Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. *Pico*, 457 U.S. 853 (1982) (No. 80-2043)).

<sup>297</sup> Challenges to books routinely come from conservative groups or elected officials, and book bans are most frequently seen in hyper-conservative states. Hayasaki, *supra* note 64 (discussing the presence of the Proud Boys' presence, an alt-right group, at library board meetings and Representative Matt Krause's book list); *see also* Ingram, *supra* note 84 (discussing that the challenge to Epic in Tennessee came from a parent who is also the president of Parents Choice Tennessee, a conservative group).

<sup>298</sup> Hayasaki, *supra* note 64.



contested books that could certainly be considered inappropriate for younger children. An elementary school student, for example, is probably not yet old enough to read *The Handmaid's Tale* or *The Kite Runner* because of their complex themes and portrayal of sexual acts or violence.

However, given the vitriol facing critical race theory and other inclusive stances,<sup>299</sup> it is unlikely these bans are motivated by anything other than an effort to force a viewpoint—something the *Pico* court would reject.<sup>300</sup> For example, following pressure from Florida Governor Ron DeSantis, the College Board gutted the Advanced Placement (“AP”) course in African American Studies, stripping the AP curriculum of “many Black writers and scholars associated with critical race theory, the queer experience and Black feminism” and “usher[ing] out some politically fraught topics, like Black Lives Matter, from the formal curriculum.”<sup>301</sup> Additionally, Governor DeSantis has taken steps to ban literature about critical race theory<sup>302</sup> and diversity, equity and inclusion programs<sup>303</sup> in public schools and universities. As such, it is unlikely most school book bans have another motivation beyond pushing a specific viewpoint.

The problem or tension is that students have a right to information while schools also have the right to educational discretion. Most of the book bans at issue in the twenty-first century would fail *Pico* for pushing a political orthodoxy. However, there are a number of issues that come about when applying *Pico*. First, there is no instruction on how to make the distinction between the ideas presented in the book—for example, its political stance—and its content.<sup>304</sup> With no additional precedent from the Supreme Court on book bans, and the fact that *Pico* itself offered no clearly binding rule, lower courts do not employ the test consistently.<sup>305</sup> Because it provides no guidance on the difference between viewpoint-motivated removals and content-motivated removals, it is easy to argue that a removal is content-based.<sup>306</sup>

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<sup>299</sup> See, e.g., Marisa Iati, *What Is Critical Race Theory, and Why Do Republicans Want to Ban It in Schools?*, WASH. POST (May 29, 2021, 8:00 AM EDT), <https://perma.cc/2BZF-NGBA>.

<sup>300</sup> *Pico*, 457 U.S. at 871.

<sup>301</sup> Anemona Hartocollis & Eliza Fawcett, *The College Board Strips Down Its A.P. Curriculum for African American Studies*, N.Y. TIMES, <https://perma.cc/B9UA-ZNJ7> (Feb. 9, 2023).

<sup>302</sup> Press Release, Ron DeSantis, Governor of Florida, Governor DeSantis Announces Legislative Proposal to Stop W.O.K.E. Activism and Critical Race Theory in Schools and Corporations (Dec. 15, 2021), <https://perma.cc/PS2Z-4STX>.

<sup>303</sup> Anthony Izaguirre, *DeSantis Pushes Ban on Diversity Programs in State Colleges*, AP NEWS (Feb. 1, 2023, 7:55 AM PDT), <https://perma.cc/LP6E-DFNM>.

<sup>304</sup> Schroeder, *supra* note 41, at 378.

<sup>305</sup> *Id.* at 382.

<sup>306</sup> *Id.* at 382–83.

Consider that “school boards have avoided liability by creating pretextual justifications for their book removal decisions.”<sup>307</sup>

Additionally, *Pico* is not set up to cope with the burden of analyzing the potential removal of 17,000 books hosted by a private actor and treated as a piece of the school’s library. *Pico* jurisprudence deals with a handful of contested books whose removal would not affect thousands of other books and would not deprive students of their First Amendment right to information.<sup>308</sup> But what happens if a book that could pass the *Pico* test gets past filtering software? As e-book services exist now, a school could theoretically suspend the entire e-book service and survive a First Amendment challenge as long as their intention was not to suppress *ideas* expressed in the hypothetical book.<sup>309</sup>

## 2. *Solutions: Reconsider the Pico Test and Rework Parental Controls*

The *Pico* opinion lacks the specificity and clarity necessary to handle the kinds of issues presented by schools’ use of e-book services. Because schools cannot target a single book for removal on an e-book service, any attempt to deprive students’ access to certain materials would either have to be done through the use of parental controls or via a blanket ban.

It is easy to conceptualize a blanket ban’s sinister results. Consider a school district that offers an e-book service with one hundred books. Of those one hundred books, two are legitimately inappropriate for elementary school students to read but appropriate for middle and high school aged students. An additional three are inappropriate for elementary *and* middle school students to read, but appropriate for high school students. Following this discovery, the school board suspends access to the entire e-book service. Under *Pico*, it is likely that a court might hold that because the e-book service hosts five books inappropriate for some of the children who have access to the service, and because the school board’s motivation is not to remove access to books containing ideas with which they disagree, the ban holds up. After all, there is no inquiry into the breadth of a removal because the *Pico* court is concerned with removing discrete books, rather than shelves of them. Even under a basic hypothetical, already the deficiencies in *Pico* become apparent—it would be

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<sup>307</sup> *Id.* at 383–84.

<sup>308</sup> Bd. of Educ., *Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 873 (1982).

<sup>309</sup> *Id.* at 871.

easy to satisfy the *Pico* standard and deprive the entire school district of one hundred books because five are inappropriate for a portion of the student body.

Now factor in the argument that stories featuring marginalized voices, critical race theory, or sex-positive rhetoric are inappropriate for some children. Given the traction these arguments have, it is well within the realm of possibility to target these books, and thus the entire e-book service, simply by invoking any argument other than a dislike of the ideas or an effort to “prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion.”<sup>310</sup> Those old enough to understand and learn from those stories lose the chance to engage with the marketplace of ideas in a way that is challenging and meaningful. Indeed, the entire district loses access to the entire service because *Pico* does not offer a meaningful backstop against overbroad bans.

As such, *Pico* should be reconsidered in favor of a test that makes it much more challenging to suspend access to entire e-book services. One scholar proposes a test reminiscent of that announced in *Tinker v. Des Moines Independent Community School District*: “the board should have to prove that inclusion of the book would ‘materially and substantially disrupt the work and discipline of the school’ or that the book needs to be removed for practical reasons, such as shelf space limitations, damage, or obsolescence.”<sup>311</sup> A school does not endorse a book simply by offering it without displaying it, assigning it, or otherwise encouraging students to read it. Rather, it is encouraging the students’ early participation in the marketplace of ideas—a major First Amendment purpose. Student interaction with the library, and by extension, with the e-book service, is almost entirely voluntary, and the *Pico* test allows libraries to restrict students’ voluntary interaction with the library in the student’s quest to develop their own thoughts, speech, and expression.<sup>312</sup> By reconsidering *Pico*, a school library that found itself in the above hypothetical would have to demonstrate that the book in question “materially and substantially disrupt[s] the work and discipline of the school.”<sup>313</sup> With a database of over 17,000 books, the likelihood of one book disrupting the school in a way that undermines the educational goals of the institution to the extent that a court would allow the school to suspend the e-book service is unlikely.

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<sup>310</sup> *Id.* at 872 (quoting *W. Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943)).

<sup>311</sup> Schroeder, *supra* note 41, at 387 (footnotes omitted) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 513 (1969)).

<sup>312</sup> Schroeder, *supra* note 41, at 387.

<sup>313</sup> *Id.* (quoting *Tinker*, 393 U.S. at 513).

Reconsidering *Pico* in favor of a more objective standard would preserve students' right to information while acknowledging that a strict scrutiny standard would deprive schools of their right to educational discretion.

This still begs the question: what about the books that are legitimately inappropriate for a younger child? If it becomes much more difficult for schools to restrict younger children's access to potentially harmful materials, would this not deprive schools of their right to educational discretion and put minors at risk? E-book services have already offered to answer this question by using parental controls. In many cases, parental controls filter out material that is allegedly harmful to minors.<sup>314</sup> There are still deficiencies with parental controls or a blanket ban on access to those under eighteen—school districts serve such a wide age range that it is easily conceivable that an e-book service might host a book appropriate for some, but not for others.

However, e-book services have shown a willingness to work with school libraries to ensure the most amount of access exists for the largest number of students. EBSCO, for example, was willing to work closely with Utah school board officials to ensure students could not access the allegedly harmful material that led to the service's full suspension.<sup>315</sup> EBSCO's willingness to work with, rather than against, school libraries highlights the additional solution. E-book services committed to providing a wide array of books to its consumers and schools committed to protecting and educating students must work together to develop a more nuanced system of parental control. For example, a sliding scale under which each grade level gains slightly more access to the service is a compromise that ensures e-book services retain contracts and further their mission while also allowing officials to retain some control and peace of mind.

By using a combination of the filtering software developed by e-book services and a more objective test to determine the constitutional legitimacy of book removals, school boards will be able to ensure they have educational discretion and are able to protect their students from inappropriate material. However, school boards will not be able to force a political scheme onto their students or deprive students of access to tens of thousands of online books. Students will likewise not have access to age-inappropriate material, but will be able to freely educate themselves, should they choose to do so, on political

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<sup>314</sup> Complaint, *supra* note 25, ¶ 81.

<sup>315</sup> Cortez, *supra* note 289.

hotbed topics of which their school might not approve but about which the student is still curious. Ultimately, the internet has evolved beyond the 1980s *Pico* test. The doctrine surrounding book removals needs to develop with technology, not fight against it. Only then can courts protect the battling interests of schools and their students.

#### CONCLUSION

The explosion of the Internet has arguably rendered book banning mostly moot. The original purpose of book banning—preventing access to inappropriate material—has been outpaced by the Internet. Libraries seeking to deny access to critical race theory, queer stories, and other ideas antithetical to animus-driven viewpoints cannot suppress access to the Internet. Indeed, it is arguable that in banning books in the digital age, state officials ensure patrons will interact with the material.<sup>316</sup> The people most greatly affected by book bans are thus people without private access to the Internet.<sup>317</sup> Continuing to ban books in the digital age could disproportionately deny low-income people access to information, which would be undesirable for any number of reasons.

Regardless, banning e-books violates the First Amendment and complicates constitutional doctrine. Banning books in both schools and public libraries is no longer as simple as removing a single book and surviving *Pico* or a reasonableness and viewpoint-neutral inquiry. Now, libraries could ban one book and take 16,999 other books with it. The complicated nature of the relationship between e-book services and libraries means that suspending e-book services opens libraries up to First Amendment liability, even though e-book services are private actors. Whether the Supreme Court will hear a challenge like that unfolding in Llano County or reconsider *Pico* remains to be seen. However, if the Court does address access to literature and the First Amendment more concretely, that jurisprudence will certainly be complicated by the expansive and intangible world of e-books.

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<sup>316</sup> The “Streisand Effect” posits that if an entity attempts to restrict access to something, people will seek out that thing out of curiosity, thus magnifying the public’s interaction with whatever the person did not want seen and doing far more damage than if the person had just left the thing alone. Justin Parkinson, *The Perils of the Streisand Effect*, BBC NEWS (July 31, 2014), <https://perma.cc/BNV2-GNA4>.

<sup>317</sup> *C.f.* Charlie Muller & João Paulo de Vasconcelos Aguiar, *What Is the Digital Divide?*, INTERNET SOC’Y (Mar. 3, 2022), <https://perma.cc/MH36-Q8WP> (“At a high level, the digital divide is the gap between those with Internet access and those without it. . . . These gaps in availability, affordability, interest, and digital literacy exist at the international level as well as the neighborhood level.”).