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THE HARM TO STUDENT FIRST AMENDMENT RIGHTS WHEN
SCHOOL BOARDS MAKE CURRICULAR DECISIONS IN
RESPONSE TO POLITICAL PRESSURE: A CRITIQUE OF
GRISWOLD V. DRISCOLL

*Jason Persinger**

I. INTRODUCTION

The rights afforded to American citizens by the First Amendment of the U.S. Constitution form some of the bedrock principles of this country. Not only are citizens free from government restriction of their speech, but they are also given the opportunity to access and receive other types of speech at will. While many people instantly identify the First Amendment with the freedom to speak, the opportunity to find and become exposed to the speech of others is fundamental to free speech rights.

One area where the extent of our First Amendment rights is not entirely clear is in the context of the public education system. A number of cases have been adjudicated in an attempt to establish the proper role of speech, assembly, religious exercise, and religious establishment inside a school. In one particular subset of cases deciding school boards' discretion in setting a curriculum, the issue of receiving and accessing particular speech has been discussed. In these cases, courts look at the authority that schools have in determining the curriculum for students, including their rights to establish acceptable reading materials and online resources.

When it comes to a school's curriculum, the main controversy stems from a school board's decision to include or exclude a certain resource that students may access. This inclusion or exclusion has prompted parents, teachers, and students to initiate litigation against school boards, claiming that the actions of the school board violated the First Amendment rights of students. While courts generally give schools full discretion to organize a curriculum for the students,¹ the Supreme Court has stated that "[t]eachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and

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1. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968).

understanding; otherwise our civilization will stagnate and die.”²

Recently, the First Circuit Court of Appeals, in *Griswold v. Driscoll*, settled a dispute in which the Massachusetts State Board of Education removed materials from its curricular guide in response to political pressure over certain resources included in the guide.³ While some students, parents, teachers and a local cultural group accused the board of violating the First Amendment rights of students to access the deleted materials, the court held that the school board’s decision was permissible and did not violate the First Amendment.⁴ Using Supreme Court case law, the court decided that state and local authorities have great discretion in setting curriculums, that state and local authorities have the important task of preparing students for life after school, and that the government, as a speaker, may advance a viewpoint if it wants.⁵

However, the decision by the First Circuit Court of Appeals ignored an important aspect of school curriculum case law. Many courts have explicitly stated that school boards may *not* approach their curriculums in a partisan or political manner. The *Griswold* court incorrectly ignored this general rule in its decision.

This Casenote explores *Griswold v. Driscoll* and the limitations placed upon school boards by other courts when school boards restrict curricular materials available to students for political reasons. Part II analyzes previous First Amendment cases involving students to develop a general rule regarding how a school may regulate its curriculum. Part III discusses the facts of *Griswold v. Driscoll* and the decision of the First Circuit Court of Appeals in finding for the Massachusetts Board of Education. Part IV reconciles the *Griswold* decision with the prior First Amendment cases involving students by discussing the ways in which the First Circuit Court of Appeals should have looked at the situation to protect the First Amendment rights of the students. Finally, Part V argues for courts to use a different approach from the one implemented in the *Griswold* in deciding future curriculum cases.

2. *Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957).

3. *Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010), *cert. denied*, 113 S. Ct. 1006 (2011).

4. *Id.*

5. *Id.* at 58–59.

II. PRIOR CASES

Part II of this Casenote discusses cases that have addressed a school board’s discretion to set its curriculum and how far that discretion can be exercised before the school board infringes on a student’s First Amendment rights. Subpart A discusses how a federal district court in Massachusetts and the United States Supreme Court addressed the removal of materials from school libraries. Next, subpart A analyzes school curriculum cases from federal district and appellate courts. Subpart B explores the permissibility of indoctrination of particular beliefs on students. Subpart C addresses the need for schools to have a compelling governmental interest to interfere with a student’s right to receive information. Subpart D analyzes cases that have defined compelling governmental interest in the context of school curriculums. Subpart E looks at a case where a student tried to compel a school to include a particular book on the school’s curriculum. Finally, subpart F lays out the common themes that have emerged in the federal courts in regards to a school board’s power in creating its curriculum.

While the Supreme Court has not directly decided the extent of a school board’s power in setting its curriculum, the Court has mentioned a general proposition for the proper role of schools. In dicta, the Supreme Court has stated that great discretion is afforded to schools and local authorities in deciding what students should study to better prepare the students for the real world.⁶ However, over the years, federal courts have eroded that view and held that students have broader rights to exercise their First Amendment freedoms. Many courts have found that students have a constitutional right to access information, and therefore a school must have a compelling reason to deprive students of that right.⁷

The discussion of these cases highlights two general propositions of law. First, a school board has substantial discretion to create a curriculum and allow access to curricular and library materials. Second, students have a First Amendment right in accessing and exploring information—a right that the government cannot limit without a

6. *Bd. of Educ. v. Pico*, 457 U.S. 853, 869 (1982) (plurality opinion).

7. *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 777 (8th Cir. 1982).

compelling governmental interest. In regards to the second proposition, courts have explicitly stated that pressure placed on the school board to conform to certain political beliefs does not constitute a compelling government interest.

A. The Right to be Exposed to Controversial Ideas and Ideas Contrary to the School Board's Prescribed Orthodoxy—Libraries

Before delving into cases involving school curriculums, an important precursor set of cases involving the removal of materials from school libraries helps underscore this framework. In *Right to Read Defense Committee of Chelsea v. School Committee of the City of Chelsea*, the District Court of Massachusetts held that the desire to eliminate controversial materials from a library did not further a substantial governmental interest and thus infringed on the First Amendment rights of students.⁸ This case involved the Chelsea School Committee's decision to remove an anthology of student poems from the school library after a parent objected to the content in the anthology as offensive and vile.⁹

The court reviewed the First Amendment rights afforded to students in school. While acknowledging that schools have the ability to choose what materials are accessible to students and that the school was under no obligation to purchase the anthology initially, the court held that the decision to purchase the anthology created a constitutionally protected interest for students to access the materials.¹⁰ To override this interest, the school had to show that the decision to eliminate the anthology did not come from the discomfort and unpleasantness that accompanied unpopular speech in the poems.¹¹

The court held that the school decided to remove the anthology simply because the school found the materials unacceptable.¹² Finding support from a Supreme Court decision, which states "students may not be regarded as closed-circuit recipients of only that which the State

8. *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703 (D. Mass. 1978).

9. *Id.*

10. *Id.* at 712–13.

11. *Id.* at 713.

12. *Id.*

chooses to communicate,” the court overturned the removal of the anthology.¹³ The importance of students exercising free will in accessing information was considered more important than the objections community members had over the information available to students.

The Supreme Court took a stance similar to that of the Massachusetts district court soon after the *Right to Read* decision.¹⁴ In *Board of Education, Island Trees Union Free School District No. 26 v. Pico*, a plurality of the Supreme Court held that school boards may not remove books from a school library just because the school board dislikes the ideas contained in the books.¹⁵

In *Pico*, a local school board told school libraries to remove books that were featured on a list of objectionable books.¹⁶ The board characterized the objectionable books as anti-American and anti-Christian, and justified its decision by saying that it had a duty to protect children from the moral danger found in the books.¹⁷

The Court noted that school boards have the discretion to allow students to access school materials but stated that the discretion must be exercised in a way that comports with the constitutional rights of those students.¹⁸ In cases where the actions of school boards infringe on students’ constitutional rights, courts may step in to resolve any disputes.¹⁹ Finding that the actions of the school board involved the students’ ability to access information as an exercise of their rights of speech, press, and political freedom, the Court decided to intervene.²⁰

The Court held that while the school board in *Pico* had discretion to regulate the contents of its libraries, it could not exercise that discretion in a narrowly partisan or political way.²¹ By denying students the opportunity to access ideas the school board disagreed with, the board

13. *Id.* at 715.

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

15. *Id.*

16. *Id.* at 857–858.

17. *Id.* at 857.

18. *Id.* at 864.

19. *Id.* at 866.

20. *Id.* at 867–69.

21. *Id.* at 870.

was casting a “pall of orthodoxy” over students that would result in an official suppression of ideas.²² The Court felt that for students to learn how to exercise their First Amendment rights in a meaningful manner, they should be able to access ideas that are unpopular to others.²³

In dicta, the *Pico* Court stated that a school board could claim that its duty to impart community values to students would allow it to possess absolute discretion in developing its curriculum.²⁴ However, this statement garnered only a plurality of the Court and was not relevant to the issues at hand. The only rule expressed in *Pico* was that a school board may not exercise its discretion in a political or partisan manner such that its actions result in a suppression of accessible ideas for students.²⁵

While these two cases did not directly address school curriculums, they put forth rules that would be adopted in school curriculum cases by many federal courts. *Right to Read* and *Pico* laid down the framework in interpreting the First Amendment as granting in students the right to access information—a right that would extend from library materials to school curriculums. These cases also expressed the belief that students should not be indoctrinated by the prescribed beliefs of the school board but rather be free to access other points of view.

B. Absence of Indoctrination of Particular Beliefs—Curriculum

Around the time that *Right to Read* and *Pico* were being decided, federal courts started to address the limits of a school board’s power in setting its curriculum. In 1980, the Seventh Circuit Court of Appeals heard a case where two high school students claimed that their First Amendment rights were violated by a school board’s decision to remove certain courses and books from the school curriculum.²⁶ In *Zykan v. Warsaw Community School Corporation*, the students alleged that the actions of the school board were not in furtherance of a legitimate educational interest but were taken because the board’s social, political,

22. *Id.*

23. *Id.* at 871.

24. *Id.* at 869.

25. *Id.* at 870.

26. *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980).

and moral tastes were offended by the content of the books.²⁷ However, the school argued that it was acting under a policy that prohibited reading materials that “might be objectionable” and decided that the banned materials violated that policy.²⁸

In deciding the scope of the students’ First Amendment rights, the court found that the students were unable to sustain their constitutional claims. The court reasoned that while it is important for academic communities to be free from ideological coercion, a student’s right to academic freedom is second to the school’s role in aiding a student’s academic development.²⁹ This academic development is the primary function of schools, and schools must be able to exercise that role as fully as possible.³⁰ In this situation, the local school board had the authority to make educational decisions based on its particular views as long as it acted within school board policy.

The court decided that it was improper for courts to step in and act when a school models its curriculum in a way it believes best aids the intellectual development of its students.³¹ However, the court noted that if a school board decided to expose students to rigid and exclusive indoctrination as an extension of its own beliefs, it would be permissible for a court to step in to resolve disputes that emerge.³²

C. Need for Substantial Governmental Interest to Interfere With Students Right to Receive Information

Two years after *Zykan* was decided came a decision from the Eighth Circuit Court of Appeals that weakened the authority of school boards to shape their curriculums when they lack a substantial governmental interest. In *Pratt v. Independent School District No. 831*, junior and senior high school students brought a lawsuit against their school district

27. *Id.*

28. *Id.* at 1302.

29. *Id.* at 1305.

30. *Id.* at 1304.

31. *Id.* at 1305.

32. *Id.* at 1306 (“But nothing in the Constitution permits the courts to interfere with local educational discretion until local authorities begin to substitute rigid and exclusive indoctrination for the mere exercise of their prerogative to make pedagogic choices regarding matters of legitimate dispute.”).

to compel the district to allow the showing of the film *The Lottery*.³³ The plot of *The Lottery* revolved around a community that held a lottery each year to select a person to be stoned to death.³⁴ The school banned the film after succumbing to political pressure from parents and community members who claimed that the film was too violent and impacted the religious and family values of the students.³⁵

The district court found that the board banned the film because of its ideological content.³⁶ Based on that finding, it held that the students' First Amendment rights were violated and that the film should be restored to its previous place in the school curriculum.³⁷

The Eighth Circuit Court of Appeals affirmed the decision of the district court.³⁸ Acknowledging that state and local authorities control public education and that school boards are allowed substantial deference in establishing their curriculums, the court conceded that decisions regarding a school's curriculum may take a community values into account.³⁹ However, the court felt this case was similar to the results in *Zykan* and *Pico* and held that local authorities could not impose a "pall of orthodoxy" on students by subjecting them to a certain ideological viewpoint while suppressing their right to explore other viewpoints.⁴⁰

Stemming from deliberation on these two concerns, the court held that for the school board to lawfully ban the material from its curriculum, it must establish that "a substantial and reasonable governmental interest existed for interfering with the students' right to receive information."⁴¹ Finding that the school board did not undertake a systematic review of violence and only banned the film in response to political pressure from the community, the court held that the school

33. Pratt v. Indep. Sch. Dist., 670 F.2d 771, 773 (8th Cir. 1982).

34. *Id.*

35. *Id.* at 774.

36. *Id.* at 773.

37. *Id.*

38. *Id.*

39. Pratt, 670 F.2d at 775.

40. *Id.* at 776.

41. *Id.* at 777.

board unconstitutionally removed the film from the school curriculum.⁴² The court reasoned that this case involved the rights of students to receive information and access controversial ideas—rights that are fundamental to the First Amendment.⁴³ Since political pressure from the community did not constitute a legitimate interest to interfere with the students’ right to receive information, the school was not allowed to ban the film.⁴⁴

D. Defining Substantial and Reasonable Governmental Interest

While the *Pratt* court held that a school board had to show a substantial and reasonable governmental interest in removing materials from its curriculum, it left unanswered the question of what constituted a substantial and reasonable governmental interest. In *Hazelwood v. Kuhlmeier*, the Supreme Court tried to define this phrase.⁴⁵ The Court, in holding that a school’s decision to delete pages from a school-sponsored student newspaper was permissible, stated that a school may censor various forms of speech at school in furtherance of a legitimate pedagogical concern.⁴⁶

In 1989, the Eleventh Circuit Court of Appeals applied the *Hazelwood* standard to a school’s regulation of its curriculum. In *Virgil v. School Board of Columbia County, Florida*, the court looked into the constitutionality of a school board’s decision to eliminate textbooks that featured vulgarity and sexuality from its curriculum.⁴⁷ Parents of students in the school district filed suit claiming that the elimination of the textbooks violated their children’s First Amendment rights.⁴⁸

The court looked at two factors in determining this case. First, applying the Supreme Court’s ruling in *Bethel School District v. Fraser*,

42. *Id.* at 778–779.

43. *Id.* at 779.

44. *Id.* at 778–779.

45. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260 (1988).

46. *Id.* at 273. In *Hazelwood*, a school deleted pages from the school newspaper that referred to students who were pregnant. *Id.* The Supreme Court held that this was permissible because the school was acting in a manner to maintain the privacy concerns of students. *Id.* This, the Court felt, was a legitimate pedagogical concern. *Id.*

47. *Virgil v. Sch. Bd.*, 862 F.2d 1517 (11th Cir. 1989).

48. *Id.*

the *Virgil* court held that a school could consider the emotional maturity of students in determining whether to expose students to controversial topics, i.e., sex.⁴⁹ Second, the *Virgil* court applied the *Hazelwood* standard, stating that the school board's motivation in removing the textbooks must be related to a legitimate pedagogical concern, which in this case was preventing exposure to sexuality and vulgarity at school.⁵⁰ Acknowledging that the motivation of the board was based on the sexual and vulgar content of the books and not on any particular community ideological or political beliefs,⁵¹ the court held that the board's actions were constitutional. Other circuits have utilized the *Hazelwood* analysis in assessing the legality of a school board's alteration of its curriculum.⁵²

E. Students May Not Compel School To Provide Access to Any Information Desired

A more recent case, from the Fifth Circuit Court of Appeals, discarded the *Hazelwood* analysis in deciding the constitutionality of a school board's discretion in setting its curriculum. *Chiras v. Miller* involved the refusal of the Texas State Board of Education to place a certain environmental book on a list of recommended books for schools to include in their curriculums.⁵³ A student brought a claim against the board, alleging that it interfered with his right to receive the information.⁵⁴ The Fifth Circuit Court of Appeals first decided that recent Supreme Court decisions had broadened the power of a school board to create its curriculum, stating that when a school chooses among private speakers to facilitate its message, its decision is not subject to

49. *Id.* at 1521. The *Virgil* court drew guidance from the 1986 Supreme Court decision *Bethel School District v. Fraser*. *Id.* In *Fraser*, a student nominated a fellow student for school-elected office. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). During the speech, the student referred to the candidate with a graphic, explicit sexual metaphor. *Id.* at 678. As a result, the student was suspended from school. *Id.* The Supreme Court found that the school did have an interest in protecting minors from sexually explicit language. *Id.* at 685.

50. *Virgil*, 862 F.2d at 1522–23.

51. *Id.* at 1523.

52. See *Borger v. Bisciglia*, 888 F. Supp. 97, 100–101 (E.D. Wis. 1995).

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

54. *Id.*

forum or viewpoint analysis.⁵⁵ As the *Hazelwood* test presumed a forum open to others, which the court said was not present in this case, the court declined to apply that test.⁵⁶

The court further held that a student does not have a right to compel schools to allow access to every resource that the student desires.⁵⁷ Therefore, it was permissible for the Texas Education Board to ignore the student’s request to include a particular environmental book in the curriculum.⁵⁸ However, the court did mention the Supreme Court’s language in *Pico* that said schools may not exercise their discretion in a narrowly partisan or political way.⁵⁹ The *Chiras* court declined to follow *Pico* because there was no evidence to show that the education board’s refusal to place a particular environmental book on a list of recommended curricular materials was motivated by partisan or political feelings.⁶⁰ This implies that in instances where a school board chooses to include certain materials in a curriculum based on the board’s political ideology, the board’s actions would be unacceptable.

F. Common Themes

Looking at these cases together, some common themes emerge. First, the federal courts are in agreement that school boards are afforded significant discretion in setting their curriculums. Second, the federal courts have balanced the discretion of schools boards with the interest of

55. *Id.* at 615. The *Chiras* court distinguished this case from the Supreme Court case *Rosenberger v. Rector and Visitors of the Univ. of Virginia*. In that case, the Supreme Court said that schools have broad discretion when making funding decisions regarding their curriculum. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 833 (1995). However, the *Rosenberger* Court said that once the school allows a fund for student publications, this created a forum that was subject to a viewpoint-neutral restriction process. *Id.* at 829–830. *Chiras* held that the school board did not create a forum for expression of various authors of textbooks, instead leaving the choice of textbooks to the discretion of board members. *Chiras*, 432 F.3d at 615.

56. *Chiras*, 432 F.3d at 616. The *Chiras* court said that to apply *Hazelwood*, it would have to find that the Texas Board of Education created a right to access its recommended textbook list in others. *Id.* The court instead found that the Board of Education was transmitting its own message by making a list of textbooks it thought was appropriate for schools to use in school. *Id.*

57. *Id.* at 620.

58. *Id.*

59. *Id.* at 619.

60. *Id.* at 619–20.

students in maintaining their First Amendment rights by holding that curricular decisions must not infringe on the rights of students to access and receive information. Third, as long as a restriction of access to information furthers a substantial governmental interest, the restriction will likely be upheld. However, a substantial governmental interest may not include a school board's partisan and political ideology. Finally, the right of students to access information is not absolute and students do not have the right to compel schools to make available any information the students desire.

III. *GRISWOLD V. DRISCOLL*

In 2010, the First Circuit Court of Appeals continued the analysis of how a school board may exercise its curricular discretion without infringing on the First Amendment rights of students. In *Griswold v. Driscoll*, the First Circuit looked at a case where the Massachusetts State Board of Elementary and Secondary Education added materials to a curricular guide but then subsequently removed the materials in response to political pressure from groups of parents and citizens of the state.⁶¹ In this case, the court took an approach different from the approaches of other circuits and district courts in settling school curriculum disputes.

A. *Facts*

In Massachusetts, the state education board was required to formulate recommendations to schools on curricular materials related to genocide and human rights.⁶² The board listed the Armenian genocide as a possible topic of instruction and included a number of relevant resources for teachers to use in the classroom.⁶³ The material on the Armenian genocide also included brief background information, which stated, "Muslim Turkish Ottoman Empire destroyed large portions of its Christian Armenian minority population."⁶⁴

61. *Griswold v. Driscoll*, 616 F.3d 53 (1st Cir. 2010).

62. *Id.* at 54.

63. *Id.*

64. *Id.*

In response to this recommendation, a local Turkish cultural group objected and asked the board to revise the materials to reflect a more “objective study of history.”⁶⁵ In particular, the group requested that the board include resources depicting the “contra-genocide perspective,” a perspective arguing that the policy of the Ottoman Turks during that period was not a policy of genocide.⁶⁶ After hearing this request from the Turkish group, the board revised the curricular guide, adding sources in support of the contra-genocide perspective and removing the background information section.⁶⁷ The revisions were submitted to legislative officials for approval after they were adopted by the board.⁶⁸

The revisions upset Armenian descendants residing in Massachusetts. In response, a group of Armenians sent a letter of complaint to the governor, asking for the removal of the contra-genocide sources from the curricular guide.⁶⁹ As a result, the curricular guide was revised again. With the exception of the Website of the Turkish embassy, all of the pro-Turkish sources were deleted.⁷⁰ After the local Turkish group complained about the removal of the contra-genocide information, the board replied that the purpose of the guide was to address the genocide, not debate whether or not it occurred.⁷¹ The board continued by saying that the guide could not refer to any source that questioned the authenticity of the genocide.⁷² The board also explicitly stated that the genocide and the human rights section of the curriculum should be based on factual information “aligned with the material in the Massachusetts Curriculum Framework.”⁷³

Students, parents, teachers, and a group of Turkish-Americans subsequently filed suit against the Massachusetts Board of Education and some of its individual officers for making these changes.⁷⁴ The

65. *Id.* at 55.

66. *Griswold*, 616 F.3d at 55.

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

72. *Griswold*, 616 F.3d at 55.

73. *Id.*

74. *Id.*

lawsuit alleged that the removal of pro-Turkish sources was viewpoint-based discrimination and infringed on free speech rights in violation of the First Amendment.⁷⁵ After the district court granted the defendants' motions to dismiss,⁷⁶ the First Circuit Court of Appeals heard the appeal.

B. The Guide Is Not Analogous To Library Materials

There were two possible classifications for the curricular guide—it could be seen as a virtual school library established for the benefit of both students and teachers or as an important element of the curriculum itself.⁷⁷ There were two arguments made for treating the guide like library materials. First, the guide was made available to students to view at will, like materials in a library.⁷⁸ Second, there was a failure in the guide to “claim consistently that it occupies the entire field of legitimate source material.”⁷⁹

Responding to these arguments, the court first concluded that the ability to view the guide was not, by itself, sufficient to transform a curriculum guide into a virtual library.⁸⁰ The state board was using the guide to provide a framework for instruction and placed it on the state board Website, along with all other curricular frameworks developed by the state.⁸¹ It was only to be used as a supplement for teachers to steer the direction of classroom discussions.⁸²

Turning to the second argument—that there was a question as to whether the curricular guide constituted the entire scope of legitimate source material on genocide—the court took the position that the guide

75. *Id.* at 56.

76. *Id.*

77. *Id.* Different standards of review are applied if the curricular guide is deemed library materials and not curricular. *Id.* The *Griswold* court noted that if the guide was considered library materials, it would apply the *Pico* decision to resolve the dispute. *Id.* at 57.

78. *Griswold*, 616 F.3d at 59.

79. *Id.* This argument refers to the ability of teachers to inquire into other information in teaching the genocide materials. *Id.* The plaintiffs claimed that this was the function of a library, open inquiry and searching into materials. *Id.*

80. *Id.*

81. *Id.*

82. *Id.*

appeared to be open-ended.⁸³ Said another way, the guide allowed teachers to look beyond the parameters set by the Massachusetts Board of Education.⁸⁴ Since the guide allowed teachers to further explore the topics beyond the information that was provided, the court believed that it was not similar to a library where people are limited to the books in the system.⁸⁵ Therefore, the court dismissed the comparisons of the curricular guide to a virtual library and held that it instead more closely resembled a school curriculum.⁸⁶

C. Treating the Guide as Part of the Curriculum

After finding that the state board guide was closely related to a school’s curriculum, the court looked to past Supreme Court decisions to discern the scope of a school board’s curricular discretion. The *Griswold* court was guided by the plurality opinion in *Pico* and its statement that a school board may have absolute immunity in matters of curriculum.⁸⁷ Building upon this statement, the court discussed three strands of Supreme Court case law to set forth the view that school board’s may exercise autonomy in curricular decisions.

The first strand of case law stresses the importance of public schools in the academic and emotional development of students. These Supreme Court cases held that the role of public schools is to prepare students for being citizens and to teach students the values our society holds dear.⁸⁸ The second strand deals with the lengths at which a public school may exercise its power within the scope of academic

83. *Griswold*, 616 F.3d at 59.

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.* at 58.

88. *Id.* The *Griswold* court used two Supreme Court cases, *Ambach v. Norwick* and *Bethel School District v. Fraser* to illustrate this point. *Id.* The *Fraser* case was previously discussed in endnote 42, with the Court deciding that a school could suspend a student for exposing other students to sexually explicit remarks. *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675 (1986). In *Ambach*, the Supreme Court discusses the proper role of public education. *Id.* The Court said that “importance of public schools in the preparation of individuals for participation as citizens, and in the preservation of the values on which our society rests, long has been recognized by our decisions.” *Ambach v. Norwick*, 441 U.S. 68, 76 (1979).

development. The Supreme Court has afforded state and local school boards considerable discretion in operating schools free from judicial interference. The general rule of the Supreme Court is that the judiciary may not interfere with curricular decisions unless basic constitutional values are implicated by the actions of a school board.⁸⁹ The third strand of case law regards the government as speaker. The Supreme Court has given the government authority to choose its own viewpoints when it is speaking.⁹⁰

The *Griswold* court found that these three strands pointed to adopting the language in *Pico* regarding absolute discretion over curricular matters being given to school boards.⁹¹ The court held that the State Board of Education had the authority to set its curriculum, and therefore the actions taken by the board were legal and did not implicate the First Amendment rights of students.⁹² The *Griswold* court concluded that this outcome was proper even if the revisions to the curriculum were “made in response to political pressure.”⁹³

IV. DISCUSSION

In conceding that the court would reach the same decision even if the school changed its curriculum in response to political pressure, the *Griswold* court ignored several contrary court cases. Even worse, the

89. *Griswold*, 616 F.3d at 58. The *Griswold* court used the Supreme Court cases *Edwards v. Aguillard* and *Epperson v. Arkansas* to show this strand. *Id.* In *Edwards*, a challenge was brought questioning the constitutionality of a Louisiana statute which forbade the teaching of evolution. *Id.* The Court struck down the statute, though made clear to note that “states and local school boards are generally afforded considerable discretion in operating public schools.” *Edwards v. Aguillard*, 482 U.S. 578, 583 (1987). In *Epperson*, the Court once again struck down an anti-evolution, this time in Arkansas. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968). Before addressing the issue, the Court noted that while it is desirable for judicial restraint in the day-to-day operations of schools, it is proper for courts to intervene when students’ basic constitutional values are implicated. *Id.*

90. *Griswold*, 616 F.3d at 58–59. The *Griswold* court looked at the 2009 case *Pleasant Grove City v. Summum* to show this strand. *Id.* In *Pleasant Grove City*, the Supreme Court looked at whether the government had to place a monument depicting the Ten Commandments in a public park. *Pleasant Grove City v. Summum*, 555 U.S. 460 (2009). The Court held that this was an example of government speech, and that it was not subject to the constraints imposed by the First Amendment. *Id.*

91. *Griswold*, 616 F.3d at 59.

92. *Id.*

93. *Id.* at 60.

Griswold court’s one sentence statement shows that it did not seriously consider the implications of condoning school boards that make curricular decisions based on political preferences. While the *Griswold* court did follow *Chiras* in stating that schools do not have to allow access to every resource students desire,⁹⁴ the *Chiras* court expressed a belief that a school acting in a partisan or political manner may be acting unconstitutionally.⁹⁵

By reaching this conclusion, the *Griswold* court has distanced itself from its sister circuits. Part of the reason for the difference is because the *Griswold* court did not find a constitutionally protected right to inquire into and access information vested to the students.⁹⁶ Unlike *Griswold*, other federal courts,⁹⁷ including the Supreme Court,⁹⁸ have recognized and protected this right.

In this Part, the *Griswold* case is compared to the holdings and principles developed in prior cases. Subpart A analyzes whether the students had a constitutionally protected right in accessing the contra-genocide materials. Subpart B discusses the political pressure that resulted in the elimination of the contra-genocide materials from the Massachusetts guide and how the *Griswold* decision differs from other courts in allowing the elimination to stand. Subpart C looks at the harm in refusing to expose students to unpopular ideas. Subpart C also discusses the harm in forcing students to follow a prescribed set of thinking. Subpart D explores the possible harm in allowing the judiciary to impose its will over school boards.

A. Creating a Constitutionally Protected Right in the Prohibited Material

Before addressing the legality of removing materials from a curriculum because of political pressure, courts must find a constitutionally protected right to access the materials. Almost every

94. *Chiras v. Miller*, 432 F.3d 606, 620 (5th Cir. 2005).

95. *Id.*

96. *Id.* at 58.

97. *Right to Read Def. Comm. v. Sch. Comm.*, 454 F. Supp. 703, 714 (D. Mass. 1978); *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 776 (8th Cir. 1982).

98. *Bd. of Educ. v. Pico*, 457 U.S. 853, 866 (1982).

federal court that has addressed school board curricular discretion has noted that courts may not intervene in any conflict in which a constitutional right is not at issue.⁹⁹

To reiterate, school boards are not required to acquiesce to every request for information a student or teacher might have.¹⁰⁰ In other words, students and teachers do not have a constitutionally protected right to demand that a particular subject is taught or is made accessible within the school. In *Zykan*, the Seventh Circuit Court of Appeals found that any right a student had to academic independence was superseded by the school's role in academic development.¹⁰¹ In *Chiras*, the Fifth Circuit Court of Appeals decided a student may not require a school to provide every single resource that a student might desire.¹⁰²

However, many courts, including the Supreme Court, have held that the First Amendment grants students the right to inquire into and access information. In *Pico*, the Supreme Court found a constitutional right to receive information as an exercise of the First Amendment. It therefore held that a school could not eliminate materials from a school library.¹⁰³ In *Pratt*, the Eighth Circuit Court of Appeals held that a student has the First Amendment right to be exposed to controversial ideas and not to be limited to exposure of only one viewpoint.¹⁰⁴ In *Cary v. Board of Education of the Adamsarapahoe School District*, the Tenth Circuit Court of Appeals found a right for teachers to use non-obscene materials to instruct students in elective courses.¹⁰⁵

Granted, neither *Pico* nor the cases from other circuits are binding precedent on the First Circuit Court of Appeals. Therefore, the *Griswold* court was not under an obligation to follow these cases to find a constitutionally protected right for students to access and receive the requested information. However, the trend of these other circuits, as

99. *Right to Read*, 454 F. Supp. at 711; *Pratt*, 670 F.2d at 775; *Pico*, 457 U.S. at 866.

100. *Chiras v. Miller*, 432 F.3d 606, 620 (5th Cir. 2005).

101. *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300, 1304 (7th Cir. 1980).

102. *Chiras*, 432 F.3d at 620.

103. *Pico*, 457 U.S. at 867–69.

104. *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 776 (8th Cir. 1982).

105. In a case where high school teachers brought a lawsuit against a school board after the school board banned ten books from elective classes, the Tenth Circuit Court of Appeals held that the banning was constitutional because there was no systemic effort made to “exclude any particular type of thinking or book.” *Cary v. Bd. of Educ.*, 598 F.2d 535, 544 (10th Cir. 1979).

well as the Supreme Court, shows that courts in the United States have found that the right to receive and access information is present in the First Amendment of the United States Constitution.

In addition to the right to receive and access information, some courts have stated that the affirmative actions of authority figures can vest certain people with constitutionally protected rights. Some courts have held that a state may create a constitutionally protected interest as a consequence of taking an action when not compelled.¹⁰⁶ A specific constitutional interest in the First Amendment that the Supreme Court has found generally is for “the right of the public to receive suitable access to social, political, esthetic, moral and other ideas and experiences.”¹⁰⁷

The important question to ask in this situation is whether the placement of the contra-genocide materials in a draft of the Massachusetts Board of Education curricular guide vested in the students the right to access this information. One argument that the school made was that the disputed curricular guide was only a draft, and there was nothing official about an inclusion of the contra-genocide material.

Conversely, it is clear for a period of time that the contra-genocide materials were included in the guide. During this time, Driscoll, the board’s commissioner, believed the materials were suitable for the guide.¹⁰⁸ By all appearances, the guide including the contra-genocide materials would have been approved but for the opposition of the Armenian groups.¹⁰⁹ This shows that if there was never any political pressure placed on Driscoll to eliminate the contra-genocide materials, the students would have been able to access the information. The initial opportunity to access the information would vest in students their First Amendment rights to be exposed to the materials. Placing the contra-

106. Right to Read Def. Comm. v. Sch. Comm., 454 F. Supp. 703, 712–13 (D. Mass. 1978).

107. Red Lion Broad. Co., Inc. v. FCC, 395 U.S. 367, 390 (1969).

108. Griswold v. Driscoll, 616 F.3d 53, 55 (1st Cir. 2010). Note 3, *supra*, mentions that it is possible that Driscoll added in the materials referencing the contra-genocide perspective without board approval and submitted them to the legislative body. *Id.* Regardless of what the actual facts are, Driscoll still took the affirmative action of including the materials on the curricular guide. *Id.* If the materials were offensive to him or students, Driscoll would never have given them the initial approval to submit to the legislature. *Id.* at 55, n. 2.

109. *Id.* at 55.

genocide materials on the guide, even for a limited time, shows Driscoll's intent in allowing students the opportunity to access and receive that information.

Whether it is the inherent right to access information or the vested right the students received when the contra-genocide materials were placed on the curricular guide, the *Griswold* court should have found that the students had a First Amendment right in accessing the contra-genocide materials.

B. The Political Decision to Remove the Contra-Genocide Materials

Finding a right in accessing the contra-genocide materials, the next factor to look at is the rationale behind the deletion of the materials. From the facts of *Griswold*, it appears that the decision to remove the contra-genocide materials was based on political pressure.¹¹⁰ Many courts have found that a school board's decision to exercise its power based on political reasons violates students' First Amendment rights.

In *Pico*, the Supreme Court held that students should be free to receive information as part of the exercise of their First Amendment right of political freedom.¹¹¹ The Court also ruled that school boards may not restrict access to library materials in a partisan or political manner.¹¹² The *Pratt* court took the view that shaping a curriculum in response to pressure from the community unlawfully infringed on students' First Amendment rights.¹¹³ The *Virgil* court also used this reasoning to hold that a decision to remove materials because of the material's contents was constitutional specifically because it was not made due to political pressure.¹¹⁴ Finally, the *Chiras* court took note of these cases, stating that if a school board decided not to purchase certain materials because of political or partisan beliefs, the actions of the

110. While the *Griswold* court tries to minimize the impact of the political pressure, Driscoll intended to submit the guide containing contra-genocide materials to legislative officials. *Griswold*, 616 F.3d at 55. However, after Armenian groups and others wrote letters to the governor, the contra-genocide materials were removed. *Id.*

111. *Bd. of Educ. v. Pico*, 457 U.S. 853, 867 (1982).

112. *Id.* at 869.

113. *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 778–79 (8th Cir. 1982).

114. *Virgil v. Sch. Bd.*, 862 F.2d 1517, 1525 (11th Cir. 1989).

school board would be unconstitutional.¹¹⁵

As mentioned previously, some courts have allowed school boards to infringe on the First Amendment right of students to access information if the schools base their decisions on a compelling governmental interest. The *Hazelwood* court held that this interest had to be related to a legitimate pedagogical concern.¹¹⁶

The question then becomes, what constitutes a legitimate pedagogical concern? In *Hazelwood*, the concern was protecting the privacy of students. In other contexts, the concern has been exposure to obscenity, sexuality, and violent content.¹¹⁷ The Massachusetts education board in *Griswold* never gave a legitimate reason for its decision to eliminate contra-genocide materials from its guide. The commissioner stated only that the guide should not include information that caused disputes and that the board had the discretion to make that decision.¹¹⁸

Looking at the facts in *Griswold*, it is evident that the decision by Driscoll to remove the contra-genocide materials before submission to the board was based on political pressure. It was not until the group of Armenians protested that Driscoll even considered removing the materials from the guide.¹¹⁹

The reasons given for the removal did not have anything to do with obscenity, violence, sexuality, or vulgarity. Instead, the board removed the materials because of political pressure. The ideas expressed in those contra-genocide materials were unpopular, and even though the ideas were premised on a multitude of research, Driscoll still felt the matter of the genocide was settled.¹²⁰

In *Griswold*, the First Circuit Court of Appeals held that even if a school board made a decision to excise materials from its curriculum based on political pressure, the board would not be acting outside of its afforded power.¹²¹ This dismisses the notion that a student’s First

115. *Chiras v. Miller*, 432 F.3d 606, 619–20 (5th Cir. 2005).

116. *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 (1988).

117. *See, e.g., Pratt*, 670 F.2d 771; *Virgil*, 862 F.2d 1517; *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980).

118. *Griswold v. Driscoll*, 616 F.3d 53, 55 (1st Cir. 2010).

119. *Id.*

120. *Id.* at 55.

121. *Id.* at 60.

Amendment rights can be violated when a school restricts access to information as a result of political pressure—a view that runs counter to other courts that have looked at this issue. Therefore, to afford the same First Amendment protection to students that many other federal courts have afforded, the *Griswold* court should have taken more notice of these cases in looking at the decision of the state board to eliminate the contra-genocide materials.

C. The Harm in Eliminating Exposure to Unpopular Information

By allowing the Massachusetts Board of Education to succumb to political pressure and eliminate controversial materials from the curricular guide, the *Griswold* court ignored the essential functions of the First Amendment. One of the principles this country holds dear is the opportunity to express and receive information regardless of how unpopular it may be. This principle has allowed a group to stage a Nazi march through a predominately Jewish community.¹²² This principle has also allowed the publisher of a pornographic magazine to publish jokes about a Reverend having incestuous relationships with his mother.¹²³ It can be argued that those two situations were in poor taste and were offensive. However, that is a trade-off we accept in our society, which takes pride in our constitutional freedoms.¹²⁴

The unpopular materials in *Griswold* were not vulgar or obscene. This differs from the materials in *Zykan*, which the Seventh Circuit Court of Appeals held could be eliminated from a school's curriculum because they violated statutory constraints on objectionable material developed by the school board.¹²⁵ The unpopular materials in *Griswold* were not violent or gruesome. Following the *Pratt* ruling, where the Eighth Circuit Court of Appeals held banned materials were not violent

122. *Vill. of Skokie v. Nat'l Socialist Party of Am.*, 373 N.E.2d 21 (Ill. 1978).

123. *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46 (1988).

124. *See FCC v. Pacifica Found.*, 438 U.S. 726, 745–746 (1978) (“[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas.”).

125. *Zykan v. Warsaw Cmty. Sch. Corp.*, 631 F.2d 1300 (7th Cir. 1980).

and should be restored to the curriculum,¹²⁶ the *Griswold* court should have employed the same logic. The unpopular materials in *Griswold* were also not sexual. This differs from the *Virgil* case, in which the Eleventh Circuit Court of Appeals upheld the elimination of school materials because the school board found the materials to be objectionable in their sexual nature.¹²⁷

The unpopular materials in *Griswold* dealt solely with the factual accuracy of events during a certain time period. Opposing sides often disagree about the actual course of history. In our scholastic world, the most persuasive evidence will prevail. In the court of public opinion, people can take evidence supporting each side and choose to believe the side with more convincing evidence.

Students are disadvantaged when they are not given the opportunity to hear opinions that are unpopular. They do not get to balance opposing sides, consider the evidence and analysis of the facts, and determine which opinion is correct. Without these opportunities, students are not as prepared for the real world as they could be.¹²⁸

D. The Harm of Limiting a Student’s Exposure to Only School-Sanctioned Material

Allowing students to be exposed only to school-sanctioned messages is as harmful as limiting a student’s exposure to unpopular materials. A concept that courts have adopted is that schools are not allowed to cast a pall of orthodoxy over the classroom.¹²⁹ While schools are generally allowed to decide what a student should study, schools cannot prescribe a particular political, national, religious, or cultural belief on students.¹³⁰ The Massachusetts Board of Education has done precisely that by

126. *Pratt v. Indep. Sch. Dist.*, 670 F.2d 771, 778–79 (8th Cir. 1982).

127. *Virgil v. Sch. Bd.*, 862 F.2d 1517, 1525 (11th Cir. 1989).

128. In *Pico*, the Court says that public schools are vital in preparing individuals to participate as citizens in the real world. *Bd. of Educ. v. Pico*, 457 U.S. 853, 864 (1982). The *Pico* Court continued by saying that the right to receive others’ ideas is necessary to the recipient’s exercise of his own First Amendment rights. *Id.* at 867. It follows that if public schools prepare students to act in the real world, and part of that acting is the exercise of First Amendment rights, limiting a student’s access to information hinders the student’s ability to exercise those rights in the real world.

129. *Id.* at 870.

130. *Id.*

succumbing to political pressure and eliminating its Website materials referencing the Armenian genocide contra-genocide viewpoint.

By acting in this manner, the state is not creating independent thinkers. One of the key tools needed to survive in our society is the ability to research, comprehend, and analyze various issues surrounding us. In almost all instances, a unanimous opinion over a particular issue does not exist. Take, for example, elections. Rarely does an important election come down to only one possible candidate. Elections feature multiple candidates with differing views on how to run a government. To make an informed decision, our electorate needs to be able to look at the positions of the candidates and decide which candidate is best suited for the area to be represented.¹³¹

Exposing students to only one prescribed school of thought hinders their abilities to function efficiently in the real world. Teaching students to look at multiple sides of an issue is one of the most important ways to make them efficient thinkers. This prevents students from being puppets of the school or from being forced to say and think only what the school believes. In the real world, students have to think for themselves. It is best to let them practice within the confines of a school.¹³²

E. The Harm of Judicially Mandated School Curriculums

The strongest argument against allowing courts to intervene in cases such as *Griswold* is that courts become the ultimate decision-maker of what students should learn.¹³³ Local decisions are often best decided by

131. See *Buckley v. Valeo*, 424 U.S. 1 (1976). Democracy depends on a well-informed electorate, not a citizenry legislatively limited in its ability to discuss and debate candidates and issues. *Id.* at 49, n. 55.

132. In the Supreme Court case *Keyishian v. Board of Regents*, the Court warned against schools creating a “pall of orthodoxy” in the classroom. *Keyishian v. Bd. of Regents*, 385 U.S. 589, 603 (1967). In essence, the Court said that authoritative selection of acceptable viewpoints in school does not prepare students for life after school. *Id.* The Court further stated that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth out of a multitude of tongues . . .” *Id.*

133. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968) (stating that “Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint.”). However, the Court continued by saying that while courts should not and cannot intervene in matters dealing with the day-to-day operations of schools, courts should step in when basic constitutional rights

those who are closest to the individuals affected by the decisions. Local decision makers are more aware of the community and can use that knowledge in a way that best represents local values and capabilities.

Courts, especially federal courts, are greatly removed from local controversies. They lack familiarity with each individual circumstance and the need for local government to enact certain rules and regulations. While the court itself might not think that a local government is making a wise or informed decision, the court would, in essence, strip the local government from its decision-making capacity by imposing its wisdom on the local community.

It can also be argued that a court imposing its will over a local community is an improper use of judicial authority and is a violation of separation of powers. However, this rule is not absolute. In situations such as the one in *Griswold*, where constitutional rights are limited by the local government, it is important that students have the opportunity to ensure that their rights are protected. This is one of the essential functions of the judiciary—ensuring that all people are afforded a day in court so that they are not forced to bow to the whim of a local government. While replacing local authority with the rule of the courts may be troubling to our society, it is also troubling for a group of people not to have a remedy for an infringement of their rights.

However, it is important for the judiciary to display caution before intervening in school curriculum cases. Should the school ban materials featuring graphic sex, violence, or obscenity, the judiciary would need to leave that decision to the judgment of the school board. In the limited situation where students are restricted access to information because a school board buckled to political pressure, the judiciary needs to intervene.

V. CONCLUSION

The decision of the Massachusetts Board of Education to eliminate contra-genocide materials from its school guide because of political pressure from community members violated First Amendment rights of students. By placing a greater weight on the rights of students to access

are implicated by school actions. *Id.*

and receive information, the First Circuit Court of Appeals should have reached a different conclusion to keep the First Amendment rights of students intact that is more in line with other circuit courts. While the Supreme Court and sister circuits have allowed schools to modify their curriculums to further a compelling governmental interest, these courts have never viewed political pressure as a compelling interest. A decision for the students would have allowed them to be exposed to different, unpopular ideas. While a decision for the students would have resulted in a judicially-mandated curricular guide, that harm is not nearly as great as the harm done by infringing on the students' First Amendment rights. Most importantly, for students to become better prepared to face the real world, a decision for the students would have compelled schools to teach children the skills needed to become informed, independent thinkers.