

Suits Challenging Book “Banning” May Be Better Politics than Law

School boards can't suppress ideas they dislike but do have “broad discretion”

By JOSHUA DUNN

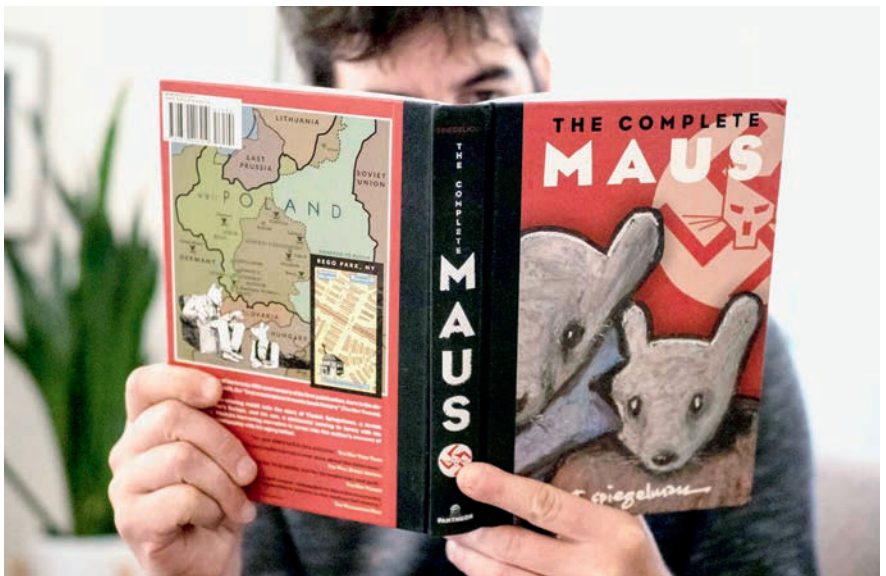
AMERICA IS EXPERIENCING another spasm of conflict over book banning in public schools. In January 2022, the McGinn County Board of Education in Tennessee provoked a nationwide uproar when it unanimously voted to remove *Maus*, a graphic novel about the Holocaust, from its curriculum. The school board said that the book wasn't appropriate because of certain language and a drawing of a nude woman. For the book and its author, Art Spiegelman, the flap generated the kind of publicity that money can't buy.

This episode illustrates how the label “banning” is thrown around too easily. Even if one disagrees with the McGinn County Board's reasons, removing a book from the curriculum is not the same as banning it. In 2020, a Massachusetts teacher boasted that she helped remove Homer's *Odyssey* from her school's curriculum. That, too, was not book banning but an attempt to make her school's curriculum conform to her pedagogical agenda. Similarly, many school districts have removed *Huckleberry Finn* from the curriculum because of its liberal use of an offensive racial epithet. Again, that is not banning. School districts must have the authority to curate class readings. If not assigning a book constitutes banning it, then every time an English class syllabus changes, a book is being banned.

School districts have the authority to make these kinds of curricular choices. There are, however, instances where limiting students' access to materials, particularly in libraries, violates the law. Such questions are already being litigated. Despite assertions of unconstitutional censorship, the scant case law that we have indicates that schools can remove material if they do so out of concerns about its appropriateness for school-age children and not to suppress ideas. That means that most alleged instances of book banning are likely lawful and that restraints on school districts are political rather than legal.

The central case addressing the issue is 1982's *Board of Education v. Pico*. In 1975, the Island Trees Union Free School removed from the school library several books that it regarded as “anti-American, anti-Christian, anti-Sem[i]tic, and just plain filthy.” It also decided that access to a few others should only be allowed with parental approval. In response, several students sued, claiming the board's action violated their First Amendment rights. When the case reached the U.S. Supreme Court, the

justices were badly fractured. Four of them ruled that the action of the board violated the First Amendment because “the right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom.” But four justices ruled that the board had not violated the First Amendment, and Justice Byron White argued that the case should be resolved without reaching the First Amendment question. White concurred with the four justices who ruled



The McGinn County Board of Education voted to remove Maus from its curriculum.

against the school district but wrote his own opinion arguing that, because there were still unresolved factual questions, it was premature to address the constitutional issue. This makes the precedential status of the decision ambiguous.

It is not clear that today's court would treat such a splintered case as binding precedent. Even if it did, school officials have broader latitude under the *Pico* decision than one might think. The plurality opinion, written by Justice William Brennan Jr., held that “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,” but also that “local school boards have broad discretion in the management of school affairs.” The opinion also made it clear that the ruling affects “only the discretion to remove books,” not a school board's discretion “to choose books to add to the libraries of their schools.” A board's discretion, the court held, was only constrained by the principle “that local school boards may not remove books from school library

MARO SIRANOSIAN / AFP VIA GETTY IMAGES

shelves simply because they dislike the ideas contained in those books.” Thus, schools can legally remove books over concern about language or content, as long as the action isn’t motivated by a desire to suppress the book’s ideas.

Those angered by decisions to remove books are still likely to sue. After all, litigation can be useful for generating publicity and applying political pressure, even if a case never makes it to court. For instance, in February 2022 the American Civil Liberties Union of Missouri sued the Wentzville School District because the school board had decided to remove eight books, including Toni Morrison’s *The Bluest Eye*, from school libraries. The ACLU accused the board of removing the books “because of the ideological disagreement members of the District’s school board and certain vocal community members have with the ideas and viewpoints that the books express.” In its filing, however, the ACLU did not provide any evidence that the four board members who voted to remove the books were in fact motivated by a desire to discriminate based on viewpoint. Instead, the ACLU pointed to the alleged viewpoint-based motivations of parents who complained

about the books. Even then, the evidence they cited only showed concerns about graphic depictions of sex, incest, and rape. Unless the ACLU could find other evidence of an attempt to discriminate based on viewpoint, the decision was almost certainly within the board’s authority. Even so, the board reversed its decision to ban Morrison’s book after the lawsuit was filed—proving that litigation can get results even if it might not prevail in court. The board did leave the bans on the other books in place, at least for the time being.

While school boards have significant authority, the Wentzville case reveals the fraught nature of these choices. Just because a board can remove a book does not necessarily mean it should. If the standard is graphic depictions of sex, or rape, or incest, then it is only a matter of time before someone calls for the Bible to be banned. And if a school district obliges, you can be certain that someone will sue.

Joshua Dunn is professor of political science and director of the Center for the Study of Government and the Individual at the University of Colorado Colorado Springs.

The scant case law that we have indicates that schools can remove material if they do so out of concerns about its appropriateness for school-age children and not to suppress ideas.



THE LEADING SOURCE FOR PROS AND CONS OF CONTROVERSIAL ISSUES

We research controversial issues and present them in a balanced and primarily pro-con format at no charge.

Dr. Jonathan Haidt calls ProCon.org the "best antidote" to bias

"Among the biggest obstacles to good thinking is what we psychologists call 'the confirmation bias.' It's the tendency to seek out only information that confirms your existing beliefs. ProCon.org is the best antidote to this bias that I have seen. It's not just that it puts disconfirming information right there on the page, where it can't be missed. It's that ProCon.org models open-mindedness, respect for the complexity of truth, and respect for the sincerity of people on both sides of controversial issues. ProCon.org is a boon to our ailing civic culture."



PROCON.ORG

