

Harris Response– Book Banning – October 11, 2023

As the divided Court decision in *Island Trees v. Pico* illustrates, prohibiting or limiting access to books in public schools is a complex and fraught subject. Given that reality, I greatly appreciated David's sharing the PEN frame of what a book ban means as a focus.

The PEN definition is very helpful insofar as it makes a clear distinction between book bans in general and book bans in schools, a subset of the larger case. Banning books in schools, especially if there is no curricular control or age appropriateness issue, seems plainly unconstitutional and antithetical to the 1st Amendment. As Justice Brennan asserted in *Island Trees*

Local school boards have broad discretion in the management of school affairs, but such discretion must be exercised in a manner that comports with the transcendent imperatives of the First Amendment...

While petitioners might rightfully claim absolute discretion in matters of *curriculum* by reliance upon their duty to inculcate community values in schools, petitioners' reliance upon that duty is misplaced where they attempt to extend their claim of absolute discretion beyond the compulsory environment of the classroom into the school library and the regime of voluntary inquiry that there holds sway.

In addition to PEN other organizations are calling out the recent rash of book banning by boards of education and state legislatures. For example, the [Foundation for Rights and Individual Expression](#) (FIRE) has sounded the alarm. While we clearly face an important challenge, I was a bit puzzled and disappointed by the PEN definition. My puzzlement is that PEN, without any explanation, shifts the Constitutional battleground from the 1st to the 14th Amendment, explicitly pinning its argument on *equal protection*. This is obviously a strategic decision that leads to my disappointment because it unnecessarily narrows the question of book bans by locking in on bans "pertaining to race, gender or sexual orientation." This narrowing make sense if one is trying to shift to a 14th amendment argument, BUT Justice Brennan's framing of bans being suspect if they are "exercised in a narrowly partisan or political manner" casts a much wider protective net, including books on race, gender, or sexual orientation under the free speech umbrella. Note that *Island Trees* struck down the banning racially controversial books (Langston Hughes and Richard Wright. Very curious, I'd say.

This issue gets a little stickier from me when the terrain shifts from the school library to the classroom and when questions of age appropriateness come into play. *Island Trees*, I think, rightly drew a distinction between classroom and library. In the former, there may be curricular matters or schools' responsibility to promote citizenship and social values that could plausibly warrant not including some materials. To take an obvious case some time ago, parents and religious organizations were lobbying for the inclusion of so-called original design texts in biology classes. While I'd be OK including such

materials in a unit on religious freedom, I completely support “banning” them in a biology class. To take a more complicated question, would it be OK to ban *Huckleberry Finn* from a literature class or Queen Bey’s rap, *Sorry* from a music class because they use the “n-word”? All of these should be available in a school library, but the classroom is more problematic for me.

It’s important also to distinguish between elementary, middle, and high schools. Some materials are inappropriate for younger children.

On the question of this being a both-sides issue, I’d say it can legitimately be viewed that way, though the greater threat and bulk of the activity is clearly coming from misguided parent’s groups (like the duo interviewed in Baltimore) or opportunistic Republican politicians (looking at you Governor DeSantis). There are notable cases of uber-progressives attempting to ban books, even in schools. A celebrated example would be Abigail Shrier’s *Irreversible Damage*.