NOTES

SAY GAY: WHY H.B. 1557 IS AN UNCONSTITUTIONAL INFRINGEMENT ON MINORS' FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION

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ABSTRACT

The Supreme Court has historically overlooked the right to receive information in its free speech jurisprudence. But children have clear First Amendment rights in school, including the right to hear. By grounding its argument in the liberty model of free speech, this Note makes a case for how laws like Florida's "Don't Say Gay" bill can be challenged in court. Finally, it illustrates why an outright ban on discussing sexual and gender identity in elementary school classrooms is a violation of kids' right to receive information.

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INTRODUCTION

Florida Governor Ron DeSantis chose to sign H.B. 1557 into law in a school library.[1] The school—Classical Preparatory Academy—is, notably, a public charter school.[2] Classical Prep, in Spring Hill, Florida, is proud of its liberal arts education model: "training solely for a career [does] not prepare students for the complex thought required in a self-governing society," the school's website proclaims.[3] Instead, the "sole purpose" of a liberal arts education "is to train students how to think for themselves."[4] H.B. 1557—also known as Florida's "Don't Say Gay" law—restricts Florida teachers from discussing gender and sexuality in public schools.

Images from the event show DeSantis surrounded by children in plaid and blue uniforms.[5] In a speech immediately following the signing, DeSantis held up a pair of posters with "FOUND IN FLORIDA" emblazoned on the top: first, a gender-neutral gingerbread cookie; second, an image from a children's book about a trans boy.[6] Shaking the poster for emphasis, he spoke about how H.B. 1557 prohibits "classroom instruction about sexuality or things like transgender" and "injecting woke gender ideology" into elementary school classrooms.[7] Finally,

1. *Florida Gov. Ron DeSantis Speaks about 'Parental Rights in Education' Bill*, (WPTVNews broadcast Mar. 28, 2022), https://perma.cc/983H-3YRN.
2. *Id.*
3. *About Classical Prep*, CLASSICAL PREPARATORY SCH., https://perma.cc/2UUV-79MN.
4. *Id.*
5. *See e.g.*, Anthony Izaguirre, '*Don't Say Gay*' *Bill Signed by Florida Gov. Ron DeSantis*, AP NEWS (Mar. 28, 2022), https://perma.cc/9NEX-S7WR.
6. *Florida Gov. Ron DeSantis Speaks about 'Parental Rights in Education' Bill*, *supra* note 1.
7. *Id.*

he closed with the promise to "make sure that parents can send their kids to school to get an education, not an indoctrination."[8]

This Note explores the limits of kids' First Amendment rights in school. Part I places H.B. 1557 in context: over the past several years, anti-LGBTQIA+ laws have proliferated across the country. Part II addresses what could be a legal barrier for any exploration of children's right to receive information. H.B. 1557 attempts to mimic Texas' infamous S.B. 8 legislation, which, by creating a private right of action to enforce restrictions on abortion, circumvented constitutional challenges. Florida's law, however, *is* challengeable in courts. To successfully challenge the law, advocates must be careful to frame their arguments around children—the party with the strongest claim to standing. In doing so, they must create a case for children's rights. Part III examines past decisions and pieces together a comprehensive understanding of First Amendment jurisprudence for minors as outlined by the Court. It explores the scant jurisprudence on children's First Amendment rights, including their right to receive speech. It also identifies a recurring legal question about how different levels of maturity affect kids' ability to realize their rights. Part IV identifies which free speech model provides the best support for any challenges to H.B. 1557. After comparing the two models of free speech most invoked by the Court, this Note makes a case for why First Amendment suits involving queer, trans, and nonbinary kids should be grounded in their right to self-expression. This self-expression model of free speech is necessary for children to affirm their right to receive identity-affirming information. Thus, restricting information about LGBTQIA+ violates kids' First Amendment rights: it limits access to speech that is essential to kids' development of their sense of self. Part V illustrates why an outright ban on discussing sexual and gender identity in elementary school classrooms is a violation of children's right to receive information.

I. ORIGINS AND IMPACT OF "DON'T SAY GAY"

H.B. 1557 is formally titled the "Parental Rights in Education" bill. Altogether, the bill has three provisions. First, it prohibits classroom instruction about sexual orientation or gender identity in kindergarten through eighth grade and restricts classroom instruction on those topics to "age-appropriate" discussions for older kids.[9] In doing so, the law also creates a private right of action for anyone to sue local schools who fail to follow the law.[10] Second, it allows parents to decline healthcare services offered to their children.[11] Finally, it requires schools to provide parents with questionnaires and health screenings prior to

8. *Id.*

9. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West, Westlaw through First Reg. Sess. 2023 of 2023 Legis. Sess.).

10. *Id.* § 1001.42 7(b) (2022).

11. *Id.* § 1001.42 8(c)(1) (2022).

administering them to kids in third grade or below, and empowers parents to prevent the school from administering those screenings to their children.[12]

School boards across the state unfurled new policies attempting to comply with the law. In Leon County, a unanimous board approved a "LGBTQ Inclusive School Guide" which requires schools to alert parents if a "student who is open about their gender identity" uses locker rooms, restrooms, or plans to attend an overnight field trip.[13] The Palm Beach County school board sent a district-wide email soliciting staff to flag any books that touch on sexual orientation, gender identity, or (Governor DeSantis' definition of) critical race theory.[14] Those books were then sent to a "media specialist" and underwent a final, additional review by the school board.[15] Relying on the "Don't Say Gay" text, the school board then restricted fifteen books to grades four and above, including *My Rainbow* (a picture book for ages four-to-eight years about a rainbow-colored wig), *Frankie & Bug* (a middle-school novel that features a trans main character), and three books about trans children written by a transgender man.[16] Teachers in Orange County reported that school officials warned them not to wear rainbows and—if in a same-sex relationship—to remove photos of their spouses or partners from the classroom.[17]

The stakes of the issues discussed in this Note are high. Legislation like H.B. 1557 can further isolate kids who are already marginalized and suffer from it. Trans and nonbinary youth are two to three times more likely than their cisgender peers to experience bullying, threats, and discrimination in schools.[18] They are also two to three times more likely to be depressed than peers.[19] Forty-two percent of LGBTQIA+ youth "seriously considered attempting suicide" in 2021,

12. *Id.* § 1001.42 8(c)(6) (2022).

13. Matt Lavietes, *As Florida's 'Don't Say Gay' Law Takes Effect, Schools Roll out LGBTQ Restrictions*, NBC NEWS (June 30, 2022, 1:18 PM), https://perma.cc/Z8Z6-MKQZ; *see also* LEON COUNTY SCHOOLS, INCLUSIVE SCHOOL GUIDE FOR LCS EMPLOYEES: LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, INTERSEX, AND ASEXUAL (LGBTQIA+) STUDENTS 8, 10 (2022). In this guide, which attempts to outline new standards for LGBTQIA+ students, Leon County's school board cites Florida's Constitution while explaining—somewhat confusingly—that students' "sexual orientation, gender identity or gender expression should not be shared with others without their input and permission . . . unless it is directly related to concerns about the student's health and safety." *Id.* at 10.

14. Giuseppe Sabella, *Were Any of These Books Banned by Palm Beach County Schools? Here's What They Reviewed and Why*, THE PALM BEACH POST (Sept. 2, 2022, 5:00 AM), https://perma.cc/QPV2-Z3TT.

15. *Id.*

16. *Id.* Books like *Letter from a Birmingham Jail* by Martin Luther King Jr. and *The Diary of a Young Girl* by Anne Frank were also reviewed, but ultimately passed muster. Only one book was placed into the highest level of restriction, where it cannot be taught in class but can be checked out from libraries: Nikole Hannah-Jones' *The 1619 Project: Born on the Water*.

17. Lavietes, *supra* note 13.

18. RUSSELL B. TOOMEY, KRISTINA R. OLSON, JESSICA N. FISH, JENIFER K. MCGUIRE, & LAURA BAAMS, GENDER AFFIRMING POLICIES SUPPORT TRANSGENDER AND GENDER DIVERSE YOUTH'S HEALTH 1 (Soc. for Rsch. in Child Dev. ed., 2022).

19. *Id.*

with significantly higher rates among Native, Black, and multiracial youth.[20] Study after study has shown that gender- and sexuality-affirming support for LGBTQIA+ youth significantly decreases depression and suicidal ideation.[21] That support necessarily includes schools recognizing the existence of queer, trans and nonbinary people. By limiting access to information that kids might want and even need to be healthy, laws like H.B. 1557 actively harm children.

H.B. 1557 is a small piece of a larger pattern: a growing number of anti-LGBTQIA+ laws. In 2018, fewer than fifty bills limiting the rights of LGBTQIA+ people were introduced in state legislatures.[22] Compare that to 2022, when 315 bills were introduced.[23] In October 2022, Republican members of Congress proposed a national bill that mimics H.B. 1557 almost exactly.[24] Though this note focuses on H.B. 1557 as a type of case study, the underlying principles can be readily applied to most anti-trans and homophobic legislation governing schools. All of these laws are framed around protecting children. In reality, they accomplish two different things. First, they strip children of their rights. Second, they use the power of the State to marginalize queer, trans, and nonbinary children.

Decisions that censor LGBTQIA+ content in schools affect everyone. Public schools are the governmental entity with the most contact with Americans over an extended period of time.[25] School is one of the few shared experiences that—legally—every American is required to have. During most weekday hours, at least one-sixth of the U.S. population can be found in a public school.[26] That estimate does not include the caregivers who interact with schools on a daily basis.[27]

Schools can be a haven from a difficult homelife, a window into new ideas and values, or a challenging place that is cruel or confusing. For many kids, it is a mixture of all three. And for everyone, it marks a period in which they begin to develop a sense of self, beyond their family. Kids' experiences in schools are inextricably intertwined with who they grow up to be. Thus, actions by local school boards, governors, or the Supreme Court also have reverberating effects: today's kids become tomorrow's decision-makers.

This Note is about elementary and middle school children's (kindergarten through eighth grade) First Amendment rights—specifically, their right to receive information. Given both the historical importance of the First Amendment right

20. THE TREVOR PROJECT, 2021 NATIONAL SURVEY ON LGBTQ YOUTH MENTAL HEALTH 2 (2022).

21. *See generally* TOOMEY, OLSON, FISH, MCGUIRE, & BAAMS, *supra* note 18.

22. Matt Lavietes & Elliott Ramos, *Nearly 240 Anti-LGBTQ Bills Filed in 2022 So Far, Most of Them Targeting Trans People*, NBC NEWS (Mar. 20, 2022), https://perma.cc/FXY8-Q5U3.

23. HRC Staff, *Human Rights Campaign Foundation State Equality Index: 91% of Anti-LGBTQ+ Bills in 2022 Failed to Become Law,* HUM. RTS. CAMPAIGN (Jan. 26, 2023), https://perma.cc/8KAL-4753.

24. *See* Stop the Sexualization of Children Act, H.R. 9197, 117th Cong. (2022).

25. JUSTIN DRIVER, THE SCHOOLHOUSE GATE: PUBLIC EDUCATION, THE SUPREME COURT, AND THE BATTLE FOR THE AMERICAN MIND 9 (2019).

26. *Id.*

27. *Id.*

to free speech in schools, and the subtle but important caveat that the right to *receive* speech does not necessarily implicate action, this Note reasons that children's right to receive information is at least as protected as their right to speak. Therefore, when Governor DeSantis signed the "Don't Say Gay" bill, he unconstitutionally violated kids' First Amendment right to receive information.

II. PARENTS AND PRIVATE RIGHTS OF ACTION

In an analysis of H.B. 1557, Florida's House Judiciary Committee focused on outlining parental rights and only glancingly mentioned minors' privacy rights.[28] At no point did it consider any other liberties. And yet, children do have inherent constitutional rights, independently of their parents.[29] The State has authority to regulate minors' activities, but—depending on the right in question and the age of the child—the level of appropriate government involvement is unclear.[30]

This Note only focuses on the first provision of the bill, which restricts or prohibits classroom instruction about sexual orientation and gender identity.[31] Though the scope of this Note is limited, the healthcare and screening provisions of the bill are rife with material for academic papers. Those provisions also directly expand parental rights in public school settings. But the first provision emphatically does not. In fact, the only two actors in H.B. 1557 (or "Don't Say Gay") are kids and the State.[32] The law neither explicitly nor implicitly protects parents. The private right of action is open to *anyone*, not just parents of kids in a school. So why does Governor DeSantis describe H.B. 1557 as "put[ting] power back in the hands of parents"?[33] DeSantis is harnessing the power of parental rights—a strong conservative rallying cry—to obscure the fact that the law constitutes a state determining what is and is not appropriate for kids to be exposed to. In short, it is a governmental reach into a private sphere, into kids' most personal right to "define one's own concept of existence, of meaning," by teaching state-imposed morals in schools.[34]

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28. STAFF OF FLA. H.R. JUD. COMM. & FLA. H.R. EDUC. & EMP. COMM., 2022 LEG., REG. SESS., ON H.B. 1557, at 2–3 (2022). Despite the fact that state and federal constitutional protections "extend to minors," those rights "do not invalidate a state's effort to protect minors from the conduct of others nor do they necessarily override the fundamental rights of parents related to child rearing." *Id.*

29. *See* Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52, 74 (1976) ("Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

30. *See id.* at 74–75. Danforth reflects this tension: the Court notes that "[c]onstitutional rights do not mature and come into being magically only when one attains the state-defined age of majority;" it also simultaneously bans "blanket" requirements for parental consent of minor abortions, while also cautioning that not "every minor, regardless of age or maturity, may give effective consent."

31. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West, Westlaw through First Reg. Sess. 2023 of 2023 Legis. Sess.).

32. FLA. STAT. ANN. § 1001.42(8)(c)(3) (West, Westlaw through First Reg. Sess. 2023 of 2023 Legis. Sess.).

33. News Release, Governor Ron DeSantis, 46th Governor of Florida, *Governor Ron DeSantis Signs Historic Bill to Protect Parental Rights in Education*, (Mar. 28, 2022), https://perma.cc/769K-9LLE.

34. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

A. S.B. 8 LEGISLATION: A FLAWED MODEL

H.B. 1557 looks similar to S.B. 8, a law that created a private right of action for people to sue abortion providers in Texas.[35] However, Florida's "Don't Say Gay" law fails to create the same legal loophole. S.B. 8 is an example of brilliant, if devastating, drafting: it was designed to circumvent judicial review and, by doing so, allow an unconstitutional law to stand.[36] The law prohibited physicians from aborting fetuses after detecting a heartbeat, but did not authorize state officials to bring criminal prosecutions or civil actions.[37] The Court held that, because state officials were not responsible for enforcing the law in any way, it was impossible to file an injunction against them.[38] H.B. 1557 attempts to employ a similar private attorney general tactic, but fails. Unlike the possible defendants in S.B. 8 (who were limited to executive licensing board officials, effectively rendering suits pointless),[39] H.B. 1557 still allows suits against schools, teachers, school boards, and potentially the state of Florida: each of those actors is actively involved in promulgating and enforcing the legislation, even if they are not responsible for enforcing liability under the law.

B. HOW TO FRAME STANDING IN H.B. 1557 CHALLENGES

In March 2022, a group of plaintiffs filed suit against Ron DeSantis, the Florida Board of Education and its members, the Commissioner of Education of Florida, the Florida Department of Education, and five county school boards.[40] By October 2022, the case had already been dismissed twice for lack of standing, as the suit originally relied on teachers and parents as the lead plaintiffs.[41] Teachers have almost no First Amendment rights in school.[42] Parental rights in curricular decisions are, admittedly, varied and complex.[43] But the District Court Judge hearing the case made her views on parental rights quite clear: the parents' claimed injuries are only tangentially related to the law.[44] In late October of 2022, the plaintiffs refiled. Included in the amended complaint is the argument

35. TEX. HEALTH & SAFETY CODE ANN. §§ 171.201–.212 (West, Westlaw current through 2023 Reg. and 2nd Called Sess. of the 88th Leg.).

36. Note, *Private Attorneys General and the Defendant Class Action*, 135 HARV. L. REV. 1419, 1440 (2022). Note that, at that time—shortly before the Supreme Court overturned *Roe v. Wade*—the six-week abortion ban promulgated by the law was blatantly unconstitutional.

37. TEX. HEALTH & SAFETY CODE ANN. § 171.204(a) (West, Westlaw current through 2023 Reg. and 2nd Called Sess. of the 88th Leg.).

38. *See generally* Whole Woman's Health v. Jackson, 142 S. Ct. 522 (2021).

39. *Id*. at 535.

40. Complaint at 1, Equality Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-00134 (N.D. Fla. Mar. 31, 2022).

41. Mike Schneider, *Judge Again Tosses Challenge to Florida's Don't Say Gay Bill*, AP NEWS (Oct. 21, 2022), https://perma.cc/SE5E-GFFH.

42. *See generally* Garcetti v. Ceballos, 547 U.S. 410 (2006) (holding that public employees do not retain First Amendment protection for speech as part of their official job duties).

43. They are also beyond the scope of this paper.

44. Order on Motion to Dismiss at 11, Equality Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-00134 (N.D. Fla. Mar. 31, 2022) ("The [injuries parents claim are not related to] classroom instruction on

that minors' First Amendment right to receive information is violated by H.B. 1557.[45] This suit (or at least, aspects of it) will likely stick. There is a clearly established private right of action under the First Amendment.[46] In *Island Trees Union Free School District No. 26 v. Pico*, the Court held that kids have the First Amendment right to receive information in school.[47] Though most of the facts of the case involved libraries, lower courts have extended it to school curriculums.[48] Thus, the foundation is strong: kids are the best plaintiffs to challenge the suit as they are the ones most directly affected by the law.

III. MINORS' CONSTITUTIONAL RIGHTS

Part III begins by examining how the Court has differentiated between the constitutional rights of minors and adults. Many of children's constitutional rights are largely undefined, though they seem to depend partially on a minor's level of maturity and her capacity to exercise those rights. The section then explores the Court's jurisprudence involving constitutional rights in schools. First, it makes clear that children *do* have First Amendment rights in schools. Next, it identifies scenarios where those rights may be limited. It emphasizes that the right to receive information applies to students, and any court's inquiry into whether that right was abridged must include examining the intent of those who created the law. Finally, it identifies the free speech model that is best suited to understand kids' right to receive identity-affirming information.

A. SUPREME COURT JURISPRUDENCE AND MINORS' RIGHTS

There are three primary actors involved in legal questions about public school: parents, kids, and local governments. Historically, courts and scholars have treated parents and kids as one family unit, assuming overlapping interests.[49] But that approach belies both the complexity of family relationships and the inherent rights that minors possess. Those rights—the

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sexual orientation or gender identity, even if they involved parties who mention a sexual orientation or gender identity. . . . [T]he act is not vague is [sic] it applies to them.").

45. Second Amended Complaint at 51, Equality Fla. v. Fla. State Bd. of Educ., No. 4:22-cv-00134 (N.D. Fla. Mar. 31, 2022).

46. F. Andrew Hessick, *Standing, Injury in Facts, and Private Rights*, 93 CORNELL L. REV. 275, 287 (2008) ("The Constitution also provides private rights . . . . Other rights, such as the First Amendment rights to freedom of speech and to free exercise of religion and the Eighth Amendment right to be free from cruel and unusual punishment, are well known.").

47. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867–68 (1982) ("[T]he right to receive ideas is a necessary predicate to the *recipient's* meaningful exercise of his own rights of speech, press, and political freedom . . . . As we recognized in *Tinker*, students too are beneficiaries of this principle.") (emphasis in original).

48. *See e.g.*, Monteiro v. Tempe Union High Sch. Dist., 158 F.3d 1022, 1027 n.5 (9th Cir. 1998).

49. *See* Catherine J. Ross, *An Emerging Right for Mature Minors to Receive Information*, 2 U. PA. J. CONST. L. 223, 225 (1999) ("All too often, discussion about constitutional rights and children has focused on the complex relationship between the state and the family as a whole, minimizing the potential divisions within the family unit.").

application and protection of them—introduces a fourth, looming actor into the school's question: the Supreme Court.

Adults possess full constitutional rights, regardless of their understanding of them.[50] Children, however, are different. They also possess constitutional rights, but the parameters of those rights—and who has custodial control over them—are largely undefined.[51] Sometimes, these rights change depending on the context. For example, minors have practically no First Amendment rights inside their parents' homes: they can be forced to practice a certain religion, barred from reading certain books, and punished for saying specific words or expressing certain ideas. This is principally because parents are, despite the protestations of certain frustrated teens, not state actors.[52] It also seems as though there is contextual deference depending on the *custodians* of children. Parental rights are intertwined with children's rights;[53] courts tasked with determining the reach of children's legal liberties must contend with the roadblocks presented by parental control.[54] Finally, unlike adults, the extent of children's constitutional rights depends on their age or maturity: their ability to exercise those rights is somehow tied to their understanding of the rights themselves.[55]

In *Bellotti v. Baird*, the Supreme Court identified three reasons why children's constitutional rights are different from adults: "the particular vulnerability of children; their inability to make critical decisions in an informed, mature manner; and the importance of the parental role in child rearing."[56] The first two reasons are intertwined: together, they represent concern about *action*, about children's capability to act on (potentially bad) choices. Still, in many situations, children have constitutional rights that are "virtually coextensive" to those of adults.[57]

Action (and possibly maturity) was central to the *Bellotti* Court's decision: the Justices held that a Massachusetts law requiring parental consent if an unmarried "mother" under eighteen years old wished to get an abortion was unconstitutional.[58]

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50. *Id*. at 223.

51. *See* Jonathan David Shaub, *Children's Freedom of Speech and Expressive Maturity*, 36 LAW & PSYCHOL. REV. 191, 193 (2012) ("The Court has never articulated a coherent theory of children's expressive rights, instead issuing opinions confined to a specific category or context of speech or opinions that evade the issue altogether by focusing on adult free speech rights.").

52. Ross, *supra* note 49, at 243.

53. *See generally* Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that parents have a right to control the education of their children).

54. *See, e.g*., Planned Parenthood of Cent. Mo. v. Danforth, 428 U.S. 52, 74 (1976) (wrestling with "whether there is any significant state interest in conditioning an abortion on the consent of a parent or person *in loco parentis*" in the case of a pregnant minor).

55. Ross, *supra* note 49, at 223 ("Children also possess constitutional liberties, but each liberty asserted by a minor may ripen at different times and in different contexts."). *See also* Planned Parenthood of Cent. Mo., 428 U.S. at 74 ("Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess constitutional rights.").

56. Bellotti v. Baird, 443 U.S. 622, 634 (1979).

57. *Id*. at 634.

58. *Id*. at 625, 651.

Writing for the plurality, Justice Powell reasoned that while children are "not beyond the protection of the Constitution," their liberty interests must be balanced with those of their parents' and the State.[59] Powell then outlined how the vulnerability of children provides minors with similar Fourteenth Amendment due process rights as adults, but also a legal system tailored to their needs for "concern. . . sympathy and. . . paternal attention."[60] Next, he asserted that the State may limit minors' freedom of choice involving decisions "with potentially serious consequences."[61] Children, he explained, "lack the experience, perspective, and judgment" to avoid making detrimental decisions.[62] Citing *Ginsberg v. New York*, Powell took a paternalistic approach: the State exists to protect children from the danger of making a bad decision.[63] His reasoning appears to be grounded in the idea that children's ability to understand the effects of exercising their rights is tied to their capability to do so.

Finally, Powell addresses the rights of parents. Here, his analysis is somewhat muddled. Protecting parental rights requires that minors cede some of their rights.[64] Children are not "mere creature[s] of the state."[65] Parents have both a right and a duty to teach, guide, and inspire their children to be "socially responsible citizens."[66] Rephrased, Powell's argument begins to look circular. Parents, instead of the State, should have ultimate control over their children, because *parents are best suited to create good citizens*. Parental control, to Powell, is rooted in the political.[67] Under his reasoning, the nature, character, and direction of the State become the ultimate justifications for limiting children's rights.[68]

Powell's argument that schools act as democratic training grounds is not unique to him.[69] But by tying parental rights to the democratic citizenship, he

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59. *Id.* at 633–634. *See also id.* at 634 ("The unique role in our society of the family . . . requires that constitutional principles be applied with sensitivity and flexibility to the special needs of parents and children.").

60. *Id.* at 635. The Court points to juvenile courts as evidence that juvenile offenders may be treated differently from adults, and thus may also have separate legal processes that bypass the requirements of both criminal trials and administrative hearings.

61. Bellotti v. Baird, 443 U.S. 622, 635 (1979).

62. *Id.*

63. *Id.* at 636. Underlying this argument is the assumption that exposure to pornography would lead minors to make *sexual* decisions. Given both the context of the case—an unmarried minor seeking an abortion—and the ultimate holding, the choice to draw on *Ginsberg* is a little confusing.

64. *See id.* at 637–638 ("[T]he guiding role of parents in the upbringing of their children justifies limitations on the freedoms of minors. . . . Legal restrictions on minors, especially those supportive of the parental role, may be important to the child's . . . participation in a free society.").

65. *Id.* at 637.

66. *Id.* at 638.

67. Bellotti v. Baird, 443 U.S. 622, 638 (1979). Powell's justification for parental control in *Bellotti* mimics justifications for minors' free speech in schools used in *Board of Education v. Pico*, a case occurring three years later. I will return to this point later in this Note.

68. *Id.* at 642–43. One final note about Powell's decision: Abortion, Powell reasoned, is unlike many decisions facing minors because it "simply cannot be postponed." *Id.* at 643.

69. *See e.g.*, Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954) ("Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society.").

therefore limits inquiries about the scope of children's constitutional rights in schools to two actors: kids and the State. Given that the exact scope of local authority to regulate curricula is unsettled, it is important to create clear rules around what rights kids can claim.[70]

B. TINKER, GINSBERG, *AND* BROWN*: ESTABLISHING MINORS' FIRST AMENDMENT RIGHTS*

Powell's reasoning in *Bellotti* echoed the Court's jurisprudence in earlier cases—namely, *Ginsberg* and *Tinker v. Des Moines Independent Community School District*—which dealt directly with minors' First Amendment rights. *Brown v. Entertainment Merchants Association,* decided thirty-two years after *Bellotti*, had no such lofty reasoning. Instead, the Court reaffirmed its commitment to minors' right to receive information, even for base information like violent video games.[71]

In *Ginsberg*, the Court drew a bright line through what was previously murky jurisprudence. Children have a clear limit on their First Amendment rights: they may not be sold sexually explicit materials that might otherwise be legal for adults.[72] Subjecting the law to rational basis review, the Court held that there was a rational relationship between banning obscenity and protecting minors from "harm."[73] Thus, the Court subordinated children's right to receive obscene materials to the State's interest in protecting them from such materials.

In *Tinker*, the Court ruled the other way, holding that banning students from wearing black armbands in protest of the Vietnam War was an unconstitutional violation of their First Amendment rights.[74] In one of the most famous lines in education jurisprudence, Justice Fortas wrote that neither students nor teachers "shed their constitutional right to freedom of speech or expression at the schoolhouse gate."[75] *Tinker* outlined two limits to students' First Amendment rights: free speech should not interfere with the rights of other students and it should not substantially disrupt school.[76] The disruption requirement (also known as the "substantial disruption" test) did not seem to include the behavior of students or staff in *reaction* to the Tinkers. While none of the armband-wearing students

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70. *See* Dylan Salzman, *The Constitutionality of Orthodoxy: First Amendment Implications of Laws Restricting Critical Race Theory in Public Schools*, 89 U. CHI L. REV. 1069, 1073 (2022) ("As the two of the most recent federal appellate opinions on this question have noted, courts have granted widely differing degrees of discretion to state officials when regulating the content of curricula."); *see e.g.*, Arce v. Douglas, 793 F.3d 968, 982–83 (9th Cir. 2015) (noting that while the Eleventh and Eighth Circuits require schools to "provide legitimate reasons for limiting students' access to information," the Seventh and Fifth Circuits give the government great leeway in "curtailing school curricula").

71. *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 789 (2011).

72. Ginsberg v. State of N.Y., 390 U.S. 629, 637 (1968) ("We conclude that we cannot say that the statute [banning sale of 'girlie magazines' to minors] invades the area of freedom of expression constitutionally secured to minors."); *but c.f. id.* at 650. (Douglas, J., dissenting) ("Although I seriously doubt the wisdom of trying by law to put the fresh, evanescent, natural blossoming of sex in the category of 'sin.'").

73. *Id.* at 643.

74. Tinker v. Des Moines Independent Community School District, 393 U.S. 503, 514 (1969).

75. *Id.* at 506.

76. *Id.* at 513.

behaved disruptively, other students commented, teased, and threatened both the protesters and counter-protestors.[77] One math teacher claimed his lesson was "wrecked" by disputes with Mary Beth, though it seems that the ruckus was caused either by the other students or, potentially, the teacher himself.[78]

Unlike *Tinker*, *Brown* involved some decidedly low-brow content. California passed a law prohibiting the sale or rental of violent video games to minors.[79] A banned game was defined as one that included violence that appealed to minors' "deviant or morbid interest[s],"' that violated some kind of community standard of decency, all while lacking "serious literary, artistic, political, or scientific value for minors."[80] In *Brown*, the video games involved characters who were "dismembered, decapitated, disemboweled, set on fire, and chopped into little pieces," characters whose "[b]lood gushes, spatters, and pools."[81] But, despite the vividity of the violence, the Court reasoned that "disgust [wa]s not a valid basis for restricting expression."[82] Although a state may have legitimate power to protect children, "that does not include a free-floating power to restrict the ideas to which children may be exposed."[83] Minors, the Court held, are entitled to First Amendment protections: The government may "bar public dissemination of protected materials" only in "relatively narrow and well-defined circumstances."[84]

There is one notable difference between *Ginsberg* and *Brown*, and *Tinker*: the first two cases dealt with minors' right to receive information generally, while the second dealt with their right to self-expression in schools. Still, *Tinker* marked a radical re-envisioning of students' rights. As Justin Driver wrote in his legal history of U.S. public schools, the case "reconceptualized" both students and schools by insisting that "students must be permitted to exchange independent ideas with one another. . . because those exchanges constitute an essential part of the educational process itself."[85] And yet, in the intervening years, the Court has generally retreated from *Tinker*'s sweeping holding and sided with schools.[86] These holdings can help advocates understand what future speech limits could be upheld by the Court.

77. *Id*. at 517.
78. *Id*.
79. Brown v. Entertainment Merchants Ass'n, 564 U.S. 786, 789 (2011).
80. *Id*. at 789.
81. *Id*. at 818 (Alito, J., dissenting).
82. *Id*. at 798.
83. *Id*. at 794.
84. *Id*. (citing Erznoznik v. Jacksonville, 422 U.S. 205, 212–213 (1975)). In a footnote, the majority reaffirms *Erznoznik* while also rebuking Justice Thomas' dissent: persons under 18 have the "constitutional right to speak or be spoken to without their parents' consent." *Id*. at n. 3.
85. DRIVER, *supra* note 25, at 73.
86. *See* Paul Forster, *Teaching in a Democracy: Why the Garcetti Rule Should Apply to Teaching in Public Schools*, 46 GONZ. L. REV. 687, 690 (2010).

C. JURISPRUDENCE FOLLOWING *TINKER*

1. Bethel School District No. 403 v. Fraser

In *Bethel School District No. 403 v. Fraser*, the Court found that schools can discipline students for sexually explicit speech made during a school assembly.[87] Matthew Fraser, a student at Bethel High School in Washington, stood in front of 600 students and delivered a one-minute speech nominating a fellow student for school council.[88] It was a roaring success: his candidate won 90 percent of the vote.[89] But Fraser's speech was also laden with sexual innuendo (inspired, he claimed, by the television program "Three's Company").[90] In response, the school suspended Fraser for three days for his "obscene" language: a suspension which the teenager then challenged in court.[91]

Relying on *Tinker*, both the district court and the Ninth Circuit sided with Fraser.[92] The Court of Appeals for the Ninth Circuit warned that allowing school districts total control over determining "decent" discourse would "increase the risk of cementing white, middle-class standards for. . . proper speech and behavior in public schools."[93] But Chief Justice Burger, writing for a seven-justice majority, promptly reversed.

Burger—surprisingly—seemed to borrow from *Tinker's* reasoning, noting that the speech could be "insulting to teenage girl students" and "seriously damaging" to the younger members of the audience, particularly those who were "14 years old and on the threshold of awareness of human sexuality."[94] (Here, too, we are reminded of Powell's reasoning in *Bellotti*: different levels of maturity affect kids' right to hear certain information). One teacher, he noted, "found it necessary to forgo a portion of the scheduled class lesson," and spent that time discussing the speech with her students.[95] And yet, despite the analysis, Burger refrained from invoking the substantial disruption test outlined by *Tinker*. Instead—writing that that the purpose of public schools is to inculcate "fundamental [democratic] values of habits and manners of civility"—he held that the First Amendment does not prohibit school officials from punishing "vulgar and lewd speech" that undermines "the school's basic educational mission."[96]

Drawing from *Pico* and *Ginsberg*, Burger reasoned that school boards have authority to remove "vulgar" books from library shelves and that minors do not have a First Amendment protection to receive "sexually oriented" material.[97] He

87. *See* 478 U.S. 675, 677–80 (1986).
88. *Id*. at 677.
89. DRIVER, *supra* note 25, at 92.
90. DRIVER, *supra* note 25, at 92.
91. *Fraser*, 478 U.S. at 679.
92. *Id*.
93. *Id*. at 680.
94. *Id*. at 683.
95. *Id*. at 678.
96. *Id*. at 681, 685.
97. *Id*. at 684.

interpreted that, combined, these cases recognize the right of school to act as parents would and protect children "from exposure to sexually explicit, indecent, or lewd speech."[98]

Scholars characterize Burger's opinion as "suffused with slipshod reasoning" and "lack[ing] analytical clarity."[99] Twenty years later, Chief Justice John Roberts would dryly note that "[t]he mode of analysis employed in *Fraser* is not entirely clear."[100] The opinion is a sharp contrast to *Tinker*, which emphasized the importance of tolerating even uncomfortable or unpleasant speech.[101] Instead, *Fraser* rejected those values in favor of "decorum, etiquette, and politesse."[102] This pearl-clutching by the Court was particularly surprising given the content and context of what was said. Fraser's short speech contained no expletives or explicit sexual words (although, admittedly, the innuendo was not subtle).[103] It was reprinted in its entirety by both the "famously prudish" *New York Times* and Bethel High's school newspaper, which, unlike Fraser, escaped punishment.[104]

2. Hazelwood School District v. Kuhlmeier

Two years later, in *Hazelwood School District v. Kuhlmeier*, the Court held that schools may censor student speech in school-sponsored activities so long as their actions are reasonably related to legitimate pedagogical concerns.[105] *Spectrum*, the high school newspaper, was published by members of Hazelwood East's Journalism II class.[106] Two days before the May issue, the principal removed two articles from the paper: one about the impact of divorce on students at the school, and one reporting on three anonymous students' experiences with pregnancy.[107] Writing for the majority, Justice White opened his opinion by nodding to *Tinker* before distinguishing it.[108] *Tinker* was a question of school authority over students' personal expression, whereas the case before the Court involved school authority over a school-sponsored publication "designed to impart particular knowledge or skills to student participants."[109] Applying rational basis review, Justice White wrote that the school was entirely within its rights to "refuse to disseminate student speech" that does not meet certain

98. *Id*.
99. DRIVER, *supra* note 25, at 98.
100. Morse v. Frederick, 551 U.S. 393, 404 (2007).
101. DRIVER, *supra* note 25, at 94.
102. *Id*.
103. Bethel School District No. 403 v. Fraser, 478 U.S.675, 687 (1986); *see also* DRIVER, *supra* note 25, at 92.
104. DRIVER, *supra* note 25, at 101.
105. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 273 (1988).
106. *Id*. at 262.
107. *Id*. at 263.
108. *Id*. at 270, 271. ("The question whether the First Amendment requires a school to tolerate particular student speech—the question that we addressed in *Tinker*—is different from the question whether the First Amendment requires a school affirmatively to promote particular student speech.").
109. *Id*. at 271.

standards, whether those standards involve bias, profanity, or merely ungrammatical writing.[110]

Kuhlmeier is frequently cited by lower courts when evaluating state curricular decisions.[111] But those citations are often in error: the holding was much narrower than many courts interpret it.[112] Instead of a broad ruling on when to regulate speech in curricular contexts, this case merely emphasized the significant authority schools have when acting as publishers. *Kuhlmeier* does not set a precedent beyond the confines of a school-sponsored paper, essay, or exam.[113] Justice White's focus on *Spectrum* as an extension of the curriculum—where students were "taught by a faculty member during regular class hours. . . [and] received grades and academic credit for their performance in the course"—distinguished this case from a scenario involving an independent student-run paper.[114] *Kuhlmeier* gives us a narrow holding to add to our student free speech cannon: schools may limit student speech in school-sponsored activities so long as the reasoning is grounded in educational principles.

3. Morse v. Frederick

Nearly twenty years after *Kuhlmeier*, the Court added to its limited jurisprudence on students' First Amendment rights. In *Morse v. Frederick*, the Court held that a school could punish students for speech advocating illegal drug use.[115] Joseph Frederick, a senior at Juneau-Douglas High School, waved a 14-foot banner trumpeting "BONG HiTS 4 JESUS" during a class field trip.[116] Accepting the school's reasoning that "'bong hits' is. . . a reference to a means of smoking marijuana" (which, at the time, was illegal in Alaska,) Chief Justice Roberts interpreted the banner as "outright advocacy" of illicit drug use and not, as the dissent claimed, political speech.[117]

Morse builds off *Fraser*'s shaky framework, solidifying the demise of the *Tinker* "substantial disruption test."[118] Roberts' reasoning has two steps: given both the "special characteristics of the school environment" and that deterring kids' drug use is "compelling," schools can restrict student speech that promotes

110. *Id*.
111. Salzman, *supra* note 70, at 1077.
112. *Id*. at 1078.
113. *Id*.
114. Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260, 268 (1988).
115. Morse v. Frederick, 551 U.S. 393, 410 (2007). Although not part of the majority opinion, Justice Thomas' concurrence is also noticeable, if only for the (unheeded) call to overturn *Tinker* because "the Constitution does not afford students a right to free speech in public schools." *Id*. at 419 (Thomas, J., concurring).
116. *Id*. at 397.
117. *Id*. at 398, 402.
118. *Id*. at 394, 405 ("*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute.").

illegal drug use.[119] The *Morse* holding is explicitly limited. Roberts rejects the petitioners' request to broaden illicit speech to "offensive" speech.[120]

4. What Remains of *Tinker*'s First Amendment Protections?

Given *Fraser*, *Kuhlmeier*, and *Morse*, what is left of *Tinker*'s broad protection of student First Amendment rights? Very little, according to some scholars.[121] But others argue that the cases should be read as limited to holdings in "particular areas."[122] *Fraser* suggests that sexually explicit speech—even in the context of political speech and voluntary student activities—can be broadly limited. *Kuhlmeier* holds that schools may censor student speech in school-sponsored activities, such as a newspaper published by a journalism class. Finally, *Morse* tells us that students have no First Amendment right to promote illegal drug use.

These cases help narrow any inquiry into kids' First Amendment rights. Together, they coalesce into a series of unprotected zones.[123] Unlike adults, kids cannot expect constitutional rights around sexually explicit speech and speech that promotes illegal drug use.[124] School assemblies and school-sponsored activities are not free speech zones, either. But beyond those limits, *Tinker* should apply. Students do not abandon their constitutional rights at the schoolhouse gate.

D. *PICO* AND STUDENTS' RIGHT TO HEAR

From the perspective of children, "Don't Say Gay" laws implicate a specific subset of First Amendment jurisprudence: the right to receive information. One case—*Island Trees Union Free School District No. 26 v. Pico*—has been enormously influential in establishing and outlining that right.[125] Unlike the cases

119. *Id.* at 407, 408.

120. *Id.* at 409.

121. *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights at the Schoolhouse Gates: What's Left of Tinker*, 48 DRAKE L. REV. 527, 530 (2000) ("[I]n the three decades since *Tinker*, the courts have made it clear that students leave most of their constitutional rights at the schoolhouse gate."); *but cf.* DRIVER, *supra* note 25, at 125 ("Reports of *Tinker's* demise, however, have been greatly exaggerated. While the Court's post-*Tinker* opinions should not be dismissed as inconsequential, neither should they be viewed as draining student speech of all vitality.").

122. DRIVER, *supra* note 25, at 125.

123. *See also* Mahanoy Area Sch. Dist. v. B.L., 141 S.Ct. 2038, 2043 (2021) ("This Court has previously outlined three specific categories of student speech that schools may regulate in certain circumstances: (1) "indecent," "lewd," or "vulgar" speech uttered during a school assembly on school grounds . . . (2) speech, uttered during a class trip, that promotes "illegal drug use" . . . and (3) speech that others may reasonably perceive as "bear[ing] the imprimatur of the school," such as appearing in a school-sponsored newspaper.").

124. In *Brown v. Ent. Merch.'s Ass'n*, the Court refused to allow limits on minors' access to extremely violent video games. ("No doubt a State possesses legitimate power to protect children from harm . . . But that does not include a free-floating power to restrict the ideas to which children may be exposed.") 564 U.S. 786, 794–95 (2011). This author would be interested to read a piece analyzing why the *Brown* Court was so concerned about the impact of sex on young minds, but not violence. Unfortunately, that analysis is beyond the scope of this paper.

125. Note that the holding was only a plurality holding, and thus should not be interpreted as binding precedent. However, lower courts still look to it for guidance.

above, *Pico* bucked the post-*Tinker* trend of narrowing students' right to free speech. In 1975, a group of parents from Nassau County, Long Island, attended a conference sponsored by Parents of New York United (shortened to the questionable misnomer PONYU), a politically conservative organization focused on education law.[126] The PONYU attendees were given a list of "objectionable" books.[127] Somehow, that banned list ended up in the school board's hands. It removed nine books from the school library and curricular assignments for being "anti-American, anti-Christian, anti-[Semitic], and just plain filthy."[128] The board argued that its actions protected children from the "moral danger" posed by these books.[129] Unlike the rules promulgated by Florida's ban, this school district's policies allowed teachers to discuss the removed books and the ideas expressed in them.[130] However, they could not assign or suggest the books "in connection with schoolwork."[131]

That distinction is both important and, frustratingly, completely overlooked by the Court. Citing precedent that established constitutional limits on the State's power to control the curriculum, the Court emphasized that their decision only applied to library books, rather than books that students are required to read.[132] The Justices never addressed the fact that the case included books assigned for schoolwork and gave no reasoning as to their omission from their holding. In fact, it emphasized that school boards have "broad discretion" over their schools' curriculum.[133] But that discretion "must be exercised in a manner that comports with the transcendent imperatives of the First Amendment."[134]

The plurality opinion, written by Justice Brennan, outlines the most comprehensive argument for children's right to receive information: "[t]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom. . . students too are beneficiaries of this principle."[135] But the resulting *Pico* test is somewhat unclear: intent

126. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 856 (1982).

127. *Id*. These books were *Slaughterhouse Five*, by Kurt Vonnegut, Jr.; *The Naked Ape*, by Desmond Morris; *Down These Mean Streets*, by Piri Thomas; *Best Short Stories of Negro Writers*, edited by Langston Hughes; *Go Ask Alice*, of anonymous authorship; *A Hero Ain't Nothin' But A Sandwich*, by Alice Childress; *Soul On Ice*, by Eldridge Cleaver; and *A Reader for Writers*, edited by Jerome Archer. One book—*The Fixer* by Bernard Malamud—was on PONYU's banned books list but only appeared in the high school curriculum and not the library itself. *Pico*, 457 U.S. at 853, n.3, 5.

128. *Id*. at 857.

129. *Id*.

130. *Id*. at n.12.

131. *Id*.

132. *Id*. at 861 (referencing Meyer v. Nebraska, 262 U.S. 390 (1923) and Epperson v. Arkansas, 393 U.S. 97

(1968), both of which struck down state law provisions that banned teaching of foreign languages and evolution in classrooms).

133. *Pico*, 457 U.S. at 863.

134. *Id*. at 864.

135. *Id*. at 867–68.

becomes the deciding factor.[136] If school officials removed books because they intended to suppress ideas they disagreed with, then they violated students' First Amendment rights.[137] But if the removal was shown to be because the books were "pervasively vulgar" or "educationally unsuitable," then there was no abridgement of students' constitutional protections.[138] In his opinion, Brennan was particularly convinced by the fact that in earlier proceedings, school officials conceded that the book removal was based on their "personal values, morals, [and] tastes," all shaped by their political philosophy.[139]

Chief Justice Burger, writing for the dissent, took issue with Brennan's educational suitability test, calling it a "standardless phrase."[140] He also challenged Brennan's political distinction as additionally meaningless, arguing that all education decisions are, by nature of public education in this country, political.[141] While Burger may be right that Brennan's proffered test lacked specificity, his argument slips past more troublesome facts, including that PONYU—a conservative lobbying organization—seems to have had a direct impact on local curriculums.

Regardless of the clarity of this test, *Pico* cemented the idea that children's First Amendment right to speak necessarily includes a First Amendment right to *hear*. However, the Court has historically overlooked the right to receive information when evaluating challenges to free speech.[142] For advocates of children's rights, it may be time to dust off the old doctrine.

E. STEPPED-CAPACITY: GRADUATED MINOR RIGHTS

A recurring issue appears throughout these cases: the blurry divisions between the ages of different students and their corresponding rights. All four of the cases above (*Tinker, Fraser, Kuhlmeier,* and *Pico*) involve high schools, and both majority opinions in *Fraser* and *Kuhlmeier* appear to be more concerned about the impressionability of freshmen than that of the older teens.[143] Two cases feature

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136. *Id*. at 871 ("Whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions.").

137. *Id*.

138. *Id*.

139. *Id*. at 871 nn.23–24. Note that when asked to give an example of "anti-Americanism" exhibited by the removed books, the petitioners pointed to *A Hero Ain't Nothin' But A Sandwich* which notes—accurately—that George Washington was a slaveholder. Petitioners argued that it was anti-American to present "one of the nation's heroes . . . in such a negatively and obviously one-sided life." *Id*. at n.25.

140. *Id*. at 890.

141. *Id*.

142. *See* Dana R. Wagner, *The First Amendment and the Right to Hear*, 108 YALE L.J. 669, 674 (1998) ("No court has ever explicitly addressed [the right to receive speech] in a government employment free speech case . . . this right has only recently begun to assume a central role in the Court's First Amendment jurisprudence."); *see also* Ross, *supra* note 49, at 230 ("Despite its importance, the right to receive information remains a relatively unexplored aspect of freedom of speech even when adults assert such a claim.").

143. *See* Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 683 (1986) ("The speech could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality."); Hazelwood Sch. Dist. v. Kuhlmeier, 484 U.S. 260,

younger students: Mary Beth Tinker was thirteen years old when she staged her protest, and one of the *Pico* plaintiffs was in junior high.[144] In both situations, and with no direct acknowledgement, the Court included the middle schoolers in their decisions.

There is no Supreme Court standard on how to delineate First Amendment rights among differently aged children.[145] In one dissent, Justice Douglas pointed out that children much younger than the fourteen- and fifteen-year-olds in the case at question regularly testify in custody proceedings, indicating a higher "moral and intellectual" capacity for judgment than the Court was willing to consider.[146]

Other judicial systems and philosophies have been more explicit. English Common Law was specific about age-graduations: girls could be married at twelve, boys at fourteen.[147] Paternal "power" over children ceased when they turned twenty-one.[148] Immanuel Kant believed that ten-year-old children were "capable of having principles" and could make decisions for themselves.[149] Many child psychologists and sociologists argue that "the moral and intellectual maturity of the 14-year-old[sic] approaches that of the adult."[150] Some scholars have suggested creating graduated scales based on children's expressive capacity, a type of framework this Note calls "stepped-capacity."[151] But so far, the Court has only offered loose guidance.[152]

The Court's chief concern is deeply intertwined with the philosophical underpinnings of the First Amendment. Children's legal ability to exercise that right is tied up with their *capacity* to exercise it.[153] That line of jurisprudence is additionally complicated when extended to the right to receive information.

274–275 (1988) ("[S]uch frank talk was inappropriate in a school-sponsored publication distributed to 14-year-old freshmen and presumably taken home to be read by students' even younger brothers and sisters.").

144. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 504 (1969); Bd. of Educ. v. Pico, 457 U.S. 853, 856 (1982).

145. Shaub, *supra* note 51, at 34.

146. Wisconsin v. Yoder, 406 U.S. 205, 249 (1972).

147. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 407 (1992). Note the difference in treatment between genders, though both boys and girls were able to choose their guardian at fourteen, became executors at seventeen, and achieved full legal adulthood at twenty-one.

148. *Id*. at 428.

149. IMMANUEL KANT, LECTURES ON ETHICS 250–251 (Louis Infield, trans. 1980).

150. Wisconsin v. Yoder, 406 U.S. 205, 249 (1972).

151. *See e.g.,* Shaub, *supra* note 51, at 36–37 (monitoring children's expressive rights based on a three-stage sliding scale: adolescents (children aged 13–17), non-adolescents (6–12), and infants (children under the age of 6)).

152. *See* Ross, *supra* note 49, at 245 ("The chronological age of the minor is a significant, though not a determinative, factor."); *see also* Peck v. Upshur County Bd. of Educ., 155 F.3d 274, 288 (4th Cir. 1998) (predicting that the Supreme Court would distinguish between elementary-age children—particularly their concerning "impressionability"—and high schoolers in their ability to discern the difference between private religious speech and government speech). This approach may be best summed up by the idea: "No law, just vibes."

153. Note the rhyme with *Bellotti*: limitations on children's due process rights depend on the "serious consequences" of children exercising those rights. *See supra* notes 59–64, and accompanying text.

If advocates attempt to argue that kids have a right to receive information about LGBTQIA+ people so they can exercise their ability to be queer, trans, or nonbinary, they will quickly run into challenges. Many adults are uncomfortable with the idea that kindergarteners have the right to act out their sexual desires. But this is not the issue at hand. Instead, the right to receive information is tied up with children's right to express their identity. Trans children expressing their identity by playing "house," or gay children reading books with characters that reflect their experiences is no different from what straight, cis children do every day in the classroom. Receiving information must be linked with self-realization, a long process that unfolds over extended periods of time.

IV. TWO FREE SPEECH MODELS

Although there are several positivist theories underlying First Amendment jurisprudence, two models are most invoked by Courts wrestling with the problem of speech in schools: The "marketplace of ideas" and "the liberty model.[154] This Part explores how these two frameworks impact the underlying right to receive information.

A. THE MARKETPLACE OF IDEAS MODEL

The first free speech model, known as the "marketplace of ideas," draws from economic theory.[155] Just as (some) theorists assume that open economic markets reward the "best" companies, so should open markets of ideas allow the "best" ones to flourish. This model is most frequently invoked by the Court in a variety of First Amendment cases.[156] Classrooms, for example, could present a certain kind of marketplace for children where they can test different concepts for themselves, where a "robust exchange of ideas. . . discovers truth 'out of a multitude of tongues, rather than through any kind of authoritative selection.'"[157] Here, free speech is seen as "instrumental" in protecting the democratic process.[158] Some

154. *Pico* directly cites the marketplace of ideas. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 867 (1982). *Tinker* also references the marketplace. Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 512 (1969) ("The classroom is peculiarly the 'marketplace of ideas.'" (quoting Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))). *Fraser* is unclear but may loosely be relating to the self-expression model by connecting speech to morality. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 682 (1986) ("[S]chools must teach by example the shared values of civilized social order."). *Morse* does not explicitly name any models in its analysis.

155. *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y 1943)).

156. *See e.g., Keyishian*, 385 U.S. at 603; FCC v. League of Women Voters, 468 U.S. 364, 377 (1984) (quoting Red Lion Broad. Co. v. FCC, 395 U.S. 367, 390 (1969)) ("[It] is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."); Mahanoy Area Sch. Dist. v. B.L., 141 S. Ct. 2038, 2046 (2021) ("Our representative democracy only works if we protect the 'marketplace of ideas.'"); *see generally* Citizens United v. FEC, 558 U.S. 310 (2010).

157. *Keyishian*, 385 U.S. at 603 (quoting United States v. Associated Press, 52 F.Supp. 362, 372 (S.D.N.Y 1943)).

158. Shaub, *supra* note 51, at 4–5.

scholars distinguish between "collectivist" (free speech helps develop a citizenry capable of critical thinking necessary for functioning democracy) and "individualist" (free speech is necessary for people to absorb, evaluate, and express information, thus leading to a unique identity) values to free speech.[159] But under the marketplace model, both approaches value individual free expression only because it is instrumental to another, greater purpose: First Amendment protection creates the best political citizen, and through that, the best government.[160]

There are obvious limitations to the marketplace model. Most glaring is the fiction that a "best" or most "truthful" idea exists.[161] It assumes that people are rational when evaluating ideas.[162] It also assumes that a marketplace is a neutral sorting mechanism for ideas, though many legal scholars believe that it creates a bias towards dominant groups and ideas.[163] The model also places a premium on political speech over other types. "Bad" speech, like obscenity, cannot claim the same kinds of protection under a marketplace model.[164] Finally, this model distorts sexuality and gender by making them into both a choice and a kind of political act. First, it is abundantly clear that sexuality and gender identity are not voluntary: exposure to different ideas will not change someone's gender or whom they are attracted to. Second, the relationship between various LGBTQIA+ communities and politics is complex. Queerness is political because desire is political.[165] However, it is not *only* political. To declare it so collapses gender and sexuality into a kind of collective good, into something separate and independent of the individual. It erases the intimacy—intimate in the most personal sense—of queerness. And this is the greatest limitation of all: something so central to the self becomes valued only because it is external, separate, or alien.

Professor Catherine Ross inadvertently illustrates the pitfalls of relying on the marketplace model to justify the right to receive information, even as she argues for an expanded understanding of kids' constitutional liberty. She believes that minors' right to receive certain information should take precedence over their parents' rights to limit certain information.[166] By examining how Ross builds her argument, this Note shows why the marketplace model fails to fully describe or protect children's right to receive information.

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159. *Id*. at 6.

160. Martin H. Redish, *Value of Free Speech*, 130 U. PA. L. REV. 591, 604, 606 (1981–1982).

161. The "post-truth" political landscape of the 2010s and 2020s is an excellent example of this type of limitation.

162. C. Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 976 (1978).

163. *Id*. at 978. *See also* Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 1, 17

(1984).

164. *See e.g.,* Roth v. United States, 354 U.S. 476 (1957) (holding that because obscenity does not contribute to the marketplace of ideas, it must be denied constitutional protection). Although *Roth* was later overruled, it demonstrates how the classic marketplace model can be interpreted as quite limiting.

165. *See e.g.,* the work of Professors Russell Robinson and Frank Valez.

166. *See* Ross, *supra* note 49, at 224 ("[M]inors have a right to receive information in some circumstances, regardless of the limitations imposed by their parents.").

Following court precedent, Ross also argues for a kind of stepped-capacity for children: "maturation is a gradual process, so specific autonomy claims gain credibility in relation to the youngster's capacities."[167] To determine free speech parameters of minors, Ross argues that it is important to evaluate their capacity to make informed decisions and "rational choices."[168] (Note how these assumptions mirror the assumptions underlying the marketplace model). The capacity to "analyze" information is central to the right to receive ideas, because "the very search for knowledge suggests that a person. . . intends to use information to make rational choices."[169] Ross' argument is grounded in *action*. It requires the received information to be used immediately and wielded in service of something else. Her framework necessarily limits kids' right to receive information to situations that "enhance the meaningful exercise of another right, such as the right to abortion, contraception or free exercise of religion."[170]

Ross' framework does two things: it subordinates the First Amendment to other constitutional liberties, only giving it power in relation to them; it also only protects information used in service of some other act. She suggests that, to exercise their right to hear, minors should demonstrate a "pressing need" to "confront a significant decision that implicates constitutional liberties."[171] But there is no choice to be gay, trans, or queer; it is not a decision made by rationally weighing multiple options. Instead, it is a fundamental expression of identity. When employed, Ross' framework effectively protects minors' political speech but fails to fully protect their liberty interests.

B. THE LIBERTY MODEL

Occasionally, the Court also references a different model of free speech: "the liberty model." Though this theory has not been explicitly invoked, courts have applied it implicitly by laying the groundwork through sweeping holdings that tie the First Amendment, self-expression, and identity together under one umbrella. Several of these holdings come from the Burger Court. In *Police Dep't of Chi. v. Mosley*, the Court nodded to the marketplace model (First Amendment protections "permit the continued building of our politics and culture") before pivoting to the idea that the purpose of the Amendment is to "assure self-fulfillment for each individual."[172] Two years later, in *Procunier v. Martinez*, the Court invoked the First Amendment as a protection for the "human spirit" which "demands self-expression. . . an integral part of the development of ideas and a sense of

167. *Id.* at 244.
168. *Id.* at 246.
169. *Id.*
170. *Id.* at 274.
171. *Id.*
172. 408 U.S. 92, 95–96 (1972) ("To permit the continued building of our politics and culture, and to assure self-fulfillment for each individual, our people are guaranteed the right to express any thought, free from government censorship.").

identity."[173] Under the liberty model (originally identified by Professor C. Edwin Baker), the First Amendment is expansive, protecting "a broad realm of nonviolent, noncoercive activity."[174] Here, the primary justification for free speech and expression is personal liberty.[175] Protected speech encompasses "self-chosen, nonverbal conduct" like dance or art, or even the black armbands the Tinkers wore to school.[176] It includes solitary speech, or intimate acts that occur alone, like writing in one's diary or praying or singing.[177] While these acts may not contribute to an external market of ideas, they do "contribute to self-fulfillment and often to individual. . . change."[178] By focusing on self-fulfillment of the individual, Professor Baker develops a theory that requires respect for people's "definition and development of *themselves*."[179] It is a theory that allows for a sense of personhood separate from the collective. And, unlike the marketplace model, it maps more directly onto issues of identity, particularly sexuality and gender identity.

Baker's model is necessary to argue that kids have a right to receive information about queer and nonbinary people.[180] Speech, both spoken and received, is essential to what is best thought of as self-actualization—or the combination of "self-expression, self-realization, and self-fulfillment."[181] But self-actualization does not happen instantly. Instead, it requires exposure over extended periods of time. This is what distinguishes the liberty model from the marketplace model, particularly in the context of H.B. 1557. Information does not lead to instant action. Instead, it enables a gradual development of the self. Thus, when LGBTQIA+ children are restricted from self-actualizing information in schools, they are taught two things: first, that they are not at liberty to be themselves in school; second, that who they are is dangerous, or bad, or wrong.[182] The liberty to define and develop themselves is gone.

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173. 416 U.S. 396, 427 (1974) ("To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity.").

174. Baker, *supra* note 162, at 990.

175. *Id*. at 992 ("Individual self-fulfillment . . . [is a] fundamental purpose[] of the first amendment.").

176. *Id*. at 1039.

177. *Id*. at 993.

178. *Id*.

179. *Id*. at 992.

180. Note that several scholars argue that free speech models need not be mutually exclusive. *See e.g.,* RODNEY A. SMOLLA, FREE SPEECH IN AN OPEN SOCIETY 14–17 (1992) (there can be "multiple justifications" for free speech); Steven Shiffrin, *The First Amendment and Economic Regulation: Away from a General Theory of the First Amendment*, 78 NW. U. L. REV. 1212, 1252 (1983) ("[T]he Court has been generous about the range of values relevant in first amendment theory, and unreceptive to those who ask it to confine first amendment values to a particular favorite."). While this may be true, I argue that without Baker's theory of self-expression, any argument grounded in the right to receive information about gender and sexual identity will fail. However, that does not mean that other models might be additionally useful or illustrative to the Court.

181. First Nat'l Bank of Bos. v. Bellotti, 435 U.S. 765, 804 (1978) (White, J., dissenting).

182. Many of Florida's high school newspapers have reported on the harmful effects of H.B. 1557 in their communities. *See* Kaden Bryant & Veronika Maynard, *Community Reflects on "Don't Say Gay"*

Under the liberty model, courts should analyze free speech restrictions from the perspective of the party who is restricted.[183] By doing so, they can better address the unique issues associated with kids' rights. Thus, Baker's liberty model gives the courts (and us) a two-step analysis to determine whether a child's right to receive information has been unconstitutionally abridged.[184] First, the court should ask whether restrictions on receipt or use of information interfere "with the listener's self-realizing activities."[185] If so, the court should then ask whether those restrictions are "justified by some special characteristic of the listener," such as age or occupation.[186]

This second inquiry is important because, of course, children *should* have limits on their right to receive information. Regardless of their political positions, the public widely accepts certain limitations. Media ratings, for example, are state-imposed to help protect kids from overly sexual and violent images or lyrics. For younger kids, limitations on vulgarity may also make sense because some children are unable to understand the impact or even content of what they repeat. Limiting advertisements geared towards children—like cigarettes, alcohol, or gambling—could be construed, by some, as a restriction on kids' right to receive information. But given the impact of addictive substances on developing brains, those restrictions seem justified.[187] By calibrating restrictions to fit children's age, laws may be—or at the very least, may *seem*—more robust when facing First Amendment challenges.

The liberty model recognizes legitimate justifications for limitations, while also weighing how important it is to receive the information in question. In answering this second part of the test—the special characteristics part—the court should rely on the First Amendment limits outlined in Part III and attempt to apply the stepped-capacity reasoning.

Bill, OHS NOW (May 12, 2022), https://perma.cc/AZ75-CECT/ ("'I feel like every time we take one step forward, we take two steps back,' said Gay/Straight Alliance senior president Camille Rush. 'This bill is sending the message that it is okay to discriminate against someone's right to live as themselves.'"); Nadia Knoblauch, *The Pros of Pronouns: How the GSA's Speech on Preferred Names and Pronouns Shifted Campus Life for LGBTQ+ Students*, THE BLUEPRINT (Aug. 27, 2021), https://perma.cc/EY66-MWGZ ("'In the past, I wasn't sure which teachers were safer to interact with because I didn't know if they would share information about me with other teachers and students,' John [a transgender high school student] said, 'But now with the surveys, I feel like you can tell which teachers are more supportive than the others.'"); Brynn Schwartz, *[Opinion] Florida's "Don't Say Gay" Bill Will Raise LGBTQ+ Suicide Rates*, THE EAGLE EYE (Feb. 7, 2022), https://perma.cc/RCA7-L3LG ("[T]he bill send[s] a message to LGBTQ youth that they are inherently wrong and that their identity is "taboo" and something that should be avoided . . . . ").

183. Baker, *supra* note 162, at 1008.

184. *Id*. at 1007.

185. *Id*.

186. *Id*.

187. Ken C. Winters & Amelia Arria, Adolescent Brain Development and Drugs 21, 23 (2011) (unpublished manuscript) (on file with Nat'l Library of Med.) (noting that "the earlier the onset of drug use, the greater the likelihood that a person will develop a drug problem," and that "early age of onset rather than duration of use is a stronger predictor in the rapid progression of substance use disorders . . . .").

V. H.B. 1557 VIOLATES CHILDREN'S FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION

This Part applies Baker's two-part liberty model test to H.B. 1557 to show why the law is unconstitutional. Florida's law impermissibly trespasses on the constitutionally protected area of free speech still protected by *Tinker*. The issue with H.B. 1557 is much simpler than Florida lawmakers would have it seem.[188] Parental rights are not at play. Instead, the analysis needs only focus on two actors: kids and the State. Baker's two-step test simplifies that analysis even more: it must be analyzed from the perspective of the receiver of information.[189] Using Baker's analysis, this Note concludes that Florida's ban restricts children's self-realizing activities. A complete ban on discussions involving gender and sexuality is not justified for the youngest children, though the ban for older children is more complicated. Finally, *Pico* provides the tools to dismantle Florida's attempts to claim the protection of local control.

A. GENDER AND SEXUAL IDENTITY IS CENTRAL TO SELF-FULFILLMENT.

Even the most vehement supporters of H.B. 1557 would agree that gender and sexual orientation are central to identity.[190] In fact, they may feel even more strongly about that point than detractors: a person's rigid adherence to binary gender roles and heterosexual relationships suggests that identifying as cis and straight is, personally, very important to them.

Gender and sexual orientation are also important to young children, though the ways in which those identities manifest are quite different. For example, play is central to how many kids express themselves: make-believe games like "house" or "dress-up" or pretending to be characters all involve gender roles to some degree. By early childhood, kids begin to develop an understanding of their own identities. Gender-typed behavior of three- to five-year-old children can be predictive of teenage sexual orientation.[191] Most children have a fixed sense of their sex by age five.[192] Although there have been few studies on trans children, a recent study of more than 200 trans adults found that most experienced gender dysphoria by the age of seven.[193]

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188. *See* discussion *infra* Part I.

189. Baker, *supra* note 162, at 1007. ("[T]he constitutional analysis of any restriction must be in terms of who is restricted . . . .")

190. *See e.g.*, Jordan Peterson (@jordanbpeterson), X (Apr. 10, 2022, 9:39 AM) https://perma.cc/4TKB-8VPX ("'It's okay to be a man.' It's not okay; It's necessary.").

191. Gu Li, Karson T. F. Kung, & Melissa Hines, *Childhood Gender-Typed Behavior and Adolescent Sexual Orientation: A Longitudinal Population-Based Study*, 53 DEVELOPMENTAL PSYCH. 764, 772 (2017).

192. *See* Diane N. Ruble, Lisa J. Taylor, Lisa Cyphers, Faith K. Greulich, Leah E. Lurye, & Patrick E. Shrout, *The Role of Gender Constancy in Early Gender Development*, 78 CHILD DEV. 1121, 1132 (2007).

193. Michael Zaliznyak, Catherine Bresee, & Maurice M. Garcia, *Age at First Experience of Gender Dysphoria Among Transgender Adults Seeking Gender-Affirming Surgery*, 3 JAMA NETWORK OPEN 1, 3 (2020).

How would the Supreme Court respond to Baker's self-realizing framework? The Court has indicated that age matters because children's rights are related to their ability to exercise those rights; for example, in a footnote to his decision in *Erznoznik v. City of Jacksonville*, Justice Powell attempted to make sense of the holding that minors' First Amendment rights are not "coextensive with those of adults."[194] Drawing partially from *Ginsberg v. New York*, Powell reasoned, first, that a child does not necessarily possess a full capacity for choice; second, that the First Amendment presupposes that capacity; and third, that the "requisite capacity for individual choice" required by the First Amendment depends partially on a child's age.[195] But beyond Powell's reasoning, the Court gives little explanation of how to determine children's capacity for different choices.

Professor Ross argues that kids' right to receive information is bound up in their ability to act on those rights.[196] But it is important to separate *action* from *capacity*. Ross is more focused on how received information might help kids access other rights, such as abortion or medical treatments their parents' religion might prohibit.[197]Action, in Ross's context, implies irreversible acts.[198] But if the framework shifts to the liberty model, young kids' rights to receive information about gender or sexuality become tied to social participation and engagement, and not to things like medical treatment or sexual activity.

Sexual and gender identity are essential parts of self-realization, whether for children or adults. Pre-pubescent gender and sexual identity is less associated with sexual acts, but rather identity through an ability to access mainstream culture like marriage, families, and expectations for the future. Elementary school classrooms place a huge emphasis on family structure: most children's books, even books about different *species*, involve parents (i.e., adult sexual relationships) or gender.[199] "[M]arriage is essential to our most profound hopes and aspirations," and these environments are where children begin to develop ideas of what's possible.[200]

So, what is the effect of H.B. 1557? The law creates a classroom where children who have same-sex parents or dream of a same-sex relationship are isolated, confused, and have no place. By restricting information, schools prevent

194. 422 U.S. 205, 214 n.11 (1975). Although the case was ostensibly about adults' First Amendment rights, Powell's footnote is the best example of the Justice wrestling with the implications of *Tinker*.

195. *Id.*

196. *See supra* notes 168–171, and accompanying text.

197. *See generally* Ross, *supra* note 49, at 253 (explaining how a teenager in a deeply religious family may be in dire need of information, as these families are "most likely to attempt to restrict their children's access to competing world views").

198. *Id.* at 274.

199. *See e.g.*, JANELL CANNON, STELLALUNA (2007) (about a baby fruit bat searching for her mother); STAN BERENSTAIN & JAN BERENSTAIN, THE BERENSTAIN BEARS (1962) (a series about a heteronormative cis bear family); MUNRO LEAF & ROBERT LAWSON, THE STORY OF FERDINAND (2011) (a young bull bucks masculine expectations to smell flowers in fields).

200. Obergefell v. Hodges, 576 U.S. 644, 657 (2015).

LGBTQIA+ children from envisioning their future. This is because information about gender and sexual identity is central to liberty interests: it shapes how people, both children and adults alike, build towards family, community, and culture. Restrictions on receipt of that information—on the basic premise that queer, trans, and nonbinary people exist—necessarily interferes with children's self-realization and self-fulfillment.

In the study referenced above—where trans adults first showed signs of gender dysphoria at age seven—those same adults lived for more than twenty years before beginning treatment via either social transition or hormone therapy.[201] This is important for two reasons. The first is that it is clear that the vast majority of trans children below age eight do not make medical decisions about their gender identity until they are older.[202] Medical standards provide prepubescent trans and nonbinary children and their families with "information, psychological support, parental and/or family counseling."[203] Supporters of H.B. 1557 could therefore argue that kids do not need to develop their gender identity until later in life, and that the right to receive information about gender identity can be delayed until kids have more capacity to act on those decisions. But it is also important to acknowledge that the adults interviewed—who all must have been at least twenty-nine—grew up at a time in which gender-affirming care was widely unavailable.[204] And that leads to the second important point, which is that delaying exposure to non-binary and trans experiences likely delays treatment. There are significant mental and physical health consequences if patients are denied gender-affirming care.[205] It begins to become clear that the capability to exercise rights—to participate in self-realization and self-fulfillment—does not require the ability to act immediately, but rather is the result of long-term exposure and normalization.

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201. Zaliznyak, Bresee, & Garcia, *supra* note 193.

202. The American Academy of Pediatrics suggests that gender-affirmative medical treatment should be started once children reach puberty. Before then, there are no medical steps to take. *See* Jason Rafferty, ENSURING COMPREHENSIVE CARE AND SUPPORT FOR TRANSGENDER AND GENDER-DIVERSE CHILDREN AND ADOLESCENTS, 142 AM. ACAD. OF PEDIATRICS 6 (2018).

203. Riittakerttu Kaltiala-Heino, Hannah Bergman, Marja Työläjärvi, & Louise Frisén, *Gender Dysphoria in Adolescence: Current Perspectives*, 9 ADOLESCENT HEALTH MED. THERAPEUTICS 31, 33 (2018).

204. Jeremi M. Carswell, Ximena Lopez, & Stephen M. Rosenthal, *The Evolution of Adolescent Gender-Affirming Care: An Historical Perspective*, 95 HORMONE RSCH. IN PEDIATRICS 649, 649 (2022) ("Adolescent gender-affirming care, however, did not emerge until the late 20th century . . . .").

205. *See* RAFFERTY, *supra* note 202, at 3. There are also significant biological issues with delaying treatment: if someone wants to conform to cis-gender appearances, it is more difficult to do so after entering puberty as their sex-assigned-at-birth. Relatedly, it is easier to delay puberty rather than reverse the effects of sex hormones. Therapy "harmonizes" internal and external gender identities: "[i]n transgender men, male-sounding voice, different fat distribution, increase in muscle mass and, in transgender women, breast growth, decreased facial and body hair, more feminine fat redistribution, and decreased muscle mass." Marta R. Bizic, Milos Jeftovic, Slavica Pusica, Borko Stojanovic, Dragana Duisin, Svetlana Vujovic, Vokin Rakic, & Miroslav L. Djordjevic, *Gender Dysphoria: Bioethical Aspects of Medical Treatment*, 2018 BIOMED RSCH. INT'L 1, 3 (2018).

B. OUTRIGHT BANS ON CLASSROOM INSTRUCTION ABOUT GENDER AND SEXUALITY ARE UNJUSTIFIED

The second step in Baker's test is to determine whether restricting the rights of a certain group of people is justified by those people's special characteristics. Here, the special characteristic is age. To answer this question, this Note looks at past decisions and pieces together a comprehensive understanding of First Amendment jurisprudence for minors as elucidated by the Court. Finally, it uses that inquiry to clarify why broad local control cannot overcome children's First Amendment right to receive information about gender and sexual identity.

1. How Content and Context Affects the Right to Receive Information

How has the Supreme Court considered age in First Amendment jurisprudence? It has approached this question broadly, only explicitly delineating between minors and adults. Therefore, this section will be approached from the perspective of all school-aged children. The specifics of how H.B. 1557 affects elementary school classrooms is addressed in Section B.

The Court has been clear that children have First Amendment rights in schools.[206] However, there are limits, as explored above. These limits can be separated into rules around content and context. First, kids cannot expect constitutional protections for sexually explicit speech, or speech that promotes illegal drug use.[207] Second, they also cannot expect protection of their speech during school assemblies and school-sponsored activities.[208] Finally, *Pico* expanded kids' First Amendment rights to include the right to receive information. It also emphasized that, while school boards have broad authority over curricula, they must "comport with" the underlying principles of the First Amendment.[209]

Of the two content rules elucidated by the Court, the *Morse* limitation on illegal activity does not apply here. It is not criminal to be queer, trans, or nonbinary.[210] However, the Court has been clear that "vulgar" and sexually explicit material has no place in the classroom.[211] This reasoning appears to undergird H.B. 1557, as DeSantis argues that classroom instruction on sex and gender "sexualizes" young children.[212] But are sexual orientation and gender identity inherently vulgar? No. The liberty model illustrates how efforts to paint them as such violates the underpinnings of the First Amendment.

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206. *See e.g.,* Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503, 506 (1969).
207. *See supra* Section III.C
208. *See supra* Section III.C.
209. *See supra* Section III.C.
210. *See e.g.,* Lawrence v. Texas, 539 U.S. 558 (2003).
211. Bethel Sch. Dist. No. 403 v. Fraser, 478 U.S. 675, 684 (1986).
212. Anthony Izaguirre, *Watch: Governor Ron DeSantis Gives Remarks as He Signs into Law Florida's "Don't Say Gay" Bill*, (PBS Newshour Mar. 28, 2022, 5:00 PM), https://perma.cc/E78V-SEVF.

2. Same-Sex Relationships and Trans People Are Not Obscene

Section 1 reviewed how the Court approaches First Amendment jurisprudence for minors and identified what rules apply to H.B. 1557. Section 2 asks whether HB 1557 can stand, given that limitations on obscenity can be justified by age. First, by looking at how the law is exercised in classrooms, this Section shows how it marginalizes LGBTQIA+ people rather than protects kids from sexually explicit material. Second, this Section shows why identifying as LGBTQIA+ is not obscene.

What happens if teachers take the law at face-value? Florida's lawmakers were careful not to write any discriminatory language into the legislation. The law bans *all* discussion of gender or sexual relationships for children below ninth grade, including in straight and cis contexts.[213] Under H.B. 1557, there can be no discussion of married couples, gay or straight. The law might even include banning actions like splitting classrooms into "boys" and "girls" for games or lessons. It could mean avoiding books like *Little House in the Big Woods*, where gender roles in homesteading families are discussed regularly.[214] Florida's efforts to be facially neutral highlight the absurdity of the bill: in straight, cis contexts, none of that content would be considered sexually explicit. Teachers will continue to reference heterosexual marriage, relationships, and cis-gender behavior. Florida's students will be exposed to that content regardless of the law in a larger context where cis and straight are explicitly normalized.

In *Bostock v. Clayton County,* Justice Gorsuch enunciated a new test: whenever sex is a "but-for" cause of an employment decision, then sex discrimination has occurred.[215] In other words, if changing the sex of the plaintiff changes the outcome of the decision, then that is an act of discrimination.[216] H.B. 1557 is a textbook example, albeit outside the employment context, of what that discrimination looks like. Referencing a "mommy" and "daddy" is not vulgar. Identifying as a boy or a girl is not sexually explicit. Ending a fairytale with a marriage—or even a kiss—is not obscene. But the proponents of "Don't Say Gay" would argue that, if you change the genders involved from what has largely been culturally accepted, they become sexually explicit. To Justice Gorsuch, H.B. 1557 is a clear act of discrimination.

Sexuality and gender identity are essential parts of personal liberty. But people like Governor DeSantis insist that that is not true, that the very act of being queer, trans, or nonbinary is a sexual act and therefore obscene. In doing so, he

213. FLA. STAT. ANN. § 1001.42 8(c)(3) (West, Westlaw through First Reg. Sess. 2023 of 2023 Legis. Sess.).

214. LAURA INGALLS WILDER, LITTLE HOUSE IN THE BIG WOODS (1932).

215. Bostock v. Clayton Cnty., 140 S Ct. 1731, 1741 (2020) ("If the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.").

216. *Id.*

stigmatizes core aspects of people's personal identity.[217] But the Court has been clear: sexuality and gender are not inherently obscene. Instead, they are a fundamental expression of the self. "Liberty presumes an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[218] Everyone "within [the Constitution's] reach" is promised the liberty "to define and express their identity."[219]

3. Local Control (with Bad Intent) Does Not Overcome the First Amendment

School boards have "broad discretion" over curricula, but the exact contours of local control are unclear.[220] *Pico* proffered a test—one that is clarified by the Baker model for free speech. Under *Pico*, school boards must not intend to override the protections of the First Amendment.[221] As explored above, Baker's model submits that the primary justification for free speech and expression is personal liberty. Finally, it becomes clear why the liberty model is necessary for all arguments relying on "Don't Say Gay" laws. The First Amendment includes the right to information to self-actualize, to explore the deepest and most personal recesses of the self. [222] School boards cannot purposely infringe on that right.

Pico explicitly protected students' right to hear and outlined a parameter for determining whether the restrictions abridge First Amendment rights: intent.[223] Although school boards have wide discretion to determine educational content, they cannot exercise that discretion "in a narrowly partisan or political manner."[224] Determining whether someone's First Amendment rights have been violated involves determining the "motivation" behind the policy.[225] Given that limitation, *Pico* begins to map onto H.B. 1557 more cleanly. Governor DeSantis himself has made it abundantly clear that the purpose of the bill is to remove

217. Various lower courts have found that stigmatization can create an impermissible infringement on kids' First Amendment rights. *See e.g.,* Counts v. Cedarville Sch. Dist., 295 F. Supp. 2d 996, 1002, 1005 (W.D. Ark. 2003) (holding that restrictions on access to *Harry Potter* "stigmatized" the books and the children who read them, thereby impermissibly infringing on the plaintiff's First Amendment rights); Parents, Fams., & Friends of Lesbians & Gays, Inc. v. Camdenton R-III Sch. Dist., 853 F. Supp. 2d 888, 895 (W.D. Mo. 2012) (holding that a school library could not filter internet content by "sexuality" without creating a stigma around LGBTQIA+ issues).

218. Lawrence v. Texas, 539 U.S. 558, 562 (2003).

219. Obergefell v. Hodges, 576 U.S. 644, 651 (2015).

220. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 863 (1982); Salzman, *supra* note 70, at 1073 ("[T]he precise scope of local officials' authority to regulate curricula is unclear."); see also Edwards v. Aguillard, 482 U.S. 578, 583 (1987) ("States and local school boards are generally afforded considerable discretion in operating public schools."); Epperson v. Arkansas, 393 U.S. 97, 104 (1968) ("[Federal] [c]ourts do not and cannot intervene in the resolution of conflicts which arise in the daily operation of school systems and which do not directly and sharply implicate basic constitutional values.").

221. *See supra* Section III.C.

222. *See supra* Section IV.B.

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

224. *Id.* at 895.

225. *Id.* at 871.

"leftists[] . . . woke ideology" from classrooms.[226] Whether recognizing the existence of LGBTQIA+ people is exclusively liberal or not, DeSantis seems to be guided by political orthodoxy in championing his bill. This falls squarely into the category of impermissible intentions as outlined by *Pico*.[227] Kids have a right to receive information in the classroom. By labeling gender and sexual identity as obscene to justify their removal from the classroom, laws like H.B. 1557 unconstitutionally outlaw the most personal aspects of the self. In short, they withhold information necessary for minors to exercise their rights under the First Amendment.

Challengers may be quick to point out that the *Pico* ruling only concerned books in libraries, leaving open the question of how it should apply to school curriculums.[228] In *Griswold v. Driscoll*, the First Circuit declined to extend *Pico* to a Massachusetts curricular guide on suggested materials related to the Armenian Genocide.[229] The *Griswold* court reasoned that Supreme Court jurisprudence supported strong local control over school curriculums, subject to very limited judicial review.[230] To justify its position, the First Circuit relied on government speech doctrine, a "developing body of law."[231] Government speech is not subject to scrutiny under the Free Speech Clause:[232] By declaring curriculums a form of government speech, courts successfully bypass First Amendment challenges.

The Ninth and Fifth Circuits have also held that curricular decisions are a form of "government speech" and therefore not subject to First Amendment restrictions.[233] In both *Downs v. L.A. Unified School District*—permitting removal of gay and lesbian material from school bulletin boards—and *Chiras v. Miller*—permitting removal of a textbook from a high school environmental curriculum—courts based their decision on the premise that curricular decisions are government speech.[234] But government speech is a "recently minted" doctrine, and so far the Supreme Court has not extended it to public schools.[235] In a more recent decision, the Ninth Circuit later declined to apply *Downs* or *Chiras* to a case that involved similar questions about local control, but with one clear difference.

In *Arce v. Douglas*, Arizona passed a law which banned teaching material that, among other restrictions, were "designed primarily for pupils of a particular

226. *Florida Gov. Ron DeSantis Speaks about 'Parental Rights in Education' Bill*, *supra* note 1.

227. Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico, 457 U.S. 853, 870 (1982) ("[T]he First Amendment . . . does not tolerate laws that cast a pall of orthodoxy over the classroom." (citing Keyishian v. Bd. of Regents, 385 U.S. 589, 603 (1967))).

228. *See supra* notes 127–131, and accompanying text.

229. 616 F.3d 53, 56 (1st Cir. 2010).

230. *Id.*

231. *Id.* at 58.

232. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 464 (2009).

233. *Id.* at n. 6.

234. Downs v. L.A. Unified School District, 228 F.3d 1003 (9th Cir. 2000); Chiras v. Miller, 432 F.3d 606, 616 (5th Cir. 2005).

235. Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 481 (2009) (Stevens, J., concurring).

ethnic group."[236] The purpose of the law was to stop a Mexican American Studies program from being taught in Tucson public schools.[237] Two students sued, arguing that the law violated the First and Fourteenth Amendment.[238] Unlike *Downs* or *Chiras*, the court reasoned, *Acre* "involved a *student's* First Amendment rights," making the other cases "inapplicable."[239] *Acre* demonstrates, again, that—in discussions around local control and curricular decisions—standing matters. By framing challenges around *students'* right to receive information, advocates are well-positioned to change the law.

CONCLUSION

This Note attempts to chart a path for kids and the advocates representing them against impermissible infringements on constitutional rights. Kids are the strongest plaintiffs to challenge the oncoming wave of "Don't Say Gay" laws; they are directly injured by laws that restrict receipt of speech about queer, trans, and nonbinary people. But for their suits to succeed, kids' challenges to the right to receive LGBTQIA+ information should be grounded in the liberty model of free speech. Information does not necessarily need to lead to action to be included under the First Amendment's right-to-hear protections. Instead, it is protected if it helps people—including children—develop their sense of self. Gender and sexual identity are central to self-fulfillment. Therefore, bans on classroom instruction about gender and sexual identity violate children's right to receive information. These bans are not justified by claims that sexual orientation and gender identity are vulgar. Instead, "Don't Say Gay" was created to marginalize LGBTQIA+ people by unconstitutionally labeling them obscene. Therefore, the law is not permissible under the First Amendment, regardless of school boards' broad control over educational content. It cannot stand.

By excavating children's right to receive information and recognizing that it extends beyond the narrow bounds proposed by *Pico*, this Note hopes to have presented a legal argument—grounded in Supreme Court jurisprudence—to challenge anti-trans and -gay legislation in schools. The reasoning in this Note can apply to new incarnations of "Don't Say Gay." As these laws proliferate, the best way to counteract them is through strong First Amendment doctrine. Most importantly, this Note hopes to have established why children have a right to receive identity-affirming information in schools.

But unanswered questions remain. In addition to the complete ban on information for children in third grade and below, H.B. 1557 originally limited classroom instruction on gender and sexuality to topics and issues that are "age appropriate"

236. Arce v. Douglas, 793 F.3d 968, 973 (9th Cir. 2015).

237. *Id.*

238. *Id.* at 974. Note that the Arizona students' First Amendment claims were grounded in overbreadth and viewpoint discrimination claims.

239. *Id.* at 982 (emphasis in original).

for fourth graders and above. [240] In March 2023, Governor DeSantis released new rules for Florida's Board of Education.[241] Now, all material involving "sexual orientation or gender identity" is effectively banned for students in elementary and middle schools, while high school students are limited to instruction required either by state academic standards, or material that is part of a reproductive health course, a course from which a parent can, of course, withdraw their student.[242]A more narrowly tailored law may be more easily justified, while also overcoming the intent test outlined by *Pico*.

There are also limits to the argument above. This Note only addresses a blanket ban on information. Students' right to receive information does not necessarily include a right to sue when the curriculum includes material they don't agree with. It may not include the right to sue if the material is incomplete, too. But when faced with a blanket ban—particularly of one that is both so broad and so central to identity—students' First Amendment rights apply.

Perhaps the key to successful future challenges to laws like "Don't Say Gay" lies in recognizing kids' evolving ability to self-define. The self-expressive capacities of a thirteen-year-old are different from that of a five-year-old; therefore, they should be received differently by the court. It is beyond the scope of this Note to propose a process for courts to use when determining age-appropriate criteria. But if those decisions are left entirely in the hands of the courts, kids' real and thoughtful attempts to self-define may be ignored. In many cases, it is the children who have spent the most time contemplating questions of their own identity. It is the children who are best equipped to understand what they need. As they age, their voices must be a part of the discussion.

240. FLA. STAT. ANN. § 1001.42 8(c)(3) (West, Westlaw through First Reg. Sess. 2023 of 2023 Legis. Sess.).

241. Anthony Izaguirre, *DeSantis to Expand 'Don't Say Gay' Law to All Grades*, AP NEWS (Mar. 22, 2023), https://perma.cc/LB2E-9BN6. Note that the original law failed to define "age appropriate." No standards were required until June 30, 2023, making the earlier version of the law—as applied to children beyond third grade—nearly impossible to challenge. DeSantis' choice to completely ban instruction on gender and sexuality is curious: It makes the law more susceptible to First Amendment challenges, as it is even less narrowly tailored than the original version. Perhaps, though, Governor DeSantis was more concerned about the political impact of the law than actual application.

242. FLA. DEP'T OF EDUC., PRINCIPLES OF PROFESSIONAL CONDUCT FOR THE EDUCATION PROFESSION IN FLORIDA, https://perma.cc/SF23-BYKN. Note that this rule appears right before another, banning teachers from "intentionally violat[ing] or deny[ing] a student's legal rights." *Id.*