

In the

Supreme Court of the United States

BOARD OF EDUCATION, ISLAND TREES	:	
	:	
UNION FREE SCHOOL DISTRICT NO. 26,	:	
	:	
ET AL.,	:	
	:	
Petitioners,	:	No. 80-2043
	:	
v.	:	
	:	
STEVEN A. PICO, BY HIS NEXT FRIEND,	:	
	:	
FRANCES PICO, ET AL.	:	

Washington, D. C.

Tuesday, March 2, 1982

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8 STEVEN A. PICO, BY HIS NEXT FRIEND, :
9 FRANCES PICO, ET AL. :
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11 Washington, D. C.
12 Tuesday, March 2, 1982

13 The above-entitled matter came on for oral
14 argument before the Supreme Court of the United States
15 at 12:58 o'clock p.m.

16 APPEARANCES:
17 GEORGE W. LIPP, JR., ESQ., Babylon, New York; on behalf
18 of the Petitioners.
19 ALAN H. LEVINE, ESQ., New York, New York; on behalf of
20 the Respondents.

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C O N T E N T S

ORAL ARGUMENT OF

PAGE

GEORGE W. LIPP, JR., ESQ.,

on behalf of the Petitioners

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ALAN H. LEVINE, ESQ.,

on behalf of the Respondents

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GEORGE W. LIPP, JR., ESQ.,

on behalf of the Petitioners - Rebuttal

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We will hear argument next in Board of Education against Pico and others.

Mr. Lipp, you may proceed whenever you are ready.

ORAL ARGUMENT OF GEORGE W. LIPP, JR., ESQ.,

ON BEHALF OF THE PETITIONERS

MR. LIPP: Mr. Chief Justice, and may it please the Court, this case is here on certiorari from the Second Circuit, where a three-judge panel rendered a plurality decision containing a vigorous dissent, with the court afterwards split five to five on en banc consideration.

Although this case involves the guarantee of freedom of expression under the First Amendment of the Constitution, it does not involve the utterance of either pure or symbolic speech by any of the plaintiff Respondents in any manner. It involves the alleged right of five public school students to receive the contents of nine books removed from the Island Trees Public School libraries and curriculum six years ago by the Petitioner school board.

The books' contents have been described by Judge Mansfield, dissenting in the court below, as containing, with one exception, and I quote, "indecent

1 matter, vulgarities, profanities, explicit descriptions
2 of sexual relations, some perverted, or disparaging
3 remarks about blacks, Jews, or Christ."

4 QUESTION: In your view, does it make any
5 difference what is in the books?

6 MR. LIPP: I think that it makes very much
7 difference what is in --

8 QUESTION: Suppose they barred the St. James
9 version of the New Testament, and the Constitution of
10 the United States, and the Declaration of Independence?

11 MR. LIPP: It makes a difference, Mr. Chief
12 Justice, what is in them, but I do think they must be
13 taken as a whole, and each board member did read the
14 full volumes that were involved, but it was these
15 alleged profane, vulgar, indecent materials that caused
16 their initial concern, and I am assuming caused the
17 final action from plaintiff. I am aware, Mr. Chief
18 Justice, that there are many other books that do contain
19 in varying degrees some vulgarities.

20 QUESTION: Mr. Lipp, perhaps I should ask your
21 opposition this one, but are any of these named
22 plaintiffs still in school?

23 MR. LIPP: One of them is still in school, Mr.
24 Justice Blackmun, until this June, and will assumedly
25 graduate in June. There is a potential question of

1 mootness.

2 QUESTION: Could I ask, just on the facts, did
3 the action taken just remove the books from the library,
4 or did it forbid their use in class, or as outside
5 reading? Suppose some of these books were assigned as
6 outside reading, and the children were told, you can get
7 it in the public library?

8 MR. LIPP: The resolution of the Board of
9 Education, if I am not mistaken, was worded so that the
10 books were to be removed from the curriculum and from
11 the libraries.

12 QUESTION: I see, okay.

13 MR. LIPP: The issue of a teacher assigning
14 that book for outside reading never arose. There has
15 been agreement by means of a 9-G statement that there
16 has never been any threat of or discipline of any
17 teacher or staff member with respect to these actions,
18 nor would there be.

19 QUESTION: What were the ages of the five
20 plaintiffs at the time the books were removed?

21 MR. LIPP: Mr. Justice Powell, the oldest was,
22 if I am not mistaken, a senior at the time, and the
23 plaintiffs were each year down from that, so I am
24 assuming roughly 17, 16, 15, 14, and 13.

25 QUESTION: And the 13 and 14 were junior high

1 school students?

2 MR. LIPP: They were, Mr. Justice Powell.

3 QUESTION: Did the same library serve both
4 junior and senior high schools?

5 MR. LIPP: It did not, Mr. Justice.

6 QUESTION: There were separate libraries?

7 MR. LIPP: There were.

8 QUESTION: And all of these books were in the
9 senior high school library?

10 MR. LIPP: If I am not mistaken, there were
11 some of these books in the junior high school libraries
12 also.

13 QUESTION: Would the record show?

14 MR. LIPP: It would show that, Mr. Justice.

15 QUESTION: How are the members of the school
16 board -- how do they acquire their positions as members?

17 MR. LIPP: They are -- there are seven members
18 on this school board. It is a New York State school
19 board. They are -- Two are elected each three years.
20 They are three-year terms that they serve. At one time
21 three are elected.

22 I would state to the Court, too, whether it is
23 of any import, that five of the seven members are still
24 on that board six years after the events complained of.

25 The Respondents have alleged merely that the

1 school board used its own social, moral, and political
2 values, and did not utilize educational criteria in
3 arriving at their decisions with regard to the removal
4 of these books. The Respondents have stated that the
5 board is promoting a favored set of values.

6 It most certainly and assuredly is. The
7 transmission of the moral, social, and political values
8 of that community to the students in that school board's
9 charge is one of their primary functions. It is a
10 responsibility and duty of that school board. The
11 doctrine of content neutrality flies in the face of this
12 basic mission, which I feel is a mission of the nation's
13 16,000 school districts. They are pluralistic school
14 systems. They are diverse. They are very different,
15 vastly different, each from the other, some naturally
16 more like others, but they are very, very much
17 pluralistic.

18 A true pall of orthodoxy will settle upon the
19 nation's school districts if they are not permitted to
20 set themselves apart and be distinctive with regard to
21 value emphasis by means of different curricular
22 choices. This ability to tailor local programs to local
23 needs is healthy, and if it involves favoring certain
24 values over others, it should not require the
25 intercession of the federal judiciary, which has been

1 occurring with increasing frequency, in part because of
2 the tremendous conflict among the circuits of the nation.

3 Mr. Justice Powell has seen the importance of
4 this and stated, and I quote, that "no area of social
5 concern stands to profit more from a multiplicity of
6 viewpoints and from a diversity of approaches than does
7 public education." Although this prescriptive model of
8 public education, this transmission of community values
9 that I have referred to, is at the foundation of our
10 arguments as contrasted with the marketplace of ideas
11 model, which is one that holds forth in the nation's
12 universities and colleges and is quite distinct --

13 QUESTION: Suppose you had a book, counsel,
14 that had been the subject of criminal proceedings, and
15 conviction of someone in connection with that book had
16 been sustained, a criminal conviction. Would you say
17 that that book comes under this broad authority you
18 suggest?

19 MR. LIPP: This broad authority to place on a
20 shelf resting or vested in a school district.

21 QUESTION: Even though --

22 MR. LIPP: Even though it is --

23 QUESTION: -- the publisher has been -- even
24 though it has been found to be criminally pornographic,
25 obscene?

1 MR. LIPP: I would say that a school board
2 would be subject to the federal and state laws with
3 regard to obscenity, and although they might have the
4 power, they certainly would be totally irrational and
5 would subject themselves to criminal penalties, but do
6 they have the power? I would think that they might have
7 the power, Mr. Justice.

8 QUESTION: The power to put it in or to take
9 it out, which?

10 MR. LIPP: I do not find any distinction
11 whatsoever with regard to the power to either put in or
12 to take out. There is, I know, in a number of the
13 circuit court rules a concept of tenure once a book is
14 on a library shelf. I posit that they have equal power
15 to either select curriculum materials or to remove
16 curriculum materials.

17 QUESTION: Yes.

18 QUESTION: Mr. Lipp, would your view be that
19 at some point a particular decision by a board which, if
20 it were made to remove from student exposure all
21 references in the library to a particular ideology,
22 would be subject to examination in the federal courts?
23 Is there some place where you would draw the line?

24 MR. LIPP: Justice O'Connor, I most certainly
25 am not asserting an absolute right, and there are a

1 number of places where the line should be drawn.

2 QUESTION: Well, would you articulate those,
3 then, from your point of view?

4 MR. LIPP: I will articulate them as best I
5 can. One would be where there is a comprehensive and
6 obvious attempt to sanitize a whole body of thought, a
7 whole doctrine of thought. The Epperson case referred
8 to that measure, in addition to referring to a sharp and
9 direct implication with constitutional values, an
10 attempt to establish a rigid and exclusive
11 indoctrination, and exclusive is important. In this
12 instance, we are dealing with nine books out of
13 thousands and thousands in this school's libraries. An
14 attempt --

15 QUESTION: Would you say, Mr. Lipp, that under
16 -- just to get an example. I was interested in the same
17 question Justice O'Connor asked. Would you say that it
18 would be appropriate to remove all books in the library
19 that contained any disparaging remarks about blacks or
20 Jews?

21 MR. LIPP: Absolutely not. I don't think so.
22 And I think it is obvious from the record that that is
23 not the attempt. I don't think that you could remove
24 all books that pertain to a particular religion, to a
25 particular political party.

1 QUESTION: Well, would there be any review --
2 MR. LIPP: You cannot favor --
3 QUESTION: Supposing they just removed one
4 book. Would there be ever any federal review of removal
5 of one book?
6 MR. LIPP: I think if that possibly were the
7 only book, Mr. Justice Stevens, in the library
8 pertaining to a substantive ideology, you might have
9 some constitutional concern.
10 QUESTION: Well, supposing the one book you
11 removed is removed because it has disparaging remarks
12 about Jews and blacks in it.
13 MR. LIPP: Then you are into the possibility
14 of mixed motivation, which the Mount Healthy case
15 addressed, and it is possible that if there were --
16 QUESTION: Would you speak up, please, sir?
17 It is very hard to hear you when you are away from the
18 microphone.
19 MR. LIPP: Oh, I am sorry. I was --
20 QUESTION: Please stay near the center of the
21 two microphones.
22 MR. LIPP: All right. I was responding to
23 Justice Stevens --
24 QUESTION: Yes.
25 MR. LIPP: -- with regard to what I felt was

1 the question concerning the possibility of mixed
2 motivation, where if there were disparaging remarks in
3 this book concerning blacks, Jews, or whomever, whether
4 that would be a valid reason for removing it, even
5 though it were the only book, Mr. Justice, that
6 contained a certain ideology, was this the --

7 QUESTION: Well, the reason I ask the question
8 is, you started your argument by quoting from Judge
9 Mansfield --

10 MR. LIPP: Yes.

11 QUESTION: -- who pointed out that all the
12 books but one were either vulgar or contained
13 disparaging remarks about blacks, Jews, or Christ, and I
14 thought, well, let's just -- it is a summary judgment
15 case. Let's just concentrate on one book that meets
16 that standard. Is there any federal review of the
17 board's decision to do that?

18 MR. LIPP: If it made that standard, I think a
19 school board would certainly have that right, because it
20 is not banning an ideology, it is not banning a doctrine
21 of thought. It is not --

22 QUESTION: Well, would there ever be any
23 federal basis for reviewing a board's decision to remove
24 one book on the ground that Judge Mansfield stated, and
25 if so, what would the federal standard of review be?

1 MR. LIPP: I would hope that there would not
2 be, at least in the face of a complaint and a 9-G
3 statement similar to that in this case, because what you
4 are assuming obviously then is the next step, being a
5 trial. There are possibly circumstances where that
6 would be justiciable and where it would raise a
7 constitutional issue, but Justice -- Judge Mansfield did
8 not state that any one book had all of those elements in
9 them. I have read the books, and the elements referred
10 to by Justice -- Judge Mansfield had varying of those
11 things that he was disparaged about, but no one book had
12 a combination of disparaging remarks about blacks, Jews,
13 and Christ. One did refer to Christ disparagingly. One
14 or two referred to blacks disparagingly, and so forth,
15 and there were obscenities and profanities throughout
16 all. So, there was a mixed bag with regard to these
17 volumes.

18 QUESTION: I thought Judge Mansfield said
19 there were -- he didn't rely on vulgarity for one of the
20 books.

21 MR. LIPP: He said, with one exception, and
22 that exception is one that contained A Modest Proposal,
23 by Jonathan Swift, that the board felt in bad taste, and
24 this board is a seven-man board.

25 QUESTION: What I am really trying to find out

1 is, what is the standard that you ask the Court to adopt
2 in deciding whether there is federal review of this kind
3 of decision?

4 MR. LIPP: I would ask the Court first to hold
5 that the mere allegation that the board or any board
6 followed its own social, moral, and political values in
7 making curricular decisions without further would not be
8 justiciable. I would also add that the rule that
9 probably should be followed, aside from the balancing of
10 conflicting interests, and I certainly admit that there
11 are many important interests, but they are conflicting
12 in this case, would be that of reasonably related to a
13 legitimate state function.

14 Certainly, I don't think you need to prove a
15 compelling state interest. We are not dealing here with
16 a public forum. We are not dealing here with
17 disciplinary actions against anyone as a result, say, of
18 teaching a proscribed volume. We are dealing with a
19 very, very unique environment, that of the public school.

20 QUESTION: Did I hear you to say political
21 values? If the board chose to remove books containing
22 favorable references to Republicans because it was a
23 good Democratic board, we should not let that go on to
24 be examined?

25 MR. LIPP: No, Justice O'Connor. The

1 complaint referred to moral, social, and political
2 values, and failure to follow educational criteria. My
3 position is initially that an examination of the record,
4 and if the Justices choose, the books themselves, will
5 indicate that there is absolutely no political
6 motivation. However, political in its good sense is not
7 a prohibited action. Politics is the study of
8 government. In the dictionary, the third definition of
9 the word "political" is one that is pejorative, but
10 certainly the mere fact that a -- schools are
11 instruments of political socialization for the students
12 in them, so the mere existence or the mere allegation of
13 the word "political" does not taint this action.

14 QUESTION: Mr. Lipp, how are books normally
15 selected for the library in this school district?

16 MR. LIPP: The normal selection, Justice
17 Powell, at least that with which I am familiar, and I
18 represent more than one school district, is basically to
19 permit the professional staff from lists submitted by
20 publishers and professional journals to make these
21 selections. This is the customary way. But I would
22 immediately remind Mr. Justice Powell of the fact that
23 in the Chelsey case, which is a lower court case, but in
24 the Chelsey case, a federal judge found fit to restore
25 what I do think most of the Court, if not all of the

1 Court, will agree was a scurrously vulgar poem to the
2 school shelves, and in that case the librarian, who
3 selected from 1,000 paperbacks the paperback containing
4 this poem, had not even read the poem. So, I don't want
5 you to endow faulty selection processes with
6 constitutional protection.

7 QUESTION: But normally the school board would
8 not have the time or the opportunity to review every
9 book that goes into the library.

10 MR. LIPP: Normally, it does -- It does not.
11 It does select textbooks, and most textbooks --

12 QUESTION: Right. That is a different matter.

13 MR. LIPP: Most textbooks --

14 QUESTION: That is required by law.

15 MR. LIPP: Yes, but most textbooks also are in
16 the library, and I know that this board does very
17 carefully select textbooks. It does not, has not in the
18 past selected library books.

19 QUESTION: How many books are in this library?

20 MR. LIPP: I would say 7,000, give or take
21 1,000.

22 QUESTION: Would this board have authority to
23 simply say, we will have no library at all in the
24 school, just abolish the library?

25 MR. LIPP: The Chelsey case to which I just

1 referred to, oddly enough, the Justice who restored the
2 poem to the shelves did state that a district or a
3 school district had the power to decide there is no
4 library whatsoever. In New York State --

5 QUESTION: What happens to the New York law?

6 MR. LIPP: In New York State, of course, we
7 must have a library. If I am not mistaken, it is in the
8 appendix to the brief. It requires at least 1,000
9 volumes in each of the elementary and secondary school
10 libraries. We would not have that power in New York.
11 Nor would we assert it if we did have it.

12 QUESTION: Mr. Lipp, getting back to the
13 standard which the First and Fourteenth Amendments
14 impose on the board in a situation like this, I find in
15 Judge Newman's concurring opinion in the court of
16 appeals some suggestion that precisely the same
17 objective acts on the part of the board could be
18 permissible or impermissible depending on the motive
19 with which the board did them, and it struck me that
20 test certainly has been applied in discrimination cases
21 under the Fourteenth Amendment, but I haven't seen it
22 applied in First Amendment cases before.

23 MR. LIPP: I --

24 QUESTION: What position do you take on that?

25 MR. LIPP: Mr. Justice Rehnquist, I have not

1 seen it applied in book banning cases, of which there
2 are now a number. Motivation may have some bearing.
3 Certainly if the motivation again is to ban a theory or
4 doctrine of thought, the motivation is to assert a rigid
5 and exclusive indoctrination with regard to all areas of
6 thought.

7 QUESTION: Do you find any authority
8 supporting the proposition that something done with a
9 good motive is all right but something done with a bad
10 motive is not all right, if it is precisely the same
11 thing that is done, in our First Amendment cases.

12 MR. LIPP: I do not know of anything
13 supporting that proposition. I also would add that it
14 is my understanding or my experience that motivation is
15 one of the most terribly difficult things to establish
16 in law, and if all that is needed to compell a
17 full-blown trial is merely an allegation of impure
18 motivation, the federal courts are going to be inundated
19 with just the very type of situation that I think the
20 doctrine of judicial restraint and local control
21 requires that we make every attempt to avoid, especially
22 in the school environment.

23 I think Justice Newman -- Judge Newman's
24 concurring opinion in the plurality is one that
25 frightened me greatly, both with respect to the

1 motivation situation and his suggestion that the trial
2 court should look prospectively to see whether possibly
3 there had been a suppression of ideas as a result of the
4 action, even though apparently there was no intent to
5 suppress.

6 That was a frightening concept, and I might
7 remind the Court, with limited time, that there
8 absolutely is no attempt to suppress ideas, and I am not
9 making that statement from my own personal knowledge. I
10 am making that statement from the record. There was a
11 9-G statement executed by the parties under the local
12 rule in the Second Circuit that states, for all
13 practical purposes, that there is no attempt to suppress
14 records. The 9-G statement said --

15 QUESTION: Would you refer us to a page in a
16 book?

17 MR. LIPP: Yes, I would. There are four 9-G
18 statements in the appendix, Justice O'Connor. The
19 latter, plaintiffs' 9-G statement is at Page 142 of the
20 appendix, and the statement to which I am referring is
21 that, quote, and it is Paragraph 12, "No teacher has
22 been instructed not to discuss the books which were
23 removed or to refrain from discussion or comment upon
24 the ideas and positions they represent."

25 And yet starting with subsequent, immediately

1 subsequent to the decision of the circuit court, all I
2 have been seeing in the briefs opposing my position is
3 that we have suppressed ideas and we have suppressed
4 points of view. That was not even alleged in the
5 complaint, and it has been agreed, and also in the other
6 plaintiffs' 9-G statement -- it was worded somewhat
7 differently -- and that is at Page 128 of the joint
8 appendix, there has been no suppression of ideas, and
9 the record supports that.

10 QUESTION: I must say, in response to Justice
11 Rehnquist, you indicate motive is entirely irrelevant.
12 Is that your view? The motive for the removal? The
13 federal judge's job is to go ahead and read the books
14 and either agree or disagree? Is that it?

15 MR. LIPP: This is what I certainly hope is
16 not the federal court's job --

17 QUESTION: Well, so do I.

18 MR. LIPP: -- to read these volumes, and I
19 think it is sad that Judge Mansfield --

20 QUESTION: But what is a federal judge to do
21 when a complaint of this kind is made? What are the
22 issues that have to be faced?

23 MR. LIPP: I think a federal judge is to
24 attempt to ascertain under the Epperson doctrine whether
25 there has been a sharp and direct conflict with

1 constitutional values alleged. I think he must
2 ascertain from the face of the documents before the
3 court whether there has been a rigid and exclusive
4 attempt at indoctrination, an allegation of that, or
5 whether there has been an allegation of a comprehensive
6 plan to ban the teaching of an ideology or a theory or a
7 doctrine, but not a mere allegation that a board used
8 its own moral, political, and social values. This is
9 their role, and if this Court finds that a full-blown
10 trial is required as a result --

11 QUESTION: What if this complaint had been
12 written this way, and said, well, we allege that the
13 board removed a book that had some disparaging comments
14 about blacks in it and was otherwise a very good book,
15 and we think we have a right to have that book in the
16 library. That would be insufficient, I guess.

17 MR. LIPP: I certainly think that would be
18 insufficient, Mr. Justice --

19 QUESTION: Supposing it said, the board
20 removed all books which contained any criticism of black
21 people of any kind. Would that be analogous?

22 MR. LIPP: This becomes an attempt at banning
23 an idea, the idea that blacks are fine people, and you
24 could have a difficulty there, but you must also
25 remember that we are -- well, we are not only dealing

1 with the possibility of religion or the possibility of
2 creed, or with profanity. We are dealing with books
3 that might involve violence. We are dealing with
4 something such as A Modest Proposal, which this board, I
5 feel, whether its wisdom -- whether it was wise or not,
6 and that is not for this Court to address, the wisdom of
7 their actions, was in fact --

8 QUESTION: Well, has the board given us any --
9 did the board act on the basis of any standards or any
10 indication of just what rules it thought it was applying?

11 MR. LIPP: This board did submit the issue to
12 a committee for recommendations and --

13 QUESTION: But then they almost entirely
14 ignored the committee's recommendation.

15 MR. LIPP: No, they did not almost entirely
16 ignore, but again, it is in the record, Mr. Justice.

17 QUESTION: Well, pretty nearly.

18 MR. LIPP: They restored two of them. The
19 committee was split seriously, and they did give that
20 committee certain guidelines. Those guidelines were
21 guidelines --

22 QUESTION: But did they follow any guidelines?
23 That is my question. They gave the committee an
24 assignment. The committee came back. And then they
25 just went ahead and --

1 MR. LIPP: Well, the guidelines were not --

2 QUESTION: -- they could have done precisely
3 the same thing without the committee.

4 MR. LIPP: The guidelines were not extensive
5 guidelines, because the State of New York did not even
6 have guidelines at that time.

7 QUESTION: No, my question is, did the board
8 act on the basis of any guidelines? They gave
9 guidelines to the committee, which presumably the
10 committee followed, but then they did not follow the
11 committee.

12 MR. LIPP: There is nothing in the record to
13 indicate precisely what guidelines the board followed.

14 QUESTION: Well, why don't we talk about what
15 the district court thought, found, what basis they --
16 didn't the district court say that the books were banned
17 because they contained vulgarity?

18 MR. LIPP: Yes.

19 QUESTION: And wasn't that the --

20 MR. LIPP: Somewhat similar to Judge Mansfield.

21 QUESTION: Wasn't that his view of the record
22 as to the reason?

23 MR. LIPP: Yes, it was.

24 QUESTION: As to the standard they used for
25 banning these books?

1 MR. LIPP: It was. In fact, he found that
2 they may have been unwise, but in effect he used
3 Voltaire's --

4 QUESTION: Well, yes, but that was the
5 standard he found they applied.

6 MR. LIPP: Yes.

7 QUESTION: That they banned vulgar books.

8 MR. LIPP: Yes.

9 QUESTION: Is that what he found?

10 MR. LIPP: Yes, I think it is.

11 QUESTION: And did the court of appeals differ
12 with that, say that, well, there should be a trial
13 because we don't agree with the district judge that --

14 MR. LIPP: The judge writing the plurality
15 opinion in the court of appeals said there should be an
16 investigation into the suppression of ideas, Judge
17 Newman concurring.

18 QUESTION: Well, that is just differing with
19 the district judge.

20 MR. LIPP: Yes, it is. And Judge Mansfield in
21 a very vigorous dissent found that the board acted
22 admirably and responsibly.

23 QUESTION: With regard to the district judge,
24 did the district judge hear any witnesses?

25 MR. LIPP: No, he did not. He had a motion

1 for summary judgment before him, to which I appended
2 every document that I could find that I thought
3 relevant. The respondents here chose not to oppose any
4 of the affidavit materials or any of the evidentiary
5 materials, and that is what the record is before the
6 court --

7 QUESTION: So he thought it was undisputed
8 that they ban books on the -- for vulgarity.

9 MR. LIPP: Oh, absolutely. There hasn't been
10 any comment about political motivation or --

11 QUESTION: Well, the district -- the court of
12 appeals thought there should be a trial on it.

13 MR. LIPP: Until then.

14 QUESTION: But you can't point to any standard
15 that the school board had?

16 MR. LIPP: The record does not show that the
17 board had regulations, which the circuit court seems to
18 feel they should have had, because none were required.

19 QUESTION: I didn't say regulations. I said
20 standards.

21 MR. LIPP: The standards, and I think this is
22 an assumption, because it is not contained in the
23 record, Mr. Justice Marshall, are the same that pertain
24 to the committee that they appointed, because this was
25 from their negotiations contract, and applied to a

1 situation where a parent objected.

2 QUESTION: But isn't it normal to have
3 standards to govern?

4 MR. LIPP: At that time, six years ago,
5 Justice Marshall, this was not a common occurrence. I
6 certainly, once this case is completed, am going to
7 recommend that guidelines be adopted.

8 QUESTION: Well, isn't it normal to say that
9 we took this action because of such and such a violation
10 of such and such a standard?

11 MR. LIPP: I don't think so, because you are
12 dealing, Justice Marshall, with so many facets. You are
13 dealing with such imponderables as morals, social
14 values, ethics, that to standardize them, to regulate is
15 going to be an unmanageable task.

16 QUESTION: How can you regulate without
17 standards?

18 MR. LIPP: You can follow the rule of minimal
19 rationality which one writer has suggested, or the rule
20 of rationality, and an examination of the record will
21 show this board to have been rational.

22 QUESTION: It couldn't be just vulgarity,
23 because I have a sneaking suspicion that once or twice
24 during a year there is some vulgarity in the schoolyard
25 there.

1 (General laughter.)

2 MR. LIPP: There -- Your Honor is in error,
3 but only with regard to the number of times. This may
4 be the case.

5 QUESTION: Yes, I know.

6 MR. LIPP: But they do not have to put their
7 condemnation, their stamp of approval upon it, nor would
8 it be permitted in the classroom, and a disciplinary
9 action against these students would be constitutionally
10 permissible for the use of that type of language.

11 QUESTION: Do you concede that when a school
12 board puts a book in its library, it puts a stamp of
13 approval on that book?

14 MR. LIPP: I say that there is some
15 imprimatur.

16 QUESTION: It wants the students to read
17 everything they can, good and bad?

18 MR. LIPP: Good and bad with regard to style,
19 with regard to content, but not with regard --

20 QUESTION: Or good and bad with regard to the
21 standards which you don't have.

22 MR. LIPP: Well, I don't think with regard to
23 profanity and indecency, Mr. Justice. I am reserving
24 time --

25 QUESTION: Mr. Lipp? Mr. Lipp?

1 MR. LIPP: Yes, Justice O'Connor.

2 QUESTION: Is it your position that a school
3 board could remove a book from the library solely on the
4 grounds that it was offensive to a particular religion?

5 MR. LIPP: I would think that would be
6 permissible, if there was no attempt to favor one
7 religion over another. Certainly I feel that that would
8 be permissible.

9 QUESTION: Within the establishment clause?

10 MR. LIPP: That -- well, that is what I
11 stated. That is the exception that I made. If there is
12 no indication of an attempt to establish a religion, in
13 other words, to favor one over another, to inculcate in
14 a particular religion. That would make it a different
15 situation.

16 Thank you, Mr. Chief Justice.

17 CHIEF JUSTICE BURGER: Mr. Levine.

18 ORAL ARGUMENT OF ALAN H. LEVINE, ESQ.,

19 ON BEHALF OF THE RESPONDENTS

20 MR. LEVINE: Mr. Chief Justice, and may it
21 please the Court, let me help to focus on where the
22 parties disagree by first saying a few things about
23 which we do agree. Schools, of course, do transmit
24 values. Local school boards may, of course, give
25 particular regard for the values of the local community

1 that we serve. What we say here is that they may not
2 ignore their obligation to observe and respect a
3 diversity of values.

4 QUESTION: Let me put to you in that
5 connection the question I put to your friend. Suppose
6 that a particular book is involved which has already
7 been found to be in violation of the criminal law as
8 obscene, pornographic. Could that be eliminated from
9 the library?

10 MR. LEVINE: Without question, Your Honor.

11 QUESTION: Why is the judgment of the jury in
12 that case determinative other than theoretically it
13 expresses the community's standard? Is that your theory?

14 MR. LEVINE: The judgment of a jury is, first
15 of all, a judgment that a book has fit into a very
16 narrow exception to First Amendment protection, the
17 obscenity standard. The exception to First Amendment
18 protection asserted by the defendants here is a very
19 broad one. They assert the power to ban books that give
20 offense. That doesn't resemble the obscenity standard
21 at all.

22 QUESTION: If a school -- under New York law,
23 if a school board took on the responsibility which it
24 has been suggested they haven't the time they do it, but
25 suppose they did take the responsibility and said, here

1 are 2,000 books that should be in the library, and no
2 books are to be added except if they are cleared with
3 the school board. Could they lawfully do that under New
4 York law?

5 MR. LEVINE: I believe under New York law, and
6 certainly there would be no constitutional exception to
7 that process. This isn't a case about the
8 constitutional right of a particular group of people to
9 make that decision. New York law gives the ultimate
10 authority to the school boards, and if they had the time
11 and the inclination, there is nothing to prevent them
12 from doing that.

13 QUESTION: Suppose it were agreed that the
14 school board decided to take off the shelves all books
15 that they thought were vulgar, and that there is an
16 agreement that, yes, these books are vulgar by anybody's
17 standards. Your position is, I take it, that those
18 books could not be removed consistent with the First
19 Amendment.

20 MR. LEVINE: The problem I have with your
21 question, Your Honor, is that it is vulgar by
22 everybody's standard. Now, I assume you mean some
23 standard short of obscenity, since in response to the
24 Chief Justice's question --

25 QUESTION: Yes, it is short of obscenity, but

1 let's just say that it is full of words that most people
2 would think are vulgar words.

3 MR. LEVINE: Well --

4 QUESTION: It may be that some people wouldn't
5 think they are vulgar, but most people would, but let's
6 just -- isn't your position, though, that just vulgarity
7 is not subject to being banned by the --

8 MR. LEVINE: Just random instances of
9 vulgarity in books such as these is not a constitutional
10 basis for permanently proscribing a book from a school
11 district.

12 QUESTION: Well, I will put it to you this
13 way. Your position is that none of these books that are
14 involved here could have been removed for "vulgarity".

15 MR. LEVINE: Absolutely. And let me make --

16 QUESTION: Could you articulate the theory of
17 your First Amendment claim? I take it it is the
18 students' either freedom of speech or freedom of the
19 press, which is the language used by the First
20 Amendment, which is being infringed. Now, could you
21 explain how that infringes it?

22 MR. LEVINE: I assume you are asking a
23 different question from Justice White's, and that is
24 simply what is the First Amendment right at stake here.

25 QUESTION: Yes.

1 QUESTION: Well, that was the next question,
2 when you said yes.

3 (General laughter.)

4 QUESTION: Sorry to have interrupted you.

5 QUESTION: That's all right.

6 MR. LEVINE: Well, the right has been
7 described in some courts and in some legal commentators
8 as the right to receive information. We have not
9 asserted that right. We think the right to read a book
10 is so clearly inherent in First Amendment analysis that
11 even though most book cases have been brought by book
12 sellers, or book publishers, surely if the state
13 deprived the citizenry of reading a book, the citizenry
14 would have a right -- a First Amendment right to protest
15 that action.

16 Within the school context, of course, the
17 Court has historically talked about the right of
18 academic freedom, and even though those cases arise
19 often with teachers, what the interest is that is
20 underlying those academic freedom cases is an interest
21 that students be exposed to diverse ideas, and it is
22 that diversity, that threat of orthodoxy which is really
23 at issue here.

24 QUESTION: There are no teachers parties to
25 this case.

1 MR. LEVINE: There are no teachers who are
2 parties to this case.

3 QUESTION: What case from this Court do you
4 think comes closest to supporting your position that the
5 students are denied their First Amendment rights if
6 books are taken off the shelf of a school library by the
7 school board?

8 MR. LEVINE: I think no case -- this is the
9 first time, of course, the issue is before the Court.
10 The lower courts have gone off in several different
11 directions. In this case, the analysis proceeds, we
12 think, from a line of cases from Meyer versus Nebraska
13 through West Virginia versus Barnette, Keyishian versus
14 Board of Regents, and Tinker, all of which are concerned
15 about the limits of a school board's power to
16 indoctrinate. They recognize that that is a legitimate
17 concern. We concede that school boards may well give
18 special regard to the values of a local community, but
19 there are limits on that process.

20 QUESTION: Well, but this -- this is quite
21 different from Tinker, isn't it --

22 MR. LEVINE: Absolutely.

23 QUESTION: -- where a form of expression was
24 expressly prohibited? I don't understand any expression
25 on the parts of the students has been prohibited here.

1 MR. LEVINE: No, but I -- I don't think the
2 Court, but for the special circumstance of this taking
3 place in a school community, would have any question of
4 Steven Pico's right to complain about the state
5 prohibiting a book store from selling books to certain
6 people. It is a --

7 QUESTION: Oh, I think that is true.

8 MR. LEVINE: It is a right to receive
9 information, though I don't think the analysis was just
10 created with Virginia Board of Pharmacies. I think it
11 is historically assumed that the right to read a book is
12 protected by the First Amendment.

13 QUESTION: But I take it Steven Pico can go to
14 any number of stores on Long Island and get the books he
15 wants.

16 MR. LEVINE: It is possible.

17 QUESTION: The state of New York hasn't
18 prevented him from doing that.

19 MR. LEVINE: It's possible, but an agency of
20 the state of New York has said that he cannot have
21 access to that book in that school.

22 QUESTION: Well, your theory would certainly
23 cover -- mean, then, that a school board, if it
24 participated, or even teachers, whoever is choosing the
25 books that the school buys may not decide not to buy

1 books because they are vulgar. You must also say that.

2 MR. LEVINE: Well, in response to your
3 questions, I was going to get back to vulgarity, because
4 it is the issue that the Court has focused on, and it is
5 the cast in which the defendants prefer to put the case.

6 QUESTION: Well, it is also the cast the
7 district court put it in.

8 MR. LEVINE: Yes, but not the circuit court.
9 It is true it is the --

10 QUESTION: Well, I understand.

11 MR. LEVINE: -- it is the focus of Judge
12 Mansfield's dissent, but it is important to understand a
13 couple of things, and why Judge Newman thought a trial --

14 QUESTION: Well, how about my question about
15 acquisition of books?

16 MR. LEVINE: I don't think --

17 QUESTION: Your theory would cover that, too.

18 MR. LEVINE: I do not think that if a school
19 board said, we are not going to buy The Fixer, a
20 Pulitzer Prize winner, National Book Award winner,
21 because it contains, according to this record, eight
22 dirty words out of 200 some odd pages, I don't think
23 that is a constitutionally defensible decision.

24 QUESTION: So you would say, yes, you would
25 say that the board could not have decided

1 constitutionally to ban any one of these books that is
2 involved here, or decide not to buy any one of these
3 books.

4 MR. LEVINE: These books. That's correct.
5 There may be -- there may be cases out there that are
6 difficult in which the books are pervasively vulgar.
7 That is not these books, however.

8 QUESTION: Is it your position that there is a
9 constitutional right to a particular book in a
10 particular place?

11 MR. LEVINE: Absolutely not, Your Honor. And
12 that is not the issue in the case, but here we go to
13 Justice Rehnquist's question of motivation before. When
14 can a book be removed? When can it be substituted for
15 another book? Understand here these books were not
16 removed because any other book was being substituted for
17 them. They got the names of these books from a list
18 that they received at a conference. They don't know who
19 authored the list. They learned nothing about them
20 except the excerpts, and then they removed them, but
21 surely, at least for a book that is in the curriculum,
22 and only one of these was, The Fixer, if they make the
23 judgment, however quixotic, that Silas Marner is of
24 better use in the English curriculum than The Fixer,
25 they have absolutely no constitutional compulsion not to

1 replace that book. No constitutional principle
2 interferes with that.

3 However, if they remove the book solely
4 because it contains a passage that offends a particular
5 group in the community, then the Constitution, then the
6 First Amendment is concerned.

7 Now, what we have here about some of these
8 books are explicitly political comments. Cleaver's Soul
9 On Ice, the excerpts contain one passage of vulgarity
10 out of the entire book. But what else do the excerpts
11 tell us? That he is a Black Panther and considered a
12 traitor to his country. That is part of the reason that
13 book was banned.

14 QUESTION: Mr. Levine, does your theory apply
15 to textbooks as well as books in the library?

16 MR. LEVINE: If you mean curricular books?

17 QUESTION: Yes.

18 MR. LEVINE: In theory, yes, though the
19 process would normally be very different, and therefore
20 generally immune to constitutional scrutiny, because the
21 process by which one book is chosen over another one
22 will generally appear to be neutral. There will not be
23 suspect reasons.

24 QUESTION: Under state law, I suppose a state
25 board of education gives the local boards the

1 opportunity to select books within a group. Or what is
2 the procedure?

3 MR. LEVINE: I --

4 QUESTION: I am talking now about textbooks.

5 MR. LEVINE: As far as I know, school
6 districts are free to order whatever textbooks they
7 want. I don't know if the procedure --

8 QUESTION: But if a pupil objected to a
9 textbook or objected to one not being used as a
10 textbook, I understand your theory would still be
11 applicable.

12 MR. LEVINE: That's right. You are not asking
13 me if New York law gives him any right.

14 QUESTION: No, no, New York law clearly does.

15 MR. LEVINE: No, then. No, I don't think a
16 student has a constitutional right not to read a book.

17 QUESTION: And what --

18 MR. LEVINE: What --

19 QUESTION: I beg your pardon.

20 MR. LEVINE: Our theory is simply that school
21 boards don't have the power to deprive a student of the
22 right to read a book because --

23 QUESTION: Even -- a school board has no right
24 to determine which books shall be used in the various
25 classes, if students object?

1 MR. LEVINE: If students object, I don't think
2 is the relevant factor. What I do mean to say is that
3 that process of selecting one textbook over another will
4 rarely, if ever, raise constitutional questions, and
5 that is no part of this case. That is not the process
6 that went on at all here. Nine books were banned
7 totally from the library and the school district. We
8 don't have the more difficult case, and the more
9 difficult case, as far as I know, has not arisen in the
10 lower courts.

11 QUESTION: But if it did arise, would your
12 theory apply to it?

13 MR. LEVINE: In the abstract, if we found --
14 if the record says that we will not use a book by
15 Eldridge Cleaver as a textbook because he is a Black
16 Panther and considered disloyal to our country, my
17 theory would apply.

18 QUESTION: Would it apply to what teachers
19 teach in the classroom? Suppose you had a teacher who
20 had the same view about that book that you have just
21 described, and refused to teach it.

22 MR. LEVINE: Well, then you get into teachers'
23 constitutional rights and what they can be compelled to
24 do.

25 QUESTION: Is there a conflict between pupils'

1 rights and teachers' rights? And who would resolve that?

2 MR. LEVINE: Unless a school board could make
3 a determination that a teacher could forego teaching a
4 book as a matter of conscience, if -- I mean, it would
5 be difficult to allow a teacher to refuse a book simply
6 because she thought that Eldridge Cleaver was disloyal.
7 I don't think that comment or that view is entitled to
8 any deference by the state.

9 QUESTION: Teachers often prepare their own
10 outlines.

11 MR. LEVINE: They do.

12 QUESTION: And use those primarily rather than
13 the approved textbooks.

14 MR. LEVINE: I have no doubt of that, Your
15 Honor.

16 QUESTION: If a pupil disagrees with the
17 outline used by the teacher, I take it she would have
18 standing or he would have standing.

19 MR. LEVINE: I don't think that a student has
20 any constitutional right not to read a book that is
21 assigned by a teacher. I don't think this case presents
22 what might otherwise be --

23 QUESTION: I know this case doesn't, but I am
24 testing --

25 MR. LEVINE: The limits of our position.

1 QUESTION: -- the reach of your theory.
2 MR. LEVINE: I understand, Your Honor.
3 QUESTION: Yes. It seems to me --
4 MR. LEVINE: I --
5 QUESTION: Do you have any limiting
6 principle? How far does your theory -- or where does it
7 end?
8 MR. LEVINE: Our position I do not think is
9 very -- a very extensive one. We do not deny that
10 Island Trees has the right to transmit its local
11 community values through the schools, including through
12 the book selection process. That's not what this case
13 is about. All we say is that there are some limits on
14 what they can do in the name of education, in the name
15 of their good taste, in the name of preserving members
16 of the community from taking offense.
17 QUESTION: Mr. Levine, what are those limits?
18 That is what Justice Powell and I would both like to
19 know.
20 MR. LEVINE: I'm sorry. I didn't hear you.
21 QUESTION: You say there are some limits.
22 What are the limits?
23 MR. LEVINE: On what a school board can do?
24 QUESTION: Yes. I assume you would say they
25 can remove obscene books from the library, if they are

1 illegal. I think you answered that. But are there any
2 other books that they may remove from the library?

3 QUESTION: I thought you indicated pervasively
4 vulgar ones, you thought.

5 MR. LEVINE: I have no standard in mind, Your
6 Honor, and obviously those cases get us into First
7 Amendment quicksand, but there may be, there may be such
8 a case, such a book which would fall within that
9 category. The problem is that if we defer entirely to
10 school boards by saying, if they label it vulgar, that
11 is the end of the case --

12 QUESTION: But you have already conceded that
13 the school board could say, here are 2,000 books, which
14 would exclude every book that they thought was
15 borderline pornographic, obscene, or vulgar. I
16 understood you to say they could --

17 MR. LEVINE: I do not concede for a moment
18 that they could ban every book that contains a vulgar
19 word.

20 QUESTION: No, you -- then we've got to clear
21 it up. I thought you, in response to my earlier
22 question, had said, if the school board put 2,000 books
23 that they wanted in the library, and it excluded all the
24 books that are in question here, that they could do
25 that. Now you say they can't do that?

1 MR. LEVINE: No, they can't. There is no --
2 QUESTION: Who is going to pick --
3 MR. LEVINE: There is no --
4 QUESTION: Who is going to pick the --
5 MR. LEVINE: I am sorry. I was not clear,
6 Your Honor. There is no constitutional obligation to
7 buy these particular nine books. That is not our theory
8 at all. We are dealing with motive, and in First
9 Amendment --
10 QUESTION: Well, what standard must the
11 librarian use in picking these books?
12 MR. LEVINE: I have no idea. One assumes --
13 it is not in the record. One assumes that the librarian
14 consulted various rating journals. What is in the
15 record is that every single one of these books is
16 recommended for use in high school libraries.
17 QUESTION: Who prepares the rating journals?
18 MR. LEVINE: Organizations like the Wilson
19 Library Journal, the School Library Journal,
20 organizations of librarians and educators.
21 QUESTION: You haven't mentioned the Pacifica
22 Foundation case. Do you think that has anything to do
23 with this case?
24 MR. LEVINE: It is, like this case, a case
25 that raises the question of vulgarity. It is not a

1 radio case, and the Court exhibited particular concern
2 for the special quality of radios intruding themselves
3 into homes. The Court exhibited particular concern for
4 young six-year-old children who might hear these
5 broadcasts. The Court exhibited concern for a monologue
6 that was pervasively vulgar, and that is where the
7 phrase comes from. None of these books are pervasively
8 vulgar. They have random instances of bad language.

9 Now, we don't have to go so far as the Court
10 did in Cohen versus California to say that each of these
11 phrases in these books is protected, as the Court did
12 say in Cohen. What we do say is that you can't ban an
13 antiwar book because it reports about Cohen's case,
14 even if the school board calls it vulgar. But there is
15 something else to be said about this case, and I don't
16 want the Court simply to focus on vulgarity, because
17 there is in the record, and Judge Newman was concerned
18 about the ideological concerns, what they said about
19 Cleaver.

20 They said about Malcolm X, whose essay had
21 appeared in A Reader for Writers, that he was a traitor
22 to his country, and this book equated him with the
23 Founding Fathers. In post-litigation, we asked him
24 which of these books was anti-American, because a press
25 release had said that one of the books was

1 anti-American, and their example was a book called A
2 Hero Ain't Nothing But A Sandwich, a book by Alice
3 Childress, a National Children's Book Award winner. And
4 they quoted a passage in which a black school teacher,
5 Nigeria Green, says to her class that George Washington
6 was a slaveholder, and she muses about the irony of him,
7 a Founding Father, having been a slaveholder.

8 QUESTION: Well, Mr. Levine, supposing that
9 these nine books had been acquired by the school
10 district, say, in 1970 or 1971 as a representative
11 collection of the kind of protest literature of the
12 sixties. I am not sure they would all fit in that
13 category --

14 MR. LEVINE: No, I don't think so.

15 QUESTION: -- but supposing they would, and
16 they had been kept there for ten years, and then there
17 was a series of books published about the history of
18 early New York, and there was a shelf space problem, and
19 the school board decided to get rid of this collection
20 of the sixties because it was somewhat passe, and to
21 expose the students to the history of early New York,
22 since they couldn't do both. Now, there, there is no
23 problem of motivation at all, but you are getting rid of
24 precisely the same books.

25 MR. LEVINE: That's right.

1 QUESTION: Do you get a different result?

2 MR. LEVINE: No, I do not. Now to your
3 question about motivation to Mr. Lipp, it of course does
4 come into First Amendment analysis in the discharge
5 situation. Men and women can get discharged from jobs
6 for legitimate and illegitimate reasons. We don't talk
7 about tenure here. That disparaging phrase has been
8 used by some of the courts rejecting our principles. We
9 simply say that as in the discharge situation, there are
10 permissible and impermissible reasons for substituting
11 books.

12 QUESTION: Now, you are saying the reasons I
13 gave you in the hypothetical are not permissible?

14 MR. LEVINE: No, those are permissible.

15 QUESTION: They are permissible.

16 MR. LEVINE: They surely are. No one is
17 making a judgment there that this book is being
18 eliminated because somebody in our community, or a
19 group, or even the majority in our community will be
20 offended by certain passages in it.

21 QUESTION: Well, then let me ask you the same
22 question I asked Mr. Lipp. If the precise same
23 objective acts depend for their constitutional validity
24 on the motivation of the people who perform the acts, in
25 one case they are bad and in the other case they are

1 good, what support do you find in our First Amendment
2 cases for the result depending on motivation? Can you
3 name one case?

4 MR. LEVINE: Aside from the discharge cases,
5 no, but I think what those cases tell us is that the
6 same act may be constitutional and unconstitutional
7 depending on the reasons. You can fire Mr. Doyle in
8 Mount Healthy because he did something that he is not
9 supposed to do as a teacher, but you can't fire him
10 because he advocates a certain point of view. You can --

11 QUESTION: But those are two different acts,
12 really.

13 MR. LEVINE: They are two different acts, but
14 in resolving that constitutional question, one does have
15 to look at motive, and in substituting a book, say, like
16 Silas Marner for A Hero Ain't Nothing But A Sandwich, it
17 is one thing if they say Silas Marner is a better
18 written book and we are going to use that in our
19 curriculum. It is something else to say, we are not
20 going to have A Hero Ain't Nothing But A Sandwich in our
21 curriculum because it says an unpleasant historical
22 fact. That the First Amendment will not permit.

23 QUESTION: Well, I take it then you would
24 always -- anybody who could draft a complaint halfway
25 decently could always get to the jury.

1 MR. LEVINE: I am not sure that is true, at
2 least --

3 QUESTION: Well, but I mean, if it is
4 motivation that is on the front burner, it is a -- you
5 are always going to survive a summary judgment motion.

6 MR. LEVINE: Well, there is a doctrine in 1983
7 law where courts do scrutinize whether or not
8 allegations are made in good faith, and of course that
9 is an advocate's obligation under the rules.

10 QUESTION: Yes.

11 MR. LEVINE: But you may not get -- you may
12 get up to summary judgment in any case by a well-drafted
13 complaint, but I don't think that imposes great burdens
14 on the courts.

15 QUESTION: Well, you are going to --

16 MR. LEVINE: This cause of action has existed
17 for eleven years, and there are about a dozen cases
18 around the lower courts.

19 QUESTION: Well, I am just suggesting that if
20 motivation is the pivotal factor, you are going to get
21 to trial a lot more often than if it were some objective
22 matter.

23 MR. LEVINE: It is entirely possible, but I
24 repeat that I don't think that this is a cause of action
25 that invites a flood of litigation any more than it has

1 in the past, and I think if the courts abdicate, if the
2 federal courts say that anything school boards say and
3 do about books is beyond judicial review, that you leave
4 people remedyless for the assertion of very important
5 rights.

6 QUESTION: Mr. Levine, do you think that
7 elementary and high school students have First Amendment
8 rights which are the same as those of adults?

9 MR. LEVINE: I do not. I don't quarrel for a
10 minute, even if I could, with the Court's decision in
11 Ginsberg, which says there are variable obscenity
12 standards, and I don't think our position here
13 challenges that at all.

14 QUESTION: Well, are not then the First
15 Amendment rights of elementary and high school students
16 somewhat different, and don't we have to --

17 MR. LEVINE: They are.

18 QUESTION: -- look to that pretty closely?

19 MR. LEVINE: They are. Important to say two
20 things, Your Honor. One, no elementary school children
21 in this case. We are talking about high school
22 children. Two --

23 QUESTION: I thought originally some of the
24 plaintiffs came from seventh or eighth grade, which is
25 not high school.

1 MR. LEVINE: Junior high school. That's
2 correct. Junior high school. Though the only book in
3 the junior high school library hear was A Reader for
4 Writers, the one about which they said Malcolm X was a
5 traitor to his country, and it is not alleged it had any
6 vulgarity whatsoever.

7 Let me say finally on the issue of vulgarity
8 that aside from all these very explicitly political
9 references in the record which led Judge Newman to think
10 that a trial was warranted, there is also the critical
11 fact that this post-litigation concern for vulgarity is
12 somewhat suspect. If this is a dominant concern of this
13 school board, one would assume --

14 QUESTION: Well, it wasn't post-litigation if
15 the district judge thought that that is what the school
16 board turned its actions on.

17 MR. LEVINE: Well, he didn't make --

18 QUESTION: That wasn't very post-litigation.

19 MR. LEVINE: He didn't make -- with respect,
20 Your Honor, he didn't make a finding that that was their
21 justification. He didn't separate out political from
22 vulgar. What he said was, all of this was objected to
23 because it offended their community values, and they
24 have the right to do that, but the point I was going to
25 make is, if that is their concern pre or

1 post-litigation, one would have assumed that at some
2 point the school board would have gone back to the
3 library and seen if there were any other books with this
4 kind of language. They had never done so before, and
5 they have never done so since.

6 QUESTION: Well, I take it then in your -- in
7 litigation that you would contemplate the federal court
8 would have to decide, well, why were these books really
9 taken off the shelves, and if they found that, well,
10 they were taken off because the school board thought
11 they were vulgar, then you would have to decide, the
12 federal court would have to say, well, were they vulgar
13 enough to warrant taking them off the shelf?

14 MR. LEVINE: I know that is an unappetizing
15 undertaking. I see --

16 QUESTION: Well, isn't that -- that is what
17 you would contemplate?

18 MR. LEVINE: I don't know that a -- I don't --

19 QUESTION: I am not saying you are wrong. I
20 just want to know what you --

21 MR. LEVINE: I don't know that a school board
22 -- a federal court has to read all these books. What we
23 have in this record is a concern with eight words in a
24 book like The Fixer, and that is not a constitutionally
25 permissible basis.

1 QUESTION: Well, the court would have to
2 decide whether that book then is vulgar or not.

3 MR. LEVINE: The court may have to try and
4 elucidate some standards, but I think the court has to
5 begin with saying that a half-dozen vulgar words in the
6 course of a book is not the basis for banning it.

7 QUESTION: Well, what you are saying, or let's
8 put it this way. Is what you are saying that is between
9 the federal judge and the elected school board, the
10 latter prevails in the judgment of this book?

11 MR. LEVINE: In a conflict between a local
12 school board and a federal judge with regard to the
13 banning of books, a local school board must abide by
14 constitutional standards as interpreted by the federal
15 courts. That is our position, Your Honor.

16 QUESTION: But the thing you haven't told us
17 as far as -- I have been listening rather carefully to
18 your argument. I don't really know what your standard
19 is. Why under your view, if the school board had
20 appointed a committee, as they did here, and they said,
21 find out if there is too much -- read the book as a
22 whole and consider its literary value, see if it has any
23 relevance to course material, and they had two or three
24 other guidelines in there.

25 Supposing the committee had come back, as they

1 did, and they maybe wrote a full report on each book,
2 and then the committee followed the recommendations, as
3 they did not here, and removed three books and kept
4 five, or six, or whatever the number is. You would say
5 that was still unconstitutional. Is that correct? And
6 say that you can't dispute their judgment. Each one,
7 any impartial observer, a teacher, a book expert would
8 agree that they had faithfully followed the standards.

9 MR. LEVINE: If they --

10 QUESTION: What constitutional right of whom
11 has been violated?

12 MR. LEVINE: If they made those judgments on
13 the basis of the kinds of criteria, educational
14 suitability, assuming that was fleshed out in relevance
15 to the community, that would be perfectly permissible.
16 That process goes on --

17 QUESTION: Well, but you have said to us every
18 book here has a -- that is not what you said earlier in
19 your argument.

20 MR. LEVINE: That -- I am sorry --

21 QUESTION: You said earlier that your clients
22 have a constitutional right to have all the books
23 retained, even those that were unanimously rejected by
24 the committee and by the board.

25 MR. LEVINE: Depending on the reasons they

1 give, Justice Stevens. If these books --

2 QUESTION: Well, I am saying to you, supposing
3 they gave the reasons that the committee followed the
4 standards and applied those standards.

5 MR. LEVINE: Then we wouldn't have this case.
6 My --

7 QUESTION: But would you have a constitutional
8 objection to what they did?

9 MR. LEVINE: Absolutely not, Your Honor. What
10 I am saying is that if the committee --

11 QUESTION: Well, then, I don't understand how
12 you can now claim a constitutional right to have all the
13 books restored to the shelves.

14 MR. LEVINE: Because of the reasons they gave
15 for removing these books. Because they considered the
16 books solely on the basis of excerpts. Mr. Lipp says
17 before we agree that they must be considered as a
18 whole. There is not a shred of evidence in this record
19 that any of these books were considered as a whole.

20 QUESTION: Well, they read the whole books,
21 according to the affidavits.

22 MR. LEVINE: They say they read the whole
23 books, though --

24 QUESTION: Well, don't we have to accept that
25 as true? You didn't file any countervailing affidavits.

1 MR. LEVINE: No, we took that position,
2 however, and there are depositions in this record, and
3 indeed, the 9-G statement, the Southern -- the Eastern
4 District's local rule in summary judgment cases says
5 that some of these books were banned on the basis of
6 isolated themes, even when the theme of the entire book
7 was to the contrary.

8 QUESTION: Well, that doesn't mean the person
9 read only the isolated theme.

10 MR. LEVINE: It is entirely possible, but it
11 is clear that he made the judgment on the basis of the
12 isolated passage.

13 QUESTION: Mr. Levine, let me pursue the
14 subject you were discussing with Justice Stevens. I
15 have Page A-97, the district court's opinion, A-97, top
16 of the page, sort of the concluding statement by the
17 district judge. What he says is, the pleadings,
18 affidavits, and so forth demonstrate that the nine
19 books, and I am omitting a word or two, were removed
20 because they were irrelevant, vulgar, immoral, and in
21 bad taste, making them educationally unsuitable for the
22 district's junior and senior high school students.

23 Now, I understand, of course, that you don't
24 agree that they were educationally unsuitable. My
25 question is, is not it the primary function of a school

1 board to determine what is educationally suitable, and
2 let's assume for the moment that you answer that in the
3 negative.

4 MR. LEVINE: No, I don't.

5 QUESTION: Are you saying that federal courts
6 are better qualified to answer that question than school
7 boards?

8 MR. LEVINE: I do not whatsoever.

9 QUESTION: I would like to think we are, but I
10 know we aren't.

11 MR. LEVINE: No, and I don't think the federal
12 courts are better suited to do that, Your Honor.

13 QUESTION: Well, what do we do then?

14 MR. LEVINE: What has happened -- First of all
15 we take issue with the district judge's conclusion. We
16 did not concede that in summary judgment. That is his
17 reading of the record, and he draws those inferences,
18 though Judge Newman was not at all willing to abide by
19 those inferences.

20 QUESTION: Well, at least we have two judges
21 one way and two the other, don't we?

22 MR. LEVINE: Well, we do have that, but there
23 is simply no disputing what they say here about Cleaver
24 and about Malcolm X and about George Washington being a
25 slaveholder. That is all in the record. That is not

1 about vulgarity.

2 QUESTION: But somebody has to make a decision
3 as to what is educationally suitable.

4 MR. LEVINE: I don't think that a school board
5 can cloak its political concerns in the mantle of
6 educational suitability. They may say that, and they
7 may want the Court to believe that is what went on here,
8 but they did in fact make some very explicit political
9 judgments.

10 QUESTION: Well, on Page A-107, the court made
11 an even narrower -- drew an even narrower inference from
12 the facts. "The board has restricted access only to
13 certain books which the board believed to be, in
14 essence, vulgar." That was his assessment of what the
15 board did.

16 QUESTION: That is Judge Pratt's assessment.
17 That's correct. I -- Like Judge --

18 QUESTION: I know you disagree with that.

19 MR. LEVINE: Well, the reason, Your Honor, is,
20 there isn't a claim that there is a single vulgar word
21 in all of A Reader for Writers. There is nothing said
22 about A Reader for Writers that suggests vulgarity.

23 QUESTION: Of course, you say all of these
24 books should go back on the shelves.

25 MR. LEVINE: That's correct. Thank you, Your

1 Honor.

2 CHIEF JUSTICE BURGER: Thank you, counsel.

3 Do you have anything further, Mr. Lipp?

4 ORAL ARGUMENT OF GEORGE W. LIPP, JR., ESQ.,

5 ON BEHALF OF THE PETITIONERS - REBUTTAL

6 MR. LIPP: Yes, I do, very briefly, Mr. Chief
7 Justice.

8 I would like to lay to rest the allegations of
9 political motivation. I would like to do it by stating
10 that I have read all of the books involved very
11 recently. I have read the one book that is allegedly to
12 have referred to Malcolm X. That was a different
13 edition. The board banned a book that had absolutely no
14 reference to Malcolm X. That was the book that
15 contained A Modest Proposal. With regard to A Hero
16 Ain't Nothing But A Sandwich, not --

17 QUESTION: On that book, Mr. -- that book, did
18 you refer -- that one was not vulgar. Is that correct?

19 MR. LIPP: That is correct.

20 QUESTION: There is no vulgarity at all in
21 that book?

22 MR. LIPP: Their feeling is that it was --

23 QUESTION: So the banning of that book cannot
24 be justified on vulgarity grounds.

25 MR. LIPP: That is correct. They felt it was

1 in bad taste.

2 QUESTION: Now, what is the ground for banning
3 it? Just bad taste?

4 MR. LIPP: Yes.

5 QUESTION: Now, supposing they took -- would
6 it be permissible for them to take every book out of the
7 library they thought was in bad taste? What does bad
8 taste mean?

9 MR. LIPP: If they felt that that bad taste
10 was related to educational suitability, I would think
11 they would have that right, as long as they are not --

12 QUESTION: Could they take every book out of
13 the library that contained the word "ain't?"

14 (General laughter.)

15 MR. LIPP: They would be very foolish, and if
16 that were the sole -- if that were the sole --

17 QUESTION: Well, the judge here says they were
18 foolish.

19 MR. LIPP: If that were the sole reason --

20 QUESTION: That is the sole reason. They
21 don't want the children to form the bad habit of using
22 the word "ain't." I was taught that was a vulgar word.

23 (General laughter.)

24 MR. LIPP: If that were the sole reason, Mr.
25 Justice Stevens, I -- I still question whether that

1 would --

2 QUESTION: Well, I really want -- this is a
3 serious question. I am not playing games.

4 MR. LIPP: I realize that.

5 QUESTION: Would that be a sufficient reason
6 to be a total answer to a constitutional objection?

7 MR. LIPP: I think it would, because it does
8 not address a doctrine of thought, an ideology or favor
9 a political party or religion, and so forth. I want
10 also to add that not only did the other book, A Hero
11 Ain't Nothing But A Sandwich, refer to George Washington
12 in what the board felt was disparaging terms, it was
13 laced with obscenities. The political excerpts that Mr.
14 Levine has said --

15 QUESTION: What if they barred the Declaration
16 of Independence and the Constitution, which also
17 recognize slavery?

18 MR. LIPP: Well, the political motivation that
19 Mr. Levine is saying "they" had was motivation of the
20 Randolph New York State School District that had a list
21 of excerpts with these comments, their own comments,
22 sitting on a table at this conference that the board
23 went to at the request of a regent of the state of New
24 York. I want to remind the Court that there are
25 substantial limitations upon the requirement for content

1 neutrality, among which are the Young against American
2 Mini-Theaters case, where Mr. Justice Stevens wrote the
3 majority decision. We have, of course, the fact that
4 juveniles do not have rights equal with adults. You
5 have many, many areas where there are erosions upon this
6 so-called absolute right that it appears that Mr. Levine
7 is claiming. It is not absolute, especially in the area
8 of public education.

9 Thank you.

10 CHIEF JUSTICE BURGER: Thank you, gentlemen.
11 The case is submitted.

12 (Whereupon, at 2:05 o'clock p.m., the case in
13 the above-entitled matter was submitted.)

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CERTIFICATION

Alderson Reporting Company, Inc. hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the matter of:

Board of Education, Island Trees Union Free School District No. 26, Et Al., Petitioners, V. Steven A. Pico, By His Next Friend, Frances Pico, Et Al. - No. 80-2043

and that these pages constitute the original transcript of the proceedings for the records of the Court.

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Suzanne Young

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