The Burger Court Opinion Writing Database

Board of Education, Island Trees Union Free School District No. 26 v. Pico

457 U.S. 853 (1982)

Paul J. Wahlbeck, George Washington University
James F. Spriggs, II, Washington University in St. Louis
Forrest Maltzman, George Washington University

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

March 8, 1982

Re: No. 80-2043 - Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico

Memorandum to: Justice Powell
Justice Rehnquist
Justice O'Connor

In due course I will circulate a dissent in this case.

Regards,

WEB

I will write also - but may await the C.J.'s

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

PERSONAL

May 26, 1982

Re: 80-2043 - Board of Education, Island Trees Union Free School District v. Pico

Dear Lewis:

In common with all of us, I am finding I have a "full plate," particularly of dissenting opinions.

Would you be interested in doing a dissent in the above case?

I know you also share the common affliction of being overloaded, and I will understand if you wish to "pass."

Regards,

WEB

Justice Powell

David - Happy 4th of July!

5/27/82

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Dear Lewis

Immediately after the Conference on 80-2043, Pico, I was so disturbed at the absurd result that I delivered myself of a dozen pages of longhand for dissent. That was more than three months ago and I had no copy in my file and had forgotten that I gave it to a clerk with directions

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

to "beef it up."

I suspect that the Clerk is trying to "soften" my draft and only now do I discover that I have a dozen pages of vigorous dissent.

If agreeable to you we will "nunc pro tunc" and if my dissent is too "soft" you can add some fire and brimstone! Regards WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 7, 1982

Re: 80-2043 - Board of Education, Island Trees Union Free School District No. 26 v. Pico

MEMORANDUM TO THE CONFERENCE:

To avoid cancelling Bill Brennan's ferry reservation, I enclose a typescript draft of dissent in this case.

If four will join me, obviously it will need more work!

Regards,

WEB

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

No. 80-2043, Island Trees School Dist. v. Pico

From: The Chief Justice

Circulated: JUN 7 1982

Recirculated: _____

CHIEF JUSTICE BURGER, dissenting.

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, the Court today, in a lavish expansion of the First Amendment, holds that a school board's decision concerning what books are to be in the school library is subject to federal court review under the First Amendment.[1] We thus proclaim ourselves a "super censor" of school board library decisions. Stripped to its essentials, the issue comes down to two important propositions: first, whether local schools are to be administered by elected school boards, or by federal judges and teenage

---

[1]At the outset, the Court notes that certain school board members found the books in question "objectionable" and "improper" for junior and senior high school students. What the Court apparently finds objectionable is that the inquiry as to the challenged books was initially stimulated by "a politically conservative organization of parents concerned about education," which had concluded that the books in question were "improper fare for school students." Ante, at 2. As noted by the District Court, however, and in the Court's opinion, ante, at 5, both parties substantially agreed about the motivation of the School Board in removing the books:

"[T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." 474 F. Supp. 387, 392 (1979).

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: JUN 10 1982

Recirculated: _____

Private!
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

CHIEF JUSTICE BURGER, dissenting.

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, the Court today, in a lavish expansion of the First Amendment, holds that a school board's decision concerning what books are to be in the school library is subject to federal court review under the First Amendment.[1] We thus proclaim ourselves a "super censor" of school board li-

[1] At the outset, the Court notes that certain school board members found the books in question "objectionable" and "improper" for junior and senior high school students. What the Court apparently finds objectionable is that the inquiry as to the challenged books was initially stimulated by "a politically conservative organization of parents concerned about education," which had concluded that the books in question were "improper fare for school students." *Ante*, at 2. As noted by the District Court, however, and in the Court's opinion, *ante*, at 5, both parties substantially agreed about the motivation of the School Board in removing the books: "[T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and senior high school students." 474 F. Supp. 387, 392 (1979).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

80-2043

June 22, 1982

MEMORANDUM TO THE CONFERENCE:

Bill Brennan and Byron thought there might be some possibility of a mootness problem arising out of Pico if it did not come down this week.

Accordingly we have striken No. 81-300, Ford Motor Company v. Equal Employment Opportunity Commission which was 40 pages and substituted Pico which is a total of 52 pages. The Computer Room can manage that additional pagination.

Regards,

WEB/pab

Brennan 81

STYLISTIC CHANGES
(plurality references)
+ addl changes made

To: Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **The Chief Justice**

Circulated: _____

Recirculated: JUN 22 1982

2nd DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

CHIEF JUSTICE BURGER, dissenting. with whom J. Rehnquist and J. O'Connor join,

The First Amendment, as with other parts of the Constitution, must deal with new problems in a changing world. In an attempt to deal with a problem in an area traditionally left to the states, a plurality of the the Court, in a lavish expansion going behond any prior holding under the First Amendment, expresses its view that a school board's decision concerning what books are to be in the school library is subject to federal court review.[1] Were this to become the law this

[1] At the outset, the plurality notes that certain school board members found the books in question "objectionable" and "improper" for junior and senior high school students. What the plurality apparently finds objectionable is that the inquiry as to the challenged books was initially stimulated by what is characterized as "a politically conservative organization of parents concerned about education," which had concluded that the books in question were "improper fare for school students." *Ante*, at 2. As noted by the District Court, however, and in the plurality opinion, *ante*, at 5, both parties substantially agreed about the motivation of the School Board in removing the books:

"[T]he board acted not on religious principles but on its conservative educational philosophy, and on its belief that the nine books removed from the school library and curriculum were irrelevant, vulgar, immoral, and in bad taste, making them educationally unsuitable for the district's junior and se-

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1982

Re: No. 80-2043 - Board of Education, Island Trees Union Free School District, No. 26, et al. v. Steven A. Pico

Dear Bill:

I had completely forgotten the possible mootness issue until you called about expediting announcement. I should have had this in mind since most high schools have their graduation well before mid-June.

However, with an extra effort Donovan and Goldstraw were able to manage as I reported in my earlier memo today.

This raises another question, at least for me, but since I am in the minority the majority position controls.

Is it not a bit odd that the Court strains so mightily to get down a plurality opinion on an important constitutional question 24-40 hours before it is mooted?

I may add a footnote observation on this score to my dissent.

Regards,

WEB

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 22, 1982

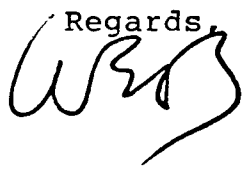
MEMORANDUM TO THE CONFERENCE

RE: No. 80-2043, Bd of Education v. Pico

At footnote 1 I will be adding the following paragraph:

In oral argument counsel advised the Court that of the original plaintiffs, "[o]ne of them is still in school...until this June, and will assumedly graduate in June. There is a potential question of mootness." The sole surviving plaintiff has therefore either recently been graduated from high school or is within days or even hours of graduation. Yet the plurality strains mightily to reach out to express its views on a very important constitutional issue. In this case there is no problem of the issue "evading review." See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Fortunately, there is no binding holding of the Court on this critical issue. But in its haste the plurality forgets the admonition of Justice Frankfurter that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." United States v. Lovett, 328 U.S. 303, 320 (1946)(Frankfurter, J., concurring.) The plurality also ignores Justice Stone's warning that "the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936)(Stone, J., dissenting.) Far from exercising self-restraint, the plurality races to reach, although happily cannot resolve in any binding way, the critical constitutional issues initially raised.

Regards,



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Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1982

MEMORANDUM TO THE CONFERENCE

RE: No. 80-2043, Bd of Education v. Pico

My footnote 1 will be stylistically changed to read as follows:

> In oral argument counsel advised the Court that of the original plaintiffs, only "[o]ne of them is still in school...until this June, and will assumedly graduate in June. There is a potential question of mootness." Transcript of Oral Argument 4-5 (Emphasis added.) The sole surviving plaintiff has therefore either recently been graduated from high school or is within days or even hours of graduation. Yet the plurality strains mightily to reach out to express its views on a very important constitutional issue. Here there is no problem of the issue "evading review." See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Fortunately, there is no binding holding of the Court on the critical constitutional issue presented.
>
> In its haste the plurality forgets the admonition of Justice Frankfurter that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." United States v. Lovett, 328 U.S. 303, 320 (1946)(Frankfurter, J., concurring.) The plurality also ignores Justice Stone's warning that "the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936)(Stone, J., dissenting.) Far from exercising the Frankfurter-Stone self-restraint, the plurality races to reach, although happily cannot resolve, the critical constitutional issues initially raised.

Regards,

WEB

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1982

MEMORANDUM TO THE CONFERENCE

RE: No. 80-2043, Bd of Education v. Pico

My footnote 1 will be stylistically changed to read as follows:

> In oral argument counsel advised the Court that of the original plaintiffs, only "[o]ne of them is still in school...until this June, and will assumedly graduate in June. There is a potential question of mootness." Transcript of Oral Argument 4-5 (Emphasis added.) The sole surviving plaintiff has therefore either recently been graduated from high school or is within days or even hours of graduation. Yet the plurality strains mightily to reach out to express its views on a very important constitutional issue. Here there is no problem of the issue "evading review." See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Fortunately, there is no binding holding of the Court on the critical constitutional issue presented.
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Regards,

WEB

Copies to the Conference

P.S. (Justices Powell, Rehnquist and O'Connor only.) Absent dissent, I assume you will join. — No!

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1982

Re: No. 80-2043 - Board of Education, Island Trees Union Free School District, No. 26 v. Pico

Dear Bill:

I am not sure I "track" your memo on June 23.

On a Constitutional issue, I had thought, we search for reasons to avoid decision. The statements made by counsel at the opening of his argument are hardly "vague references", i.e. "There is a potential question of mootness." (Transcript of Oral Argument 4-5).

What brought the possible mootness back into my own consciousness was your concern that we get the case out before Monday in case the respondent was graduated on Saturday or Sunday. Mootness, like jurisdiction generally, "never goes away" as someone once said; the sole exception is if the issue is "capable of repetition yet evading review." This case is quite unlike today's Globe mootness issue where we all agree that case is not moot.

I did not expect to persuade you to my view. I simply want to assert my own.

The significance of your point that four voted for cert is not clear to me. You can't be saying this was an irrevocable vote on the existence of a live controversy.

As to your other points, I remain in doubt as to what you mean. Are you suggesting that I am inhibited in some way from expressing my view that the ancient doctrine of avoiding Constitutional decisions whenever possible still retains a "mite" of validity?

I repeat, I did not assume anyone would be persuaded, but we now have all points of view stated.

Regards,

WEB

Justice Brennan

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1982

Re: No. 80-2043 - Board of Education, Island Trees School District, No. 26 v. Pico

Dear John:

I am still puzzled why the point is made now concerning the date of announcement. That was agreed on at least by Monday June 21 after Bill Brennan alerted us on the mootness problem. We have all agreed on the Friday release. No one suggested delay that might moot the case.

I do not agree we should depart from the fixed practice of non-disclosure of Conference votes, particularly as to argued cases. Three dissents from denial do occasionally reveal some data, but out of thousands of cases that represents only a handful in one year. No data has ever been disclosed on argued cases.

It is not correct that my dissent "implies that the five Justices who actually voted to deny cert are the ones who eagerly have reached out to decide a constitutional question unnecessarily ...." I think you confused my June 23 memo with my footnote. Moreover only the public disclosure of the cert vote puts flesh on your point and there should be no public disclosure of that vote.

I cannot conceive that anyone would seriously question the propriety of our raising the "Frankfurter doctrine" that Constitutional issues should be avoided "if at all possible." Here a plurality tries to resolve a Constitutional issue on a case not yet tried and possibly on the verge of becoming moot. The dissenters acknowledge the right of the plurality to have the case come down Friday by agreeing on that so as to avoid the risk of mootness.

If you withdraw your comment I will undertake to accommodate by modifying my note to read as attached.

Regards,

WEB

In oral argument counsel advised the Court that of the original plaintiffs, only "[o]ne of them is still in school...until this June, and will assumedly graduate in June. There is a potential question of mootness." Transcript of Oral Argument 4-5 (Emphasis added.) The sole surviving plaintiff has therefore either recently been graduated from high school or is within days or even hours of graduation. Yet the plurality expresses views on a very important constitutional issue. Here there is no problem of the issue "evading review." See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980). Fortunately, there is no binding holding of the Court on the critical constitutional issue presented.

We do well to remember the admonition of Justice Frankfurter that "the most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." United States v. Lovett, 328 U.S. 303, 320 (1946)(Frankfurter, J., concurring.) In the same vein Justice Stone warned that "the only check upon our own exercise of power is our own sense of self-restraint." United States v. Butler, 297 U.S. 1, 79 (1936)(Stone, J., dissenting.)

Rec'd 1 copy

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Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 23, 1982

Re: No. 80-2043 - Board of Education, Island Trees Union Free School District No. 26 v. Pico

Dear John:

Of course you are wholly free to articulate any view you wish, as I have mine in this case. Bill's memo of June 22 however, seemed to intimate a challenge to my even referring to the imminent mootness. My reference to it was prompted by his desire to expedite announcement and I agree on that. There is no basis whatever to suggest that there is an effort to delay announcement to effect mootness. However, what you say on that score is your affair.

On the matter of disclosing the Conference voting on cert however, that is another matter. That is strictly confidential, internal information and it is wholly irrelevant to any issue. Plainly the case will not be moot if it comes down Friday as now scheduled. If there is any further delay, it may become moot and I am for a Friday announcement.

Regards,

WEB

Justice Stevens

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1982

Re: 80-2043 - Board of Education, Island Trees Union Free School District, No. 26 v. Pico

Personal

Dear Lewis:

With the "downstairs" pressures in remission for a moment, I'll go to a typed memo in response to yours.

I take your note to mean you join what is now note 2 (formerly part of note 1) with the omission of "Here there is no problem, etc. . .," which certainly meets all the problems you raised. Absent further word, I will proceed.

Regards,

WEB

Justice Powell

Rice 80-2043

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

Received at 2.50 PM on 6/24

Lewis

Between John yesterday and you today, I am not at all sure Rico will come down Friday.

I'll try once more. Can you "stay in place" 4 4

Supreme Court of the United States
Washington, D.C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

I simply omit the sentence "Here there is no problem of 'evading review' [e.g. Richmond Newspapers]."?

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
THE CHIEF JUSTICE

June 24, 1982

Re: No. 80-2043 - Board of Education, Island Trees Union Free School District, No. 26 v. Pico

MEMORANDUM TO THE CONFERENCE:

The "potential mootness" footnote has been made footnote 2 and placed at the end of the introductory paragraph. The sentence "Here there is no problem of the issue 'evading review.' See, e.g., Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555 (1980)." is omitted.

Regards,

WEB

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 4, 1982.

No. 80-2043 -- Board of Education v. Pico.

This is my effort to write as narrowly as the case permits. That was the desire of the five of us, as I recall it. I would appreciate your reaction before I make a general circulation.

Sincerely,

Bill

W. J. B., Jr.

Justice White.
Justice Marshall.
Justice Blackmun.
Justice Stevens.

To: The Chief Justice
Justice White
✓Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 4 May 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May ——, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The principal question presented is whether the First Amendment[1] imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries.

I

Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim. When this suit was brought, Ahrens was the President of the Board, Martin was the Vice-President, and the remaining petitioners were Board members. The Board is a state agency charged with responsibility for the operation and administration of the public schools within the Island

[1] The Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It applies to the states by virtue of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

No. 80-2043 -- Board of Education v. Pico -- Your Suggestions.

Dear John,

I have attempted to incorporate the suggestions that you made yesterday. Do the marked changes -- which would appear at pages 18-19 of the current draft -- meet with your suggestions?

Sincerely,

W.J.B., Jr.

May 7, 1982.

Brennan 11

... Finally, while petitioners originally defended their removal decision with the explanation that "these books contain obscenities, blasphemies, and perversion beyond description," 474 F. Supp., at 390, one of the books, A Reader for Writers, was removed even though it contained no such language. 638 F. 2d, at 428, n. 6 (Mansfield, J., dissenting).

Standing alone, this evidence respecting the substantive motivations behind petitioners' removal decision would not be decisive. This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. Petitioners' removal procedures were vigorously challenged below by respondents, and the evidence on this issue sheds further light on the issue of petitioners' motivations.[footnote 27] Respondents alleged that in making their removal decision petitioners ignored "the advice of literary experts," the views of "librarians and teachers within the Island Trees School system," the advice of the superintendent of schools, and the guidance of "publications that rate books for junior and senior high school students." App. 128-129. Respondents also claimed that petitioners' decision was based solely on the fact that the books were named on the PONYU list received by petitioners Ahrens, Martin, and Hughes, and that petitioners "did not undertake an independent review of other books in the [school] libraries." Id., at 129-130. Evidence before the District Court lends support to these claims. The record shows that

attach to W.3 5/7/82 to JS

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 10, 1982.

No. 80-2043 -- Board of Education v. Pico
Proposed Addition.

At John's suggestion, I propose to add the following at pages 18-19 of the draft you have already received:

At pages 18-19, instead of the first two sentences of the crossover paragraph, add

"Standing alone, this evidence respecting the substantive motivations behind petitioners' removal decision would not be decisive. This would be a very different case if the record demonstrated that petitioners had employed established, regular, and facially unbiased procedures for the review of controversial materials. But the actual record in the case before us suggests the exact opposite. Petitioners' removal procedures were vigorously challenged below by respondents, and the evidence on this issue sheds further light on the issue of petitioners' motivations.[footnote 27]"

At page 19, at the end of the same paragraph, add

"In sum, respondents' allegations and some of the evidentiary materials presented below do not rule out the possibility that petitioners' removal procedures were highly irregular and ad hoc--the antithesis of

those procedures that might tend to allay suspicions regarding petitioners' motivations."

Further suggestions are, of course, welcome.

Sincerely,

W. J. B., Jr.

Justice White.
Justice Marshall.
Justice Blackmun.
Justice Stevens.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

May 19, 1982.

No. 80-2043 -- Board of Education v. Pico.

Dear Byron,

Thank you for your letter of May 10. I am not sure that we are really very far apart in this case. In any event, the proposed changes outlined below are an effort to close any gap, and will be included, along with John's earlier suggestions, in the general circulation that I am about to make.

You are correct, of course, that I "deem it essential ... to provide a First Amendment standard for the district court to use on remand." It seems to me that in the absence of such a standard, there is no way for a district court to know whether or not there is a bona fide factual issue foreclosing summary judgment: There will always be factual disputes, but whether they are relevant to the disposition of the constitutional issue presented in cases such as the present one will necessarily depend upon the standard that we specify.

The standard-setting paragraph in my current draft appears at the bottom of page 16. I propose to try to reflect your comments by changing that paragraph to read as follows:

> "With respect to the present case, the message of these precedents is clear. Petitioners rightly possess significant discretion to determine the content of their school libraries. But that discretion may not be exercised in a narrowly partisan or political manner. If a Democratic school board, motivated by party affiliation, or-

dered the removal of all books written by or in favor of Republicans, few would doubt that the order violated the constitutional rights of the students denied access to those books. The same conclusion would surely apply if an all-white school board, motivated by racial animus, decided to remove all books authored by blacks or advocating racial equality and integration. Our Constitution does not permit the official suppression of ideas. Thus whether petitioners' removal of books from their school libraries denied respondents their First Amendment rights depends upon the motivation behind petitioners' actions. If petitioners intended by their removal decision to deny respondents access to ideas with which petitioners disagreed, and if this intent was the decisive factor in petitioners' decision,[fn 22] then petitioners have exercised their discretion in violation of the Constitution. To permit such intentions to control official actions would be to encourage the precise sort of officially prescribed orthodoxy unequivocally condemned in Barnette. On the other hand, respondents implicitly concede that an unconstitutional motivation would not be demonstrated if it were shown that petitioners had decided to remove the books at issue because those books were pervasively vulgar. Tr. of Oral Arg. 36. And again, respondents concede that if it were demonstrated that the removal decision was based solely upon the "educational suitability" of the books in question, then their removal would be "perfectly permissible." Id., at 53. In other words, in respondents' view such motivations, if decisive of petitioners' actions, would not carry the danger of an official suppression of ideas, and thus would not violate respondents' First Amendment rights.

"As noted earlier, nothing in our decision today affects in any way the discretion of a local school board to choose books to add to the libraries of their schools. Because we are concerned in this case with the suppression of ideas, our holding today affects only the discretion to remove books. In brief, we hold that local school boards may not remove books from school library shelves

simply because they dislike the ideas contained in those books and seek by their removal to "prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion." West Virginia v. Barnette, 319 U.S., at 642. Such purposes stand inescapably condemned by our precedents."

In this revision, footnote 22 would remain as it is, and footnote 23 of the present draft would be omitted. Later footnotes would be renumbered accordingly.

Your further suggestions are, as always, welcome.

Sincerely,

Bill

W. J. B., Jr.

Justice White.
Justice Marshall.
Justice Blackmun.
Justice Stevens.

Pages 16-21

To: The Chief Justice
Justice White
✓ Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Brennan**

Circulated: 20 May 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[May ——, 1982]

JUSTICE BRENNAN delivered the opinion of the Court.

The principal question presented is whether the First Amendment[1] imposes limitations upon the exercise by a local school board of its discretion to remove library books from high school and junior high school libraries.

I

Petitioners are the Board of Education of the Island Trees Union Free School District No. 26, in New York, and Richard Ahrens, Frank Martin, Christina Fasulo, Patrick Hughes, Richard Melchers, Richard Michaels, and Louis Nessim. When this suit was brought, Ahrens was the President of the Board, Martin was the Vice-President, and the remaining petitioners were Board members. The Board is a state agency charged with responsibility for the operation and administration of the public schools within the Island

[1] The Amendment provides in pertinent part that "Congress shall make no law . . . abridging the freedom of speech, or of the press." It applies to the states by virtue of the Fourteenth Amendment. *Gitlow* v. *New York*, 268 U. S. 652, 666 (1925); *Grosjean* v. *American Press Co.*, 297 U. S. 233, 244 (1936).

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE WM. J. BRENNAN, JR.

June 22, 1982.

No. 80-2043 -- Board of Education v. Pico --
Possible Mootness Issue.

Dear Chief,

I have received the new footnote that you intend to add to your dissenting opinion. I am constrained to point out several facts.

In the first place, there is nothing whatever in the record as to the date on which the remaining respondent, Sochinski, will be graduated. I have always thought that we decided cases on the basis of the record before us, not on the basis of vague references at oral argument. Moreover, even assuming that this extra-record information is accurate, any number of unexpected events -- such as illness, or academic failure -- might prevent Sochinski's graduation at the end of the term. Cf. my separate opinion in DeFunis v. Odegaard, 416 U.S. 312, 348 (1974). And even if Sochinski does graduate as scheduled, he may retain his library privileges for the summer after graduation, as is not uncommon. The plain fact of the matter is that we just do not know whether the case will be moot "hours" from Friday, as you suggest in line 7 of your new footnote -- and it would simply be an abdication of our constitutional responsibility to sit around waiting for the case to become moot.

As for the fact that this case presents "a very important constitutional issue," lines 8-9 of your new footnote, we all crossed that bridge a long time ago, when certiorari was granted on the votes of Lewis, Bill Rehnquist, Sandra, and you. Your vote meant that you were willing to take this question and decide it. Thus it seems to me strange that you should now take the view that the issue has somehow become too important to decide: especially strange since you are now in dissent.

Finally, as for the potential question of mootness in this case, we have all known about that question since at least March 2, the date of oral argument. See Tr. of Oral Arg. 1-2. And it has been perfectly plain from the outset that this case was one of those important ones that normally come down in the last week of our Term -- that is, in June. In short, we have all possessed all of the information pertinent to this case for many months, and we resolved to decide the case based on that information. In my view, nothing has changed since then except that time has passed -- and that you, who voted to grant, are now in dissent.

Sincerely,

W. J. B., Jr.

The Chief Justice.
Copies to the Conference.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE BYRON R. WHITE

May 10, 1982

Re: 80-2043 - Board of Education, Island Trees Union Free School Dist. No. 26 v. Pico

Dear Bill,

Pardon my delay in answering your note of May 4, but I was away last week.

As your draft is presently written, I doubt that I could join it, at least without seeing what might be written on the other side. If the others voting to affirm see no problems with your draft, however, I surely have no objections to your circulating at this time.

I voted to affirm primarily because I do not usually think it worthwhile to overturn a court of appeals that disagrees with a district court's conclusion that there is no bona fide factual issue foreclosing summary judgment. Although the prevailing opinions in the court of appeals are not too informative, the factual issue appears to me to be the reasons for the school board's ordering the books to be removed from the library. Until one knows that, the identity and scope of the constitutional issue are obscure.

You deem it essential, however, to provide a First Amendment standard for the district court to use on remand. You propose as the proper constitutional benchmark the intention to suppress constitutionally protected ideas with which the school board disagrees, or the intention to impose a political or ideological orthodoxy upon the students of the junior and senior high schools. I am frank to say that I scarcely know what a "political or ideological orthodoxy" is, and it would take years to find out. The removal of any book based on its content could be challenged on this basis.

As for intending to suppress constitutionally protected ideas, if you mean constitutionally protected from removal from a school library, we are back at ground zero and the district court is on its own. But if you mean constitutionally protected in the marketplace, then I suppose anything short of obscenity is protected. No book, however vulgar, could be removed from the

school library unless it were obscene under prevailing standards. For myself, had the court of apppeals agreed with the district court that the books had been removed because they were vulgar, had agreed they were vulgar, but nevertheless held that they could not be removed, I would have voted to reverse. I doubt that you would have so voted.

I also doubt that the standard you propose for the school library in which a student could independently browse could be so easily isolated from the question of what books may be used in the school curriculum or for assigned outside reading.

With all of that, Bill, you have written an interesting opinion in a a difficult case, an opinion that may command a majority and that (hence?) may grow upon me with more mature consideration.

Sincerely yours,

Justice Brennan

cc: Justice Marshall
Justice Blackmun
Justice Stevens

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice White

Circulated: 6/10/82

Recirculated: _____

Re: 80-2043 - Board of Education, Island Trees Union Free School District No. 26 v. PICO

Justice White, concurring in the judgment.

The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar". Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

The Court seems compelled to go further and issue a dissertation on the extent to which the First Amendment limits the discretion of the school board to remove books from the school library. I see no neccessity for doing so at this point. When findings and conclusions of law are made by the District Court, that may end the case. If, for example, the District Court concludes after a trial that the books were removed for their vulgarity, there may be no appeal. In any event, if there is an appeal, if there is dissatisfaction with the subsequent Court of Appeals' judgment, and if certiorari is sought and granted, it will be time enough to address the First Amendment issues that may then be presented.

To: The Chief Justice
Justice Brennan
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice White**

Circulated: _____

Recirculated: 6/11/82

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE WHITE, concurring in the judgment.

The District Court found that the books were removed from the school library because the school board believed them "to be, in essence, vulgar". 474 F. Supp. 387, 397 (EDNY 1979). Both Court of Appeals judges in the majority concluded, however, that there was a material issue of fact that precluded summary judgment sought by petitioners. The unresolved factual issue, as I understand it, is the reason or reasons underlying the school board's removal of the books. I am not inclined to disagree with the Court of Appeals on such a fact-bound issue and hence concur in the judgment of affirmance. Presumably this will result in a trial and the making of a full record and findings on the critical issues.

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Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE THURGOOD MARSHALL

June 9, 1982

Re: No. 80-2043 - Bd. of Ed., Island Trees Union Free School District No. 26 v. Pico

Dear Bill:

Please join me.

Sincerely,

T.M.

T.M.

Justice Brennan

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE HARRY A. BLACKMUN

June 23, 1982

Re: No. 80-2043 - Board of Education v. Pico

Dear Bill:

I find this to be an extraordinarily difficult case. Byron's separate writing concurring only in the judgment means that you are not in command of a Court opinion. You do have a plurality, however, inasmuch as Thurgood and John have joined you and there are five votes to affirm.

I therefore hope that you do not mind too much that I have finally decided to write separately concurring in part, that is, in all but Part IIA(1) of your opinion, and concurring in the judgment.

Sincerely,

Harry

Justice Brennan

Brennan

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Blackmun

Circulated: JUN 29 1982

Recirculated: _____

No. 80-2043 - Board of Education v. Pico

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

While I agree with much in today's plurality opinion, and while I accept the standard laid down by the plurality to guide proceedings on remand, I write separately because I have a somewhat different perspective on the nature of the First Amendment right involved.

I

To my mind, this case presents a particularly complex problem because it involves two competing principles of constitutional stature. On the one hand, as the dissenting opinions demonstrate, and as we all can agree, the Court has acknowledged the importance of the public schools "in the preparation of individuals for participation as citizens, and in the preservation of values on which our society rests." Ambach v. Norwick, 441 U. S. 68, 76 (1979). See, also, ante, at 9-10 (pluarlity opinion). Because of the essential socializing function of schools, local education officials may attempt "to promote civic virtues," Ambach v. Norwick, 441 U. S., at 80, and to "awake[n] the child to cultural values." Brown v. Board of Education, 347 U. S. 483, 493 (1954). Indeed, the Constitution presupposes the existence of an informed citizenry prepared to participate in governmental affairs, and these democratic

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Powell
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Blackmun**

Circulated: _____

Recirculated: _____ 1982

1st Printed DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE BLACKMUN, concurring in part and concurring in the judgment.

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May 27, 1982

PERSONAL

80-2043 Board of Education v. Pico

Dear Chief:

"Nunc pro tunc" is, of course, entirely agreeable with me.

I stand ready to write the dissent, but my guess is that I will have more fun reading what you write than I would if I put my pen to it.

Sincerely,

The Chief Justice

lfp/ss

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 8, 1982

80-2043 Board of Education v. Pico

Dear Chief:

Bill Rehnquist and I have discussed this case, and in view of its importance one of us will probably write a separate dissent, in support of yours.

Sincerely,

Lewis

The Chief Justice

Copies to the Conference

LFP/vde

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1982

80-2043 Board of Education v. Pico

Dear Bill:

Here is my dissent in Pico, that I will circulate within a matter of minutes.

You will not be surprised, in view of my 11 years on the Richmond School Board and eight years on the Virginia State Board of Education, that I am not enthusiastic about your opinion!

If there should be any delay because of the appendix, I believe it could be printed after the opinion is announced.

We will get you to Woods Hole in time for the ferry.

Sincerely,

Lewis

Justice Brennan

lfp/ss

At least this has not been a dull Term!

Brennan

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: Justice Powell

Circulated: JUN 22 '82

Recirculated: _____

Board of Education v. Pico: 80-2043

Justice Powell, dissenting.

The plurality today rejects a basic concept of public school education in our country: that the States and locally elected school boards should have the responsibility for determining the educational policy of the public schools. After today's decision any junior high school student, by instituting a suit against a school board or teacher, may invite a judge to overrule an educational decision by the official body designated by the people to operate the schools.

I

School boards are uniquely local and democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1982

80-2043 Board of Education v. Pico

Dear Chief:

Please join me in your dissent.

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 22, 1982

80-2043 Board of Education v. Pico

Dear Bill:

Please join me in your dissent.

Sincerely,

L. Lewis

Justice Rehnquist

lfp/ss

cc: The Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE LEWIS F. POWELL, JR.

June 23, 1982

80-2043 Pico

Dear Chief:

This refers to the postscript in your memorandum of this date.

As I have indicated to you I am willing to let the case come down. I think it is fairly arguable that this issue is one that may "evade review". In more than one Circuit (e.g., CA5 and CA9), civil cases often take more than four years to reach us.

I appreciate, of course, that for the reasons you state in your proposed footnote 1, the question of mootness is not frivolous. But at this late date, and absent a more specific documentation in the record, I do not think we are compelled to view it is as moot.

At the policy level, I also think it best not to leave the Second Circuit opinion as "the law". My guess is that fewer children and their lawyers will bring suits of this kind in light of the sharp division of this Court, the absence of a Court opinion, and what I believe to be the strength of the dissenting opinions.

For these reasons, include me "out" on footnote 1, but I will remain a "join" in the rest of your excellent opinion.

Since JPS no joins do you still wish to

Sincerely,

Lewis

The Chief Justice

lfp/ss

cc: Justice Rehnquist
Justice O'Connor

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: JUN 23 1982

Recirculated: _____

Printed
1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE POWELL, dissenting.

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I

School boards are uniquely local and democratic institutions. Unlike the governing bodies of cities and counties, school boards have only one responsibility: the education of the youth of our country during their most formative and impressionable years. Apart from health, no subject is closer to the hearts of parents than their children's education during those years. For these reasons, the governance of elementary and secondary education traditionally has been placed in the hands of a local board, responsible locally to the parents and citizens of school districts. Through parent-teacher associations (PTAs), and even less formal arrangements that

June 24, 1982

Pico

Dear Chief:

I simply do not understand your longhand note, just delivered, indicating that I am holding up Pico.

Not only did I express my disagreement with your view in at least two conversations, but I wrote you a letter yesterday saying that I would not join your note. As you know I have thought the issue could evade review. Also - as I have said for three days - I think it in the best interest of what we both believe to have the case come down without a cloud.

But if I am delaying Pico in any way, shape or form, please accept this letter as authority to join your dissent without qualification. Forget my objection to the note!

Sincerely,

The Chief Justice

lfp/ss

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Rehnquist
Justice Stevens
Justice O'Connor

From: **Justice Powell**

Circulated: _____

Recirculated: JUN 24 1982

2nd
~~1st~~ PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE POWELL, dissenting.

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To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: Justice Rehnquist

Circulated JUN 2 [illegible]

Recirculated _____

No. 80-2043 Board of Education v. Pico

JUSTICE REHNQUIST, dissenting.

Addressing only those aspects of the constitutional question which must be decided to determine whether or not the District Court was correct in granting summary judgment, I conclude that it was. I agree fully with the views expressed by THE CHIEF JUSTICE, and concur in his opinion. I disagree with JUSTICE BRENNAN's opinion because it is largely hypothetical in character, failing to take account of the facts as admitted by the parties pursuant to local rules of the District Court for the Eastern District of New York, and because it is analytically unsound and internally inconsistent.[1]

---

[1] I also disagree with JUSTICE WHITE's conclusion that he need not decide the constitutional issue presented by this case. That view seems to me inconsistent with the "rule of four" -- "that any case warranting consideration in the opinion of [four Justices] of the Court will be taken and disposed of" on the merits, Ferguson v. Moore-McCormack Lines, 352 U.S. 521, 561 (1957) (Harlan, J., concurring and dissenting) -- which we customarily follow in exercising our certiorari jurisdiction.

Footnote continued on next page.

STYLISTIC CHANGES THROUGHOUT

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Stevens
Justice O'Connor

From: **Justice Rehnquist**

Circulated: _____

Recirculated: JUN 15 '82

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE REHNQUIST, dissenting. with whom THE CHIEF JUSTICE joins,

Addressing only those aspects of the constitutional question which must be decided to determine whether or not the District Court was correct in granting summary judgment, I conclude that it was. I agree fully with the views expressed by THE CHIEF JUSTICE, and concur in his opinion. I disagree with JUSTICE BRENNAN's opinion because it is largely hypothetical in character, failing to take account of the facts as admitted by the parties pursuant to local rules of the District Court for the Eastern District of New York, and because it is analytically unsound and internally inconsistent.[1]

[1] I also disagree with JUSTICE WHITE's conclusion that he need not decide the constitutional issue presented by this case. That view seems to me inconsistent with the "rule of four"—"that any case warranting consideration in the opinion of [four Justices] of the Court will be taken and disposed of" on the merits, *Ferguson* v. *Moore-McCormack Lines*, 352 U. S. 521, 561 (1957) (Harlan, J., concurring and dissenting)—which we customarily follow in exercising our certiorari jurisdiction. His concurrence, although not couched in such language, is in effect a single vote to dismiss the writ of certiorari as improvidently granted. Justice Harlan debated this issue with Justice Frankfurter in *Ferguson* v. *Moore-McCormack Lines*, *supra*, and his view ultimately attracted the support of six out of the seven remaining members of the Court. He stated:

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

May 24, 1982

Re: 80-2043 - Board of Education, Island Trees Union Free School District No. 26 v. Pico

Dear Bill:

Please join me.

Respectfully,

Justice Brennan

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: Justice Stevens

Circulated: 6/23/82

Recirculated: _____

80-2043 - Board of Education, Island Trees Union Free School District No. 26 v. Pico

JUSTICE STEVENS, concurring.

When the Court acted on the petition for certiorari in this case, it was apparent that two reasons, both unrelated to the merits, would have justified a denial of the petition. First, the case was in an interlocutory posture, since it had not yet been tried; second, there was a possibility that it might become moot before final decision. One of those reasons prompted me to vote to deny certiorari.[1] I find it ironic that the four members of the Court who voted to grant certiorari now elect to criticize the Court for discharging its responsibilities after taking jurisdiction of the case.

[1]One of "the most fundamental principles of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." United States v. Lovett, 328 U.S. 303, 320 (1946) (Frankfurter, J., concurring). One method of avoiding such questions that is not considered acceptable is simply to delay decision until a case becomes moot.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 23, 1982

Re: 80-2043 - Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico

Dear Chief:

Every time three members of the Court dissent from the denial of certiorari, the conference vote is fully disclosed. Moreover, in an argued case, I see no reason for not making public every formal action that affected the disposition of the case.

In this case, I do not regard the conference vote as irrelevant since your dissent implies that the five Justices who actually voted to deny cert are the ones who eagerly have reached out to decide a constitutional question unnecessarily, when the exact opposite is true.

If, as you state in your note, you are agreeable to having the case come down on Friday, I must confess to some puzzlement as to why you criticize the Court for taking action of which you approve. In all events, I will of course withdraw my concurrence if you withdraw what I regard as a most unfair and misleading footnote.

Sincerely,

JPS

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice O'Connor

From: **Justice Stevens**

Circulated:

Recirculated: JUN 22

1st PRINTED DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80-2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE STEVENS, concurring.

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* "[T]he most fundamental principle of constitutional adjudication is not to face constitutional questions but to avoid them, if at all possible." *United States* v. *Lovett*, 328 U.S. 303, 320 (Frankfurter, J., concurring). One method of avoiding such questions that is not considered acceptable is simply to delay decision until a case becomes moot.

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE JOHN PAUL STEVENS

June 24, 1982

Re: 80-2043 - Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico

Dear Chief:

In view of the change in your footnote, I am withdrawing my separate concurrence.

Respectfully,

JPS

The Chief Justice

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

May 21, 1982

No. 80-2043 Bd. of Education v. Pico

Dear Bill,

I will await the dissent before resolving this case.

Sincerely,

Sandra

Justice Brennan

Copies to the Conference

Supreme Court of the United States
Washington, D. C. 20543

CHAMBERS OF
JUSTICE SANDRA DAY O'CONNOR

June 8, 1982

No. 80-2043 Island Trees School District
v. Pico

Dear Chief,

Please join me in your dissent. I may also circulate a brief additional dissent.

Sincerely,

Sandra

The Chief Justice

Copies to the Conference

To: The Chief Justice
Justice Brennan
Justice White
Justice Marshall
Justice Blackmun
Justice Powell
Justice Rehnquist
Justice Stevens

From: **Justice O'Connor**

Circulated: JUN 15 1982

Recirculated: _____

1st DRAFT

SUPREME COURT OF THE UNITED STATES

No. 80–2043

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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

[June ——, 1982]

JUSTICE O'CONNOR, dissenting.

If the school board can set the curriculum, select teachers, and determine initially what books to purchase for the school library, it surely can decide which books to discontinue or remove from the school library so long as it does not also interfere with the right of students to read the material and to discuss it. As JUSTICE REHNQUIST persuasively argues, the Court's analysis overlooks the fact that in this case the government is acting in its special role as educator.

I do not personally agree with the board's action with respect to some of the books in question here, but it is not the function of the courts to make the decisions that have been properly relegated to the elected members of school boards. It is the school board that must determine educational suitability, and it has done so in this case. I therefore join THE CHIEF JUSTICE's dissent.