

## SCHOOL BOARDS, SCHOOLBOOKS AND THE FREEDOM TO LEARN

"A forbidd'n writing is thought to be a certain spark of truth that flies  
up in the faces of them who seeke to tread it out."

—MILTON, *Areopagitica*

THE book-burning spectre ascribed to the past <sup>1</sup> has experienced a modern revival. Its new setting is an American public school <sup>2</sup> where the local school board is playing Censor with controversial ideas in books and magazines.

1. "From time immemorial fire has been employed as an agent to combat contrary opinion. . . . To burn a man relieved the burners from the necessity of argument from reason. . . . A civil government found its corner stone threatened or its fundamental principles attacked, and, given the power, into the fire went either the rebel or his book. But the teaching persisted in the lives and thoughts of other men, only to appear again in another form and with, perhaps, a stronger emphasis. An ecclesiastical establishment found its practice or its tenets attacked in a writing or in a printed book, and, lacking the convincing scriptural authority on which it claimed to be founded, it had recourse to the argument of force, and the offending book was burned. The fiery trial was quicker than the course of protracted debate, and in controversy there is always the danger of defeat." GILLET, *BURNED BOOKS* 3-4 (1932).

The burning of books, for religious, political or moral reasons, dates back to the days of the Old Testament. See the burning of the scroll in *Jeremiah* 36:23. From the Bible to the works of Homer, Confucius, Dante, Shakespeare, Sinclair Lewis and Hemingway, few have escaped an occasional scorch by the flame or decree of proscription. Categorizations of the various books, reasons, times and places, may be found in BACHMAN, *CENSORSHIP IN FRANCE FROM 1715 TO 1750* (1934); CRAIG, *THE BANNED BOOKS OF ENGLAND* (1937); FARRER, *BOOKS CONDEMNED TO BE BURNT* (1892); GOODRICH, *THE LITERARY INQUISITION OF CH'EN-LUNG* (1935); HAIGHT, *BANNED BOOKS* (1935); POPPER, *THE CENSORSHIP OF HEBREW BOOKS* (1899).

On May 10, 1933, the greatest of modern bonfires was kindled in Berlin Square. As twenty thousand "un-German" books burned brightly, Minister of Public Enlightenment, Dr. Goebbels, proclaiming the end of "Jewish intellectualism," shouted to the assembled students: "The old goes up in flames, the new shall be fashioned from the flame in our hearts." *N.Y. Times*, May 11, 1933, p. 12, col. 3. The infamous event was commemorated by Stephen Vincent Benet, to serve as a token "it can't happen here."

Narrator: "Suppose it happened here.

Suppose the books were burned here.

This is a school, somewhere in America.

This is the kind of school we've always had,

Argued about, paid taxes for, kept on with,

Because we want our kids to know some things.

Suppose it happened here.

. . .

Nazi Voice: "When I give the command, you will rise and bring your textbooks to my desk. All this nonsense of freedom and tolerance—that is finished. All this nonsense of men being equal—that is finished. We shall give you new textbooks. The old ones will be burned in the schoolyard. Are there any questions?"

BENET, *THEY BURNED THE BOOKS* 12-13 (1942)

But the lesson of history—"fire cannot destroy ideas"<sup>3</sup>—sounds a note of caution. The enlightenment of tomorrow's citizen depends on his freedom to learn today.

Public school education, through powers reserved by the Tenth Amendment, has become a vital function of every state.<sup>4</sup> Statutes provide a basic

But the lesson has not been learned. In 1941, the Rugg Social Science textbooks were burned in Ohio. Haines, *Balancing the books: reason enthroned*, 73 LIBRARY J. 149, 150 (1948). And in 1948-9, *The Nation* and other literature was banned from various schools throughout the land. See pages 933, 939-40 *infra*.

2. In almost all cases, secondary rather than primary schools have been the victims of book-banning. Therefore, reference to "children" in this Comment generally connotes those of high school age. The significance of this factor becomes evident when it is realized that, for the vast majority of Americans, high school is the last opportunity for formal education. See, for statistics, *Status and Practices of Boards of Education*, 24 NAT. EDUC. ASSOC. (NEA) RESEARCH BULL. 45, 52 (1946).

3. A picturesque sample of ideas burned, but not forgotten, may be found in the JUDGMENT AND DECREE OF THE UNIVERSITY OF OXFORD PAST IN THEIR CONVOCATION JULY 21, 1683, AGAINST CERTAIN PERNICIOUS BOOKS AND DAMNABLE DOCTRINES DESTRUCTIVE TO THE SACRED PERSONS OF PRINCES, THEIR STATE AND GOVERNMENT, AND OF ALL HUMANE SOCIETY (1683):

"Proposition 1. All Civil Authority is derived originally from the People.

...

3. That if lawful Governours become Tyrants, or govern otherwise than by the laws of God and man they ought to do, they forfeit the right they had unto their government.
4. The Sovereignty of *England* is in three Estates, *viz.* Kings, Lords, and Common. The King has but a coordinate power and may be overruled by the other two.

...

"We decree, judge and declare all and every of these Propositions to be false, seditious, and impious; and most of them to be also Heretical and Blasphemous, infamous to Christian Religion, and destructive of all Government in Church and State.

"We farther decree that the Books which contain the forsaid propositions and impious Doctrines, are fitted to deprave good manners; corrupt the minds of unwary men, stir up seditions and tumults, overthrow States and Kingdoms, and lead to Rebellion, murther of Princes, and Atheism it self: and therefore we interdict all members of the University from the reading the said Books, under the penalties in the Statutes exprest.

"We also order the before recited Books to be publicly burnt, by the hand of our Marshal in the court of our Scholes. . . ."

But an eloquent defense of freedom in the dissemination of man's writings may be found in the immortal essay by MILTON, *AREOPAGITICA* (Hales ed. 1878): "For Books are not absolutely dead things, but doe contain a potencie of life in them to be as active as that soule was whose progeny they are; nay, they do preserve as in a violl the purest efficacie and extraction of that living intellect that bred them. I know they are as lively, and as vigorously productive, as those fabulous Dragons teeth; and being sown up and down, may chance to spring up armed men. And yet on the other hand, unless wariness be us'd, as good almost kill a Man as kill a good Book; who kills a Man kills a reasonable creature, Gods Image; but hee who destroyes a good Booke, kills reason it selfe, kills the Image of God as it were in the eye." *Id.* at 5-6.

4. THE FORTY-EIGHT STATE SCHOOL SYSTEMS iv (Council of State Governments, 1949) ("The foundation of every state is the education of its youth").

framework for the system, and then delegate to various school boards,<sup>5</sup> state and local, the power to formulate and effectuate educational policy. This delegation to the hands of lay citizenry<sup>6</sup> enables school administration to reflect most effectively the aspirations of the community, and constantly to adapt its academic curriculum to changing social needs.<sup>7</sup> Determination of courses of study,<sup>8</sup> certification of teachers,<sup>9</sup> and adoption of textbooks<sup>10</sup> and library materials are but a few of its manifold responsibilities.

But school boards are not automatons, and their actions are best understood by recognizing the human element in their composition.<sup>11</sup> The board

An educational provision may be found in the constitution of every state. *E.g.*, R.I. CONST. ART. XII, § 1: "The diffusion of knowledge, as well as of virtue, among the people, being essential to the preservation of their rights and liberties, it shall be the duty of the general assembly to promote public schools, and to adopt all means which they may deem necessary and proper to secure to the people the advantages and opportunities of education." The background of these provisions is discussed briefly on page 946 *infra*.

5. In the eyes of the law, the school board is a quasi-corporation created by the state to govern a school community. It possesses no inherent powers, and derives all authority expressly or by implication from specific statutory provisions. EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* 115-117 (1933). For general discussions of the status and legal powers of school boards, see DEFFENBAUGH & KEESECKER, *STATE BOARDS OF EDUCATION AND CHIEF STATE SCHOOL OFFICERS* (Fed. Sec. Agency, U.S. Office of Educ. Bull. 1940, No. 6, Monograph No. 1); MESSICK, *THE DISCRETIONARY POWERS OF SCHOOL BOARDS* (1949); OVERN, *HANDBOOK FOR PUBLIC SCHOOL BOARDS* (1940); REEDER, *SCHOOL BOARDS AND SUPERINTENDENTS* (1944).

6. For tabulations of the methods of selection, number of members, terms of office, and compensation of school boards, see *THE FORTY-EIGHT STATE SCHOOL SYSTEMS* (Council of State Governments, 1949) at 185-7 (state boards) and 196-7 (local boards). Activities of school boards are recounted in *School Boards in Action*, 24 *YEARBOOK OF AMER. ASSOC. OF SCHOOL ADMINISTRATORS* (1946).

7. For portrayals of the school board as representative of community interests, rather than as mere administrator, see OVERN, *op. cit. supra* note 5, at 1, 8-9; REEDER, *op. cit. supra* note 5, at 10-11. And see Fine, *Education in Review*, N.Y. Times, Feb. 19, 1950, § 4, p. 9, col. 1-2.

8. The powers of school boards in regard to the school curriculum are discussed in MESSICK, *op. cit. supra* note 5, at 124-6.

9. The relationship between school board and teacher is discussed in *id.* at 57-86. See also *The Legal Status of the Public School Teacher*, 25 *NEA RESEARCH BULL.* 25-72 (1947).

10. For the factors and law involved in the selection of textbooks for use in public schools, see generally CLEMENT, *MANUAL FOR ANALYZING AND SELECTING TEXTBOOKS* (1942); COFFEY, *LEGISLATIVE ENACTMENTS AND JUDICIAL DECISIONS AFFECTING THE ADOPTION, SALE AND USE OF TEXTBOOKS* (1931); MESSICK, *THE DISCRETIONARY POWERS OF SCHOOL BOARDS* 127-32 (1949); *The Textbook in American Education*, 30 *YEARBOOK OF THE NAT. SOC. FOR THE STUDY OF EDUCATION* (1931).

11. Despite the common assumption that school boards tend to represent the interests of the community as a whole, statistical studies made in recent years reveal significant indicia of "non-representativeness." Note the following comparison of school board members and average citizens:

members' personal predilections, and their sensitivity to various social,<sup>12</sup> economic,<sup>13</sup> religious<sup>14</sup> and political<sup>15</sup> forces in the community, are often reflected in the content of courses they design,<sup>16</sup> the character of personnel they employ,<sup>17</sup> and the types of literature they choose for the school.<sup>18</sup> Ex-

Characteristic	School Board (1945)	Average Adult Citizen (1940)
Average Age	48	44
% College Graduates	30%	4%
% High School Graduates	42%	21%
% Non-H.S. Graduates	28%	75%
% of Women	10%	50%
Average Income	\$4000	\$1500

—adapted from *Status and Practices of Boards of Education*, 24 NEA RESEARCH BULL. 45, 52 (1946).

For an interesting analysis of the implications of deviations such as these on the "non-conservatism" of school board actions, see generally ARNETT, *THE SOCIAL BELIEFS AND ATTITUDES OF AMERICAN SCHOOL BOARD MEMBERS* (1932). Arnett also compared the attitudes of school board members with those of educators, and concluded that "one might reasonably expect to find the educators taking a more open-minded and a more progressive attitude than board members toward . . . the possible gains to the pupils of including the study of controversial issues in schools." *Id.* at 214. See also MCKENDREE, *THE COMPOSITION OF THE STATE BOARDS OF EDUCATION IN THE UNITED STATES* (1941).

A discussion of occupational data on school board members, and the resultant influence on policy is contained in COUNTS, *THE SOCIAL COMPOSITION OF BOARDS OF EDUCATION* 50-74 (1927). In his conclusion, Counts analyzes the educational significance of having boards constituted by persons from the more favored economic and social groups, with their unusual educational background. Despite the undeniable personal competence of these community representatives, the author suggests that the *character* of the educational policies, rather than the *efficiency* with which they are executed, should be the basic consideration in selecting school boards. Yet the present pattern permits one element in society to legislate for all, to impress upon the mind of the coming generation its own special biases and points of view. *Id.* at 82-97. To the same effect, see NEWLON, *EDUCATIONAL ADMINISTRATION AS SOCIAL POLICY* 108 (1934).

12. See BEALE, *ARE AMERICAN TEACHERS FREE?* 98-173 (1936); NEWLON, *EDUCATIONAL ADMINISTRATION AS SOCIAL POLICY* 46-52, 104-24 (1934).

An analysis of the causes and effects of pressures is contained in WALLER, *OUTSIDE DEMANDS AND PRESSURES ON THE PUBLIC SCHOOLS* (1932).

13. *Ibid.*

14. BEALE, *ARE AMERICAN TEACHERS FREE?* 208-24 (1936).

15. *Id.* at 79-97.

16. *E.g.*, "Societies for the prevention of cruelty to animals obtain mandatory study of bird and animal life. The WCTU, or the Anti-Saloon League procures mandatory temperance instruction." *Id.* at 326. And see WALLER, *op. cit. supra* note 12, at 42.

17. See, for example, the report on the May Quinn incident in a New York City public school. Miss Quinn was accused of making certain anti-Negro statements in her classroom and, after a lengthy inquiry, was severely reprimanded. N.Y. Herald Tribune, Dec. 17, 1949, p. 13, col. 6. The interest displayed by the city's large minority groups in this and similar incidents tends to keep the Board of Education on its toes in the selection of racially and religiously unbiased teachers.

But not all pressures tend to improve teacher standards. *E.g.*, the *Howard* case in Muskegon, Michigan (arithmetic teacher dismissed because of allegedly socialistic writ-

cept on election day,<sup>19</sup> the wide discretion exercised in these decisions is seldom reviewed.<sup>20</sup> Review may become urgent, however, if the board's overt action in response to pressure by a community segment comes into

ings) cited in REPORT OF COMMITTEE ON TENURE AND ACADEMIC FREEDOM 16 (NEA 1948); the *Stuhr* case in New Ulm, Minnesota (dismissal for activity in teacher organizations), *id.* at 10. The NEA publishes similar reports annually. See also WHAT FREEDOM IN NEW YORK SCHOOLS? (N.Y. Academic Freedom Comm., ACLU, 1934); *The Legal Status of the Public School Teacher*, 25 NEA RESEARCH BULL. 25, 58-60 (1947); BEALE, ARE AMERICAN TEACHERS FREE? (1936) *passim*.

18. See generally CLEMENT, EDUCATIONAL SIGNIFICANCE OF ANALYSIS, APPRAISAL, AND USE OF TEXTBOOKS (1939). For some interesting and constructive criticisms of the social and political attitudes found in contemporary school and college literature, see INTERGROUP RELATIONS IN TEACHING MATERIALS (American Council on Education, 1949); Hart, *School Books and International Prejudices* in DOCUMENTS OF THE AM. ASSOC. FOR INTERNATIONAL CONCILIATION (1911); PIERCE, CIVIC ATTITUDES IN AMERICAN SCHOOL TEXTBOOKS (1930).

Shortly after the banning of *The Nation* from the New York City public schools, see page 933 *infra*, the Board of Education issued a pamphlet on THE SELECTION OF TEXT BOOKS, LIBRARY BOOKS AND MAGAZINES FOR THE NEW YORK CITY PUBLIC SCHOOLS (1949). Among the criteria listed for choosing literature were:

"d. Is it free from subject matter that tends to irreverence for things held sacred?

"e. Are both sides of controversial issues presented with fairness?

"f. Is it free from offensive humor in dialect form which reflects upon the dignity and democratic status of any group or race?

"g. Does the subject matter promote moral-civic values?

"h. Does it promote loyalty and Americanism?

"i. Is the book free from derogatory statements concerning racial or religious groups?

"j. Is it free from matter which is so interwoven into the text as to give rise to misunderstanding and prejudice?" *Id.* at 6.

These indicia of the Board's undue sensitivity to the possibility of offending any group in the purchase of literature were quickly criticized by *The New Yorker*, Oct. 8, 1949, p. 19: "We think the way for school children to get both sides of a controversy is to read several books on the subject, not one. In other words, we think the Board should strive for a well-balanced library, not a well-balanced book."

19. And not all school board members hold office by election. According to a recent survey, at least 15% are appointed by city, county or state officials. *Status and Practices of Boards of Education*, 24 NEA RESEARCH BULL. 45, 77 (1946). For a more detailed breakdown of methods of selection, see COUNTS, THE SOCIAL COMPOSITION OF BOARDS OF EDUCATION 14-19 (1927).

20. Review of local school board actions generally lies to the commissioner of education, *e.g.*, N.Y. EDUC. LAW Art. 7, § 310, or to the county court, *e.g.*, 10 MINN. STAT. ANN. § 122.32 (1946).

The vast bulk of lawsuits involving school boards concern the organization of school districts, use of school property, and contractual affairs. See EDWARDS, THE COURTS AND THE PUBLIC SCHOOLS (1933) *passim*. Although a court order to include a certain course, buy a specific book, or employ a certain person as teacher, appears to be highly unlikely, courts will not allow the shibboleth of "discretion" to run wild. See, *e.g.*, *Keller v. Hewitt*, 109 Cal. 146, 41 Pac. 871 (1895), where a board of education had refused to certify a teacher possessing all the professional and moral qualifications required by law. Characterizing the act as arbitrary and unreasonable, the court declared that "it was never intended to vest in the board of education any such absolute power in the premises." Quoted in EDWARDS, *op. cit. supra*, at 402.

conflict with educational demands for freedom.<sup>21</sup> Thus, the appearance in schoolbooks of criticism aimed at government, race, class or religion may cause some element in the community to assert that the minds of its children are being poisoned. Yet, should the reaction of the school board be immediate suppression, citizens opposing restraints in education are likely to rise in protest.<sup>22</sup>

#### AN ACT AND ITS REPERCUSSIONS: THE BANNING OF THE NATION

In the winter and spring of 1947-8, *The Nation*, an old and respected liberal magazine,<sup>23</sup> carried a series of twelve articles highly critical of the Roman Catholic Church.<sup>24</sup> Thereafter, on June 24, 1948, the Board of Education of the City of New York, without notice or hearing, suspended

21. See *The Case for Intellectual Freedom* at page 942 *infra*.

22. Recent schoolbook "witch-hunts" have met with severe criticism in several cities. New York City's experience with *The Nation* is discussed on the following pages. Proposals to sift books in Toledo, Ohio and Scarsdale, N.Y. were abandoned in the face of adverse public reaction. See *The Toledo Blade*, Sept. 16, 1949 *et seq.*, and the N.Y. *Herald Tribune*, Oct. 15, 1949, p. 4, col. 7, and Nov. 9, 1949, p. 26, col. 3. And "in the face of national publicity and far and wide criticism of educators and teachers," schools in Houston, Texas, were permitted to use books previously banned by their school board. *Houston Chronicle*, Oct. 26, 1949, p. 1, col. 6-8. See note 53 *infra*.

23. For a brief history and appraisal of *The Nation*, see MARTIN, *MAGAZINES FOR SCHOOL LIBRARIES* 148 (1946): "Its international outlook, its facility in revealing the significant details in situations, details which often clarify official silences, and the scholarly appraisals in its book reviewing columns, are contributing factors in the building of its long standing prestige." Laura K. Martin, author of this widely used manual for school libraries, is an Associate Professor of Library Science, University of Kentucky, and chairman of the Magazine Evaluation Committee of the American Association of School Libraries.

24. The articles, written by Paul Blanshard, an ordained Congregationalist minister, appeared in *The Nation* as follows:

November 1, 1947	"The Roman Catholic Church in Medicine"
November 8, 1947	"The Sexual Code of the Roman Catholic Church"
November 15, 1947	"The Roman Catholic Church and the Schools"
April 10, 1948	"The Roman Catholic Church and Fascism"
April 17, 1948	"The Roman Catholic Church and Fascism"
April 24, 1948	"The Roman Catholic Church and Fascism"
May 1, 1948	"Roman Catholic Censorship"
May 8, 1948	"Roman Catholic Censorship"
May 15, 1948	"Roman Catholic Science I. Relics, Saints, Miracles"
May 22, 1948	"Roman Catholic Science II. Apparitions and Evolution"
May 29, 1948	"The Catholic Church and American Democracy"
June 5, 1948	"The Catholic Church and American Democracy"

The entire series was recently incorporated into a book—BLANSHARD, *AMERICAN FREEDOM AND CATHOLIC POWER* (1949), which became a best seller. *E.g.*, N.Y. *Times Book Review Section*, Sept. 18, 1949, p. 8.

Answers to Blanshard's articles were written by many. See *e.g.*, DUNNE, *RELIGION AND AMERICAN DEMOCRACY* (pamphlets reprinting series of articles which originally appeared in *America*, June 4-July 30, 1949); Fitzgerald, *My Own Pinch of Salt*, 167 *NATION* 62 (1948).

*The Nation* indefinitely from the public schools by removing it from the list of approved periodicals.<sup>25</sup> This action was by no means unprecedented.<sup>26</sup>

25. The New York City Board of Superintendents submitted the approved list for 1948-9 to the Board of Education, omitting *The Nation*. N.Y. Times, June 24, 1948, p. 1, col. 6. Despite public protests, the Board of Education ratified it. N.Y. Times, June 25, 1948, p. 25, col. 8. Under the New York system, an approved list is "exclusive," and no literature absent from the list may be purchased by any of the city's schools. On the other hand, the presence of a title on the list compels no school to subscribe.

A survey conducted shortly after the banning of *The Nation* revealed that only 4 out of 34 cities sampled used "exclusive" lists. Brief *Amicus Curiae* submitted by Archibald MacLeish [to the Commissioner of Education] on behalf of A Number of Individuals and Organizations Who Have Protested the Action of the Board of Superintendents in This Case (hereinafter cited as Ad Hoc Committee Brief), pp. 1H-2H. Excerpts from the Ad Hoc Committee Brief are printed in *Can the Ban Be Justified?*, 167 NATION 569 (1948).

In order to prove that *The Nation* was not eliminated from the list because of budgetary considerations, an offer was made on July 13, 1948, "to contribute free of charge as many subscriptions to *The Nation* as had been subscribed for" prior to the Board's action. The offer was refused by the Board of Superintendents. Brief of the N.Y. City Civil Liberties Committee and the Committee on Academic Freedom of the American Civil Liberties Union as *Amicus Curiae* before the Commissioner of Education (hereinafter cited as ACLU Brief), p. 10.

It is worthy of note that the Board's action did not remove the issues containing the Blanshard articles. Rather, their decision only prevented issues subsequent to July 1, 1948 from entering. On June 23, 1949, the Board of Education ratified renewal of the ban for another year. N.Y. Herald Tribune, June 24, 1949, p. 19, col. 5.

26. Several months earlier, *The Nation* had been banned from Newark, New Jersey high schools. At the same time, the "pro-communist publication" *Soviet Russia Today* was "automatically barred from the schools by the Board of Education resolution of June 27, 1947. . . . Publications that are patently anti-Catholic, anti-Protestant, anti-Semitic, anti-Negro, or anti-American have no place as teaching or reference materials in a public school. . . . All people of good will in the community will applaud such action, even though some critics may resurrect the term 'censorship.'" Statement by John S. Herron, Superintendent of Schools, Newark, N.J., January 15, 1948. See N.Y. Times, Jan. 9, 1948, p. 23, col. 6-7.

But cf. MARTIN, MAGAZINES FOR SCHOOL LIBRARIES (note 23 *supra*) 160 (1946): *Soviet Russia Today* "has none of the pattern of doctrinaire obsession, nor of the traditional communist assumption that America is lost to progress. There is much that would appeal to young people in the friendliness toward, and appreciation of, things American, and the profuse and appealing illustrations."

New York City had played the banning game previously, though with less sensational repercussions. On April 15, 1947, it banned the anthology *This Way to Unity* from the official list of textbooks, despite the fact that it contained writings of many outstanding persons, including Cardinal Spellman and Wendell Willkie. Objections to the book were (a) inclusion of Norman Corwin's famous play *Untitled*, which contained "coarse" phrases, e.g., "mother's womb" and "the seed of his father"; and (b) the fact that the appendix proposed class reports on the basic tenets of the Catholic, Protestant, and Jewish faiths. *New York Board of Superintendents Opposes "This Way to Unity,"* 151 PUBLISHER'S WEEKLY 2305 (1947). And see, for a compilation of New York City's banning problems, Young, *Public Schools May Test Books on Theme Instead of Excerpts*, N.Y. Herald Tribune, Jan. 3, 1949, p. 15, col. 1-2.

New York City's banning of *The Nation* bore some fruit of its own. In Massachusetts, the magazine was banned from all teachers' colleges. The director admitted that he

But the resulting widespread criticism<sup>27</sup> raised *The Nation* to the status of a *cause célèbre*, and drew into sharp focus grave educational and legal problems.

*Legal Justification: Church and State*

Called upon to justify suppression of *The Nation*, the Board declared that American public school tradition was opposed to bringing religious controversies into the classroom.<sup>28</sup> To support this position, a concurring opinion of Justice Frankfurter was quoted out of context: "The public school must keep scrupulously free from entanglement in the strife of sects."<sup>29</sup> Certainly the principle sounded reasonable. Its novel<sup>30</sup> application, however, lay open to serious question.

The secular nature of American public education derives from the separa-

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hadn't read Blanshard's articles, but was taking this action because he heard they were anti-Catholic and that New York City had banned them. N.Y. Times, July 17, 1948, p. 13, col. 4. Two months later, the Massachusetts State Board of Education lifted the ban. N.Y. Times, Sept. 29, 1948, p. 42, col. 2; 167 NATION 385 (1948). In addition, pressure was put on Rochester's Board of Education to ban *The Nation*. This board stood firm. N.Y. Times, Aug. 5, 1948, p. 19, col. 3.

27. See, e.g., *Banning Denounced by American Council of Christian Churches*, N.Y. Herald Tribune, July 10, 1948, p. 9, col. 5; "Many Groups Fight City Ban on Nation," N.Y. Times, July 14, 1948, p. 25, col. 1. Outspoken in denunciation of the Board's action was the Ad Hoc Committee Brief, *supra* note 25, representing 72 individuals and 34 organizations; and *An Appeal to Reason and Conscience—In Defense of the Right of Freedom of Inquiry in the United States* (petition signed by 107 outstanding men and women of all faiths, including 21 heads of universities and institutions of higher learning, 22 professors, 8 other noted educators, 20 religious leaders of various denominations, 12 leading lawyers, etc.) reprinted in 167 NATION 419 (1948). Decrying the ban as a repudiation of both freedom of education and the separation of Church and State, the petition noted that "ignorance is notoriously the worst foundation for tolerance, and the American people have never felt that it was the purpose of education to teach their children to be blind. The truth is that the suppression of ideas impoverishes human life and warps the human mind in an increasing and progressive sickness. . . . One of the principal purposes of American education should be to see to it that no generation grows up in ignorance of the controversial issues it will have to face." *Id.* at 420, 447. See also Berninghausen, *The Case of the Nation*, 19 AM. SCHOLAR 44 (1949-50); *Catholics and The Nation*, New Republic, July 5, 1948, p. 6 ("New York City took a step backward toward the Middle Ages last week—").

For the proceedings instituted by *The Nation*, see note 70 *infra*.

28. SHOULD RELIGIOUS BELIEFS BE STUDIED AND CRITICIZED IN AN AMERICAN PUBLIC HIGH SCHOOL? (a statement by William Jansen, Superintendent of Schools, City of New York, and Chairman of the Board of Superintendents, concerning elimination of *The Nation* from the list of publications authorized for use in the high schools, Oct. 1, 1948), pp. 7-8.

29. People of Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 216 (1948), quoted in Jansen statement, *supra* note 28, at 8.

30. Heretofore, the Church-State dichotomy has been a factor in schoolbook selection only where the constitutionality of Bible-reading was involved. The divergent state of the law in this regard is discussed by JOHNSON & YOST, SEPARATION OF CHURCH AND STATE IN THE UNITED STATES 33-73 (1948).



tion of Church and State embodied in the First Amendment.<sup>31</sup> It signifies recognition of the existence of a "wall of complete and perfect partition"<sup>32</sup> between government and religion. Though the locus of this wall remains uncertain with respect to most aspects of state aid to religious education,<sup>33</sup> the Supreme Court's attitude toward religion in the public school curriculum is illustrated by the recent *McCullum*<sup>34</sup> decision. Splitting 8 to 1, the Court found religious instruction under public school auspices on "released time" to constitute a forbidden breach in the wall. The tax-supported educational system could not be utilized "to aid religious groups to spread their faith."<sup>35</sup>

31. "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof. . . ." U.S. CONST. AMEND. I. Interpretations and legal development of this separation may be found in CUBBERLEY, *PUBLIC EDUCATION IN THE UNITED STATES* 230-40 (1934); JOHNSON & YOST, *op. cit. supra* note 30, *passim*; Siegel, *Church-State Separation And The Public Schools*, 26 *PROG. EDUC.* 103 (1949); THAYER, *RELIGION IN PUBLIC EDUCATION* 9-41 (1947); *The State and Sectarian Education*, 24 *NEA RESEARCH BULL. NO. 1* (1946) *passim*. See also Justice Frankfurter concurring in the *McCullum* case, *supra* note 29, at 216-7. Many states have incorporated the principle directly into their constitutional provisions for public schools. *E.g.*, OKLA. CONST. Art. I, § 5; WASH. CONST. Art. IX, § 4.

32. Black, quoted in JOHNSON & YOST, *op. cit. supra* note 30, at 257.

33. Note, *Tracing the "Wall": Religion in the Public School System*, 57 *YALE L.J.* 1114, 1116 (1948) ("this judicial masonry, while it may be 'impregnable,' has already proved far from removable"); Meiklejohn, *Educational Cooperation between Church and State*, 14 *LAW & CONTEMP. PROB.* 61, 72 (1949) ("The *McCullum* decision seems to the writer to have deepened, rather than to have cleared away, the current confusion"); Sullivan, *Religious Education in the Schools*, 14 *LAW & CONTEMP. PROB.* 92 (1949) ("For many years, the courts have been trying to decide the appropriate relationship of the church and religion to the public schools and education"). And see the concurring opinion of Justice Jackson in the *McCullum* case, 333 U.S. 203, 238 (1948) ("famous serpentine wall").

The wall's flexibility has caused confusion among recent commentators because of a seeming inconsistency between the *McCullum* decision and the prior *Everson* "school-bus" case, *Everson v. Board of Education of the Township of Ewing*, 330 U.S. 1 (1947). There, Justice Black, in upholding the reimbursement of bus transportation fares to children of both religious and public schools, declared for the 5-4 majority: "New Jersey cannot consistently with the 'establishment of religion' clause of the First Amendment contribute tax-raised funds to the support of any institution which teaches the tenets and faith of any church. On the other hand, other language of the Amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion. Consequently, it cannot exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, Non-believers, Presbyterians, or the members of any faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation." 330 U.S. 1, 16 (1947). *Accord*, *Cochran v. Louisiana State Board of Education*, 281 U.S. 370 (1930) (upholding constitutionality of state free-textbook law as applied to students of sectarian schools).

34. *People of Illinois ex rel. McCullum v. Board of Education of School Dist. No. 71, Champaign County, Illinois*, 333 U.S. 203 (1948).

35. Justice Black at 333 U.S. 203, 210.

An excellent discussion of the *McCullum* case is contained in Sutherland, *Due Process and Disestablishment*, 62 *HARV. L. REV.* 1306 (1949).

Where, then, would the wall stand if a secular magazine, regularly subscribed to by the school library, were found to contain articles criticizing a religion? The coercive aspect of the *McCullum* situation,<sup>36</sup> that of *teaching* sectarian doctrines, is lacking here. School subscription to journals of public opinion, whether *The Nation*, *Life*, or *The New York Times*, implies no state endorsement of controversial views they may contain;<sup>37</sup> hence this free current of opinions cannot be transformed into deliberate aid—or discrimination—whenever “religion” is its subject. Yet Justice Frankfurter’s categorical dictum,<sup>38</sup> if so misconstrued, would place a dragnet in that stream to catch every such allusion. But the doctrinal policy of State neutrality toward Church should imply no flight the other way: “hands-off” does not mean amputation. A ruling to the contrary, providing freedom for all “but please don’t mention religion,” reduces freedom to a shambles and makes State subserve Church.<sup>39</sup>

*Administrative Implications: “One good ban deserves another”*

Apart from the controversy over its Church-State rationale, the *Nation* ban established an awkward precedent. In the moment of crisis, banning a controversial book may seem to the school board more feasible than a firm stand beneath some vague banner of academic freedom. But, in a dynamic and heterogeneous community, many ideas are bound to encroach upon the sensitivity<sup>40</sup> of one group or another. Submission to one pressure, therefore, simultaneously sets the stage for an encore.

The encore to the *Nation* ban was the trial of Shakespeare and Dickens. Shylock<sup>41</sup> and Fagin<sup>42</sup> are malevolent Jews in the pages of two English

36. That the “compulsory” aspect was controlling in the *McCullum* decision, see 333 U.S. 203, 209 and Sutherland, *Due Process and Disestablishment*, 62 HARV. L. REV. 1306, 1343 (1943). See also *Letter to the Times*, N.Y. Times, April 15, 1948, p. 24, col. 7-8.

37. *Evans v. Selma Union High School*, 193 Cal. 54, 222 Pac. 801 (1924) (mere act of purchasing a book for school library held not to carry any implication of adoption of dogma or theory therein, nor any approval of book as work of literature fit for a reference library).

38. See page 935 *supra*.

39. “If all *religious* instruction were prohibited, no history could be taught. Hume was an unbeliever and writes as such; Macaulay is accused of partiality to dissenters; Motley of injustice to Roman Catholics. . . .” People *ex rel. Vallmar v. Stanley*, 81 Colo. 276, 289, 255 Pac. 610, 616 (1927). And see *Donahoe v. Richards*, 38 Me. 379, 407 (1854).

40. See Holmes, *Sensitivity as Censor*, Sat. Rev. Lit., Feb. 26, 1949, pp. 9-10. This provocative article, inspired by a then-current attempt to remove *The Merchant of Venice* and *Oliver Twist* from public schools, discusses the implications of censorship by a sensitive minority group. A similar article by John Mason Brown, entitled *Wishful Banning*, appeared in Sat. Rev. Lit., March 12, 1949, pp. 24-6. See page 940 *infra*.

41. Shylock: “The pound of flesh, which I demand of him,  
Is dearly bought; ’tis mine, and I will have it.  
If you deny me, fie upon your law!  
There is no force in the decrees of Venice.  
I stand for judgment: answer; shall I have it?”

SHAKESPEARE, *THE MERCHANT OF VENICE* 139 (Pooler ed. 1927)

classics. A Brooklyn taxpayer recently brought suit to have these classics expelled from the public schools.<sup>43</sup> Challenging the New York City Board of Education, he contended that *The Merchant of Venice* and *Oliver Twist* were viciously anti-Semitic and tended to inculcate racial hatred into the hearts and minds of children.<sup>44</sup> Furthermore, he maintained that if the Board's respect for Catholics could lead to the ousting of *The Nation*, then an equal consideration for Jews should compel similar treatment of Shakespeare and Dickens.<sup>45</sup> Though the trial court rejected this rationale,<sup>46</sup> the petitioner's citation of *The Nation* as the controlling precedent demonstrated a telling

42. ". . . standing over them, with a toasting-fork in his hand, was a very old shrivelled Jew, whose villanous-looking and repulsive face was obscured by a quantity of matted red hair. He was dressed in a greasy flannel gown. . . ." DICKENS, *THE ADVENTURES OF OLIVER TWIST* 70 (Cruikshank ed.).

"In short, the wily old Jew had the boy in his toils. Having prepared his mind, by solitude and gloom, to prefer any society to the companionship of his own sad thoughts in such a dreary place, he was now slowly instilling into his soul the poison which he hoped would blacken it, and change its hue for ever." *Id.* at 166.

43. *Rosenberg v. Board of Education of City of New York*, 92 N.Y.S.2d 344 (Sup. Ct. 1949). See *What About the Book?*, Time, April 4, 1949, p. 70: Joseph Goldstein, the lawyer who helped unseat Bertrand Russell from a teaching chair in 1940, threatened to sue the Board of Education if *Oliver Twist* and *The Merchant of Venice* were not removed from the public schools. He said that "at least a dozen organizations" were backing him, but revealed no names.

44. *Teachers Explain Literature's 'Bias'*, N.Y. Times, Sept. 27, 1949, p. 29, col. 6.

45. Petitioner's Memorandum, p. 4, *Rosenberg v. Board of Education*, *supra* note 43: "The respondents have made a determination [*The Nation*], which the undersigned claims is an established precedent, and they are bound by it. . . . The undersigned avers that if books are stricken from the approved lists of the respondents and not permitted to be read by or taught to the pupils in the secondary schools because it attacks one racial group, it is of course, equally true that books or any other reading matter which attacks another racial group should be stricken from the approved list and not permitted in our public schools. To adopt any different standard, would be unfair, unjust, and un-American, arbitrary and capricious. It would make Fish of one and Fowl of another."

46. *Rosenberg v. Board of Education of City of New York*, 92 N.Y.S.2d 344, 346 (Sup. Ct. 1949): "Except where a book has been maliciously written for the apparent purpose of promoting and fomenting a bigoted and intolerant hatred against a particular racial or religious group, public interest in a free and democratic society does not warrant or encourage the suppression of any book at the whim of an unduly sensitive person or group of persons, merely because a character described in such book as belonging to a particular race or religion is portrayed in a derogatory or offensive manner. The necessity for the suppression of such a book must clearly depend upon the intent and motive which has actuated the author in making such a portrayal." See also *Educators Upheld in Book Freedom*, N.Y. Times, Oct. 12, 1949, p. 31, col. 6.

The decision was cited with approval in an editorial, *Dickens and Shakespeare*, N.Y. Herald Tribune, Oct. 13, 1949, p. 26, col. 3: "Banning books is always a dangerous operation. . . . When books are suppressed, we invite the larger intolerance that is dangerous to the free mind. By proceeding against Dickens and Shakespeare at this late date, even in the restricted area of high schools, the peril is one of precedent. Next time the attempt at censorship may not appear quite as ludicrous."

point: with *The Nation* excluded, few schoolbooks would be secure from attack.<sup>47</sup>

#### RATIONALES AND REASON

If Blanshard's articles<sup>48</sup> had been less critical, or had gone the other way, the *Nation* case would never have arisen. And if Shylock were a good Jew and the Rugg books<sup>49</sup> sang straight praise, no inquests into printed words might ever have begun. In essence, then, these actions have arisen from a fear of "hostile" ideas. Where the story tells the "right" side, no hue and cry is heard; but an author turned dissenter becomes a menace to the child.

Campaigns to eliminate antagonistic literature from public schools have not been waged solely by racial and religious partisans; a long history of multi-motived, often ludicrous book bannings in America bears witness.<sup>50</sup>

47. The petitions in the four *Nation* cases now pending, note 70 *infra*, take full advantage of the taxpayer's "precedent-controlling" citation in the *Oliver Twist* case. If, as its attorney has planned, the *Oliver Twist* trial decision goes up on appeal, the respondent Board of Education may find itself arguing in the uncomfortable middle of a legal "ring-around-the-rosie": *Oliver Twist* citing *The Nation* as precedent; *The Nation* citing *Oliver Twist* as a "we told you so"; and the Board trying to explain how two "nasty old stereotypes" of Jews and one "highly un-Catholic series of articles" are so clearly distinguishable as to justify banning the latter while favoring the former.

48. See note 24 *supra*.

49. During 1940 and 1941, the National Association of Manufacturers and the American Legion carried on a crusade against Harold Rugg's Social Science textbooks. The books were burned in Ohio, banned in New York, New Jersey, California and elsewhere; "treason in the textbooks" was the watchword. Haines, *Balancing the books: reason enthroned*, 73 LIBRARY J. 149, 150 (1948); N.Y. Times, Feb. 22, 1941, p. 1, col. 4; Feb. 23, 1941, p. 1, col. 1; May 3, 1941, p. 21, col. 1; July 1, 1941, p. 4, col. 1.

50. A most extensive compilation of textbook troubles in the United States is contained in BEALE, ARE AMERICAN TEACHERS FREE? 261-319 (1936): "Stories of books banned from schools would fill many pages. . . . Before the [First World] War the pages of Muzzey's text [MUZZEY, AN AMERICAN HISTORY (1911, 1920)] dealing with socialism were literally cut out of all copies in use in Leonia, New Jersey. The book was banned from the schools of Elmira, New York, because of a 'derogatory' reference to David B. Hill, mayor of Elmira in 1882. After Muzzey deleted the offending statement, his text was reinstated. . . . Another city threw it out because the high school was named for Grant, and Muzzey drew an 'unfavorable picture of Grant.' Muzzey's text was taken off the North Carolina list after protests by the D.A.R. and the U.D.C. [United Daughters of the Confederacy], partly because of his statement that Carolina history need not long detain us, partly because of objection to his making slavery the chief cause of the Civil War." *Id.* at 300-301.

Beale cites scores of "witch-hunting" statutes, instances of corruption in publisher pressures on school administration, and attacks on passages in history books which caused their removal until suitable changes were made. *E.g.*, "In 1919, Guitteau [the author] said, 'Hamilton distrusted the masses, and once exclaimed at a public dinner, "Your people, sir, is a great beast!"' In 1923 and 1933 this read, 'Hamilton was inclined to doubt the ability of the common people to take part wisely in public affairs.'" *Id.* at 292.

See also Beale, *The Present Status of Freedom in the Schools*, EDUCATIONAL FREEDOM AND DEMOCRACY 50, 70 (1938) (Vannest & Smith's *Socialized History of the United*

And despite most educational authorities' sincere opposition to censorship, instances of suppression continue to mount. A California Senate education committee recently blue-pencilled the *Building America* series.<sup>51</sup> This action was taken after certain super-patriotic groups decried the books' " 'communistic emphasis' on America's shortcomings," on the basis of such quotations as "one-third of our people are poorly housed."<sup>52</sup> In Houston, Texas, a single paragraph, illustrating the postal system and progressive taxes as "bits of socialism," caused the local school board to vote a ban on the entire textbook.<sup>53</sup> And Birmingham, Alabama, discontinued a classroom magazine subscription because of its "purported stand for President Truman's civil rights proposal."<sup>54</sup> In no case was the ban based on the falsity of the matter printed. Circumscribed by a spectre of "subversion," the realm of free education appears to be slowly shrinking.

### *The Opposition to Unfettered Freedom*

Minority groups have an appealing reason for desiring to exclude literary seeds of intolerance from the schools. In the current struggle against bigotry and prejudice, their already sensitive children deserve protection against added criticism of creed or color.<sup>55</sup> And realistically viewed, the Shylocks

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*States* "was barred in Franklin, Pennsylvania, on the charge that it was 'wet propaganda' because it told that our Revolutionary fathers drank liquor and made money making and selling rum"); N.Y. Times, March 20, 1947, p. 10, col. 5 (Glendale, California, Board of Education "drops text [STEWART, THE LAND OF THE SOVIETS] on soviet"); N.Y. Times, July 13, 1947, p. 44, col. 3 (Wallis, South Dakota Board of Education bans "books which contain teachings of 'atheistic evolution'").

51. *Burnings Next?* New Republic, Aug. 30, 1948, p. 11. See also *California Censorship Attacked by State Librarians*, 151 PUBLISHER'S WEEKLY 2499 (1947); *California Senate Group Attacks Popular Textbook Series*, 153 PUBLISHER'S WEEKLY 1812 (1948); THE RIGHT TO FIND OUT—AN ANALYSIS OF THE CRITICISMS OF BUILDING AMERICA (pamphlet issued by California Library Committee on Intellectual Freedom, 1948) at p. 1: "The two year controversy over the *Building America* textbook series in California is a warning to those who say 'It can't happen here.' Suppression of opinion CAN happen in the United States if the public continues to ignore increasing attempts at censorship."

And note MARTIN, MAGAZINES FOR SCHOOL LIBRARIES 135 (1946) (*Building America* is "sponsored by outstanding leaders [NEA] in the teaching profession").

52. *Burnings Next?*, New Republic, Aug. 30, 1948, p. 11.

53. N.Y. Times, Oct. 26, 1949, p. 29, col. 4: "With one negative vote, the school board last night moved to ban the book [MACRUDER, AMERICAN GOVERNMENT]. . . . Mrs. Olon Rogers was the only board member voting against the ban. She said her action did not necessarily mean approval of the paragraph but she thought the board should at least read the remainder of the chapter before taking action. . . . J. O. Webb, assistant superintendent of Houston's senior high schools, said the book actually condemned communism. 'The way he expressed it though, is most unfortunate,' Mr. Webb said."

Due to a storm of adverse nationwide publicity, however, the ban was not put into effect. Houston Chronicle, Oct. 26, 1949, p. 1, col. 6-8.

54. N.Y. Times, March 7, 1948, § 1, p. 31, col. 4.

55. See Letters to the Editor in Answer to *Sensitivity as Censor*, Sat. Rev. Lit., March 19 & 26, 1949, pp. 23-4; Schary, *Censorship and Stereotypes*, Sat. Rev. Lit.,

and Uncle Toms are objectionable stereotypes,<sup>55</sup> not mere characters from the pages of fiction. Hence, if minorities can find some refuge in censorship, their efforts ought not be condemned by an unsympathetic demand for "freedom."

Committees against un-American thoughts appear to support a different theory.<sup>57</sup> Respect for the beliefs which society deems "proper" must be instilled in the citizenry of tomorrow. The child, when young and "susceptible to ideas," should be sheltered from hostile ideology. A love of country and an idealized status quo will promote the greatest resistance to subversions. Education is inculcation, not exposure.

April 30, 1949, pp. 9-10: "When the war against bigotry and prejudice is concluded, we can condone carelessness and lack of judgment, but, until that time, we have the right to defend ourselves against anything that might help lose that war."

56. "It is urged that we cannot object to Fagin without objecting equally to Bill Sykes, Uriah Heep and all other unpleasant Englishmen in Dickens' works. This argument may have had some plausibility twenty years ago. The events of the last two decades demonstrate its naivete. First, Fagin is the only Jew in 'Oliver Twist.' As such he represents Jews generally. To the unsophisticated reader . . . his outstandingly evil characteristics become associated with all Jews. Sykes does not similarly represent all Englishmen. Second, anti-British feeling is not today a serious problem." ROBINSON, THE RIGHT OF FREEDOM OF SUPPRESSION 8 (unpublished manuscript in the files of the American Jewish Congress, written in reference to the controversy over the film version of *Oliver Twist*).

"Is the objection to villains among Jews or to stereotype villains among Jews? Would there be equal objection to occasional villains with Jewish names if that villain did not have a hooknose and an East-European kaftan and beard? Moreover, would there be objection to an occasional villain with a Jewish name if there were an occasional hero with a Jewish name and, far more important, a frequent appearance of a character with a Jewish name who is neither a hero nor a villain but an ordinary clerk or worker or housewife or mail-carrier. In other words, is not the objection to stereotyping rather than villainy? Does not life imitate art as much as art imitates life? Did not the identification of Jew and usury become much stronger after the 'Merchant of Venice' than before? Are not Negroes given servile work to a substantial extent because white employers have been conditioned to associate Negroes with servile employment?" PFEFFER, QUESTIONS ON FREEDOM OF EXPRESSION IN DEMOCRACY 5 (unpublished memorandum in the files of the American Jewish Congress written in reference to the controversy over the film version of *Oliver Twist*, May 6, 1949). See also *Should Minority Groups Exercise Censorship Over Books and Films*, 15 BULL. OF TOWN MEETING OF THE A.J.C., No. 2, May 10, 1949 *passim*.

57. The negative side of the proposition, "That academic freedom in the highest sense should prevail in educational institutions," is outlined in Johnsen, *Academic Freedom*, 3 REFERENCE SHELF, No. 6, pp. 12-18 (1925). It seems to be well in accord with Plato's idea of educational freedom: "Youth is the time when the character is being molded and easily takes any impress one may wish to stamp on it. Shall we then simply allow our children to listen to any stories that anyone happens to make up and so receive into their minds ideas often the very opposite to those we shall think they ought to have when they are grown up?" Quoted in GENERAL EDUCATION IN A FREE SOCIETY 3 (Report of the Harvard Committee, 1945).

*The Case for Intellectual Freedom*<sup>58</sup>

But to envision the school as a social vacuum distorts the whole aim of education: the prejudices and variant beliefs characteristic of a community must be examined, not ignored, by its growing children.<sup>59</sup> Viewing the immaturity of these students as a challenge, rather than a limitation, the educational system provides a friendly and intellectual environment for the discovery and study of differences of opinion.<sup>60</sup> The resultant capacity to make informed, intelligent decisions strengthens the students' ability to reject attractive but shallow ideas in some later, less neutral, more emotional context. And realization that high school—the situs of all recent bannings—is the “last formal avenue of education”<sup>61</sup> for the vast majority of Americans makes an enlightened approach to societal problems an indispensable part of their training for citizenship.<sup>62</sup>

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58. Intellectual freedom is the “inherent human right [n]ot to be bound in one's reason and conscience,” but rather “to search unceasingly for what one believes to be truth.” This definition is proposed and elaborated in Johnsen, *Academic Freedom*, 3 REFERENCE SHELF, No. 6, pp. 7–8 (1925).

59. The common theme running through almost all books on modern educational theory conceives of education as an instrument of enlightened social criticism and reform. E.g., CURTI, *THE SOCIAL IDEAS OF AMERICAN EDUCATORS* 581–91 and *passim* (1935); NEWLON, *EDUCATIONAL ADMINISTRATION AS SOCIAL POLICY* (1934) *passim*, especially the chapter on “Education in the Conflict of Social Forces,” pp. 26–52; *EDUCATION AND SOCIETY* (University of California faculty, 1944) *passim*. See note 62 *infra*.

And one recent survey indicated that 72% of the American people believe that controversial subjects should be discussed, rather than avoided, by youth. *What People Think About Youth and Education*, 18 NEA RESEARCH BULL. 185, 197 (1940). Nevertheless, the sensitivity of criticism on the part of various community groups has resulted in school boards attempting to protect respected beliefs at all costs. Bode, *What is the Meaning of Freedom in Education*, *EDUCATIONAL FREEDOM AND DEMOCRACY* 1, 8 (1938): “The demand that certain preferred beliefs be protected against scrutiny and criticism is not fair either to the pupil himself or to the social order which has a stake in his enlightenment.” *Id.* at 14.

And even in the absence of banning, this undue sensitivity on the part of school boards results in a choice of school literature “whose chief virtue is the purely negative one of not offending any particular group.” Beale, *The Present Status of Freedom in the Schools*, *EDUCATIONAL FREEDOM AND DEMOCRACY* 50, 70 (1938).

60. For example, “[librarians] look upon the high school years as a precious time in which to open doors, to show young people that difference of opinion is a normal and socially valuable phenomenon. . . . Wise workers with young people have less fear that in a school atmosphere their students will absorb dangerous ideas, than that too soon they will close their minds to all but a familiar pattern of traditional formulae.” Berninghausen, *The Case of the Nation*, 19 AM. SCHOLAR 44, 48 (1949–50).

61. Supplement to Ad Hoc Committee Brief, *supra* note 25, at 3.

62. A model statement of school board policy with respect to the discussion of controversial issues in the schools was adopted by the Board of Education of Ann Arbor, Michigan, and is found in Haisley, *Controversial Issues in School Policy*, 13 PROC. EDUC. 609, 610 (1936), quoted in COOK, *COMMUNITY BACKGROUNDS OF EDUCATION* 330–1 (1938). For other authorities to the same effect, see BRUBACHER, *MODERN PHILOSOPHIES OF EDUCATION* 228–31, 236 (1939) (“The only thing [the teacher] must vigilantly guard against

Inevitably, the freedom to inquire involves a risk that the child may favor the "wrong" ideas. But faith in democracy is predicated on the belief that greater benefits accrue from freedom, instead of suppression, of thought. In a public school the risk of "subversion through literature" is especially slender. For prejudices arise from the life of the community, not from the literature its children read. Psychological studies indicate that books alone will seldom change basic attitudes; rather, they tend to initiate a learning process by stimulating ideas held previously.<sup>63</sup> And the constant devotion of the public schools to democratic ideals could hardly be counteracted by a few passages in a textbook or a series of magazine articles. Children who salute the flag every day, sing the Star Spangled Banner every week, and hear the American way of life extolled every hour are not likely to fall victim to subversive elements in the classroom.

The teacher's influence in classroom reading mitigates still further the effect of "hostile" literature. To be sure, his interpretations may lend color to the ideas gleaned from books. While the stereotype of Shylock or Uncle Tom may be analyzed and its misconceptions corrected by a good teacher,<sup>64</sup>

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is that his position as teacher does not unduly influence his pupils in coming to their personal conclusions"); DE YOUNG, *INTRODUCTION TO AMERICAN PUBLIC EDUCATION* 656-8 (1942) (containing a bibliography endorsing same viewpoint); Edwards, *The Role of the Board of Education in a Democratic Society*, 47 *ELEM. SCHOOL J.* 552, 555 (1947) ("Every pupil who graduates from high school should have as adequate an understanding of communism as it is possible to give him. He should understand its basic ideology, its political drives, the institutions that it employs, its attitude toward the freedoms that we feel essential in a democracy"); Laura K. Martin, "authority on magazine use in high schools," note 23 *supra*, quoted in Berninghausen, *On Keeping Our Reading Free*, 6 *EDUC. LEADERSHIP* 104, 107 (1948) ("Extreme expressions of opinion (and the reactionary periodicals are also worthy of examination as specimens) are part of the living fabric of social studies materials to be weighed and analyzed"); MYERS & WILLIAMS, *EDUCATION IN A DEMOCRACY* 329-30 (1948); *School Boards in Action*, 24 *YEARBOOK OF AMER. ASSOC. OF SCHOOL ADMINISTRATORS* 179 (1946).

63. Several recent reports bear out this conclusion. See Foulds, *The Child's Response to Fictional Characters and its Relationship to Personality Traits*, 11 *CHARACTER & PERSONALITY* 64, 75 (1942) ("the child's fictional choices are predictable since they cohere with other observable aspects of his personality. Fiction can only stimulate what is already there, even though in a latent form"); Le Maire, *L'importance de la littérature comme facteur criminogène*, 21 *ACTA PSYCHIATRICA ET NEUROLOGICA, KJØBENHAVN* 585 (1946), cited in 22 *PSYCHOLOGICAL ABSTRACTS* 104 (1948) (concludes, on basis of review of available literature and own investigations of criminals, that "the type of literature read is insignificant as a criminogenic factor"); Rath & Trager, *Public Opinion and Crossfire*, 21 *J. OF EDUC. SOCIOLOGY* 345, 368 (1948) (experiment testing attitude changes due to movie dealing with anti-Semitism). An excellent series of articles breaking down popular misconceptions concerning the influence on children of comic-book reading appears in *Comics as Reading for Children*, 23 *J. OF EDUC. SOCIOLOGY* 193-245 (1949).

64. See the chapter *On Dealing With Stereotypes* in *LITERATURE FOR HUMAN UNDERSTANDING* 13-30 (American Council on Education, 1948); Weeks, *Teaching Tolerance Through Literature*, 35 *ENG. J.* 425 (1946). The great importance of such study in the public schools is emphasized by two recent reports revealing the shocking misconceptions of school-children. Radke & Sutherland, *Children's Concepts and Attitudes about Mi-*



others may use it as a vehicle for expressing their personal hostility towards a race or religion.<sup>65</sup> But clearly a teacher who would so abuse his position does not require the medium of a particular book. Here, then, the banning of the book will only be self-deceptive: it will remove the token, not the cause, of any harmful results. If perverted use by teachers is the evil sought to be avoided, a greater care in their training and selection, rather than censorship of the materials they use, would appear a more effective remedy. Book-banning, however, only reveals a school board's lack of confidence in its educational system.

Apart from its innate distrust of knowledge, book-banning's efficacy is doubtful in light of its limited scope. The school is not the only source of the literature proscribed.<sup>66</sup> Once the ban is reported in the public press,<sup>67</sup> the opinions sought to be excluded come within the reach of the inquisitive child.<sup>68</sup> Nothing so intrigues the young as the charm of locked doors and sealed pages. Thus, the ineffective suppression may only serve to glorify the ousted viewpoint.

#### THE SCHOOL BOARD GOES TO COURT

A school board playing censor under the guise of "education" may be subjected to pressures more formal than the mere disfavor of public reaction.

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*nority and Majority American Groups*, 40 J. OF EDUC. PSYCHOLOGY 449 (1949); Zeligs, *Children's Intergroup Concepts and Stereotypes*, 21 J. OF EDUC. SOCIOLOGY 113 (1947).

65. E.g., the May Quinn incident, *supra* note 17. Her anti-Negro remarks were made in the course of comment on a student's oral report. N.Y. Herald Tribune, Dec. 17, 1949, p. 13, col. 6.

66. The public library, newsstands and bookstores are all outside the school board's sphere of influence. However, it is significant that subsequent to the banning of *The Nation* from New York City's public schools, Blanshard's book compiling the controversial articles was difficult to obtain in some bookstores in New York and other parts of the country. See Tallmer, *The Silent Treatment*, 169 NATION 59 (1949).

67. While the number of "quiet bans," i.e., removals without publicity, are not known, it is quite certain that any leak will quickly make news. See, for example, notes 25-7, 49, 50-4, *supra*.

68. See, e.g., *Trade Winds*, Sat. Rev. Lit., May 15, 1948, p. 4: In reference to a proposal to ban *Gentlemen's Agreement* and *Focus* from the New York City public schools, Lewis Gannett of the *Tribune* relates that during the previous year the Board of Education had dropped Howard Fast's *Citizen Tom Paine* from its approved list, because of Communist charges. As a result of the ban, Fast's royalties skyrocketed. Later, when Gannett talked to a group of high school magazine editors, he discovered that one after another had reviewed the book in his school paper, all because they had read about the ban in the newspapers.

And see JACKSON, *THE FEAR OF BOOKS* 62-4 (1932). Admitting that the influence of many books is contrary to what is desired, he denounces those "who waste their time in waging war upon books which for the most part have no power beyond the moment, and whose brief fame would be briefer still if it were not prolonged by the advertisement of moral condemnation. . . . Forbidden fruit is sweet, and to forbid a book is to increase its chances of immortality."

Thus an imminent election day<sup>69</sup> or a successful appeal to the state commissioner of education<sup>70</sup> could provide the desired remedy. Should these measures prove inappropriate, recourse to legal action can be instituted.

*The Basis for Legal Action: A Constitutional Framework*

"Freedom" is a term not often applied to the context of a school full of children. As commonly conceived, discipline and control are indispensable accompaniments to the theme of purposeful education. Here, effective channeling and guidance of the child's intellectual efforts necessarily requires wide latitude of administrative power.<sup>71</sup> This discretion, however, cannot be without limit. School boards, empowered by state statutory delegations, must still conform to their State and Federal Constitutions.

The limitations on a school board's power to control the curriculum derive from the Freedom to Learn. This Freedom, an essential element in the modern American conception of education,<sup>72</sup> was a fundamental principle

69. See note 19 *supra*.

70. The necessity of exhausting administrative remedies before embarking on an action at law is dependent upon the statutes of the particular jurisdiction concerned. See note 20 *supra*.

When public reaction failed to cause rescission of the ban, *The Nation* appealed to the State Commissioner of Education. His decision, handed down on May 25, 1949, Case No. 5321, "concluded that a board of education has complete discretion in refusing to purchase or to accept for its school libraries any particular publication"; and the Commissioner was thus "constrained to find that neither support nor refutation of an argument in behalf of the character of any publication is material in this proceeding." But the Commissioner is not without power to review a discretionary school board action. *Cf.* Board of Education of the City of New York v. Graves, Commissioner of Education, 175 Misc. 205, 24 N.Y.S.2d 644 (Sup. Ct. 1940) (upholding Commissioner's right to reverse Board's decision dismissing teacher).

The Commissioner's determination did not end the appellate procedure. Four proceedings are now pending: (1) Petition for rehearing before the Commissioner (filed Sept. 23, 1949) on the above decision; (2) Petition before the Commissioner (filed Sept. 23, 1949) appealing the renewal of the ban by the Board of Superintendents and Board of Education on June 23, 1949; (3) suit in the New York Supreme Court, Albany County, by Kornblum, taxpayer, and *The Nation Associates, Inc. v. Spaulding, Commissioner of Education* (filed Sept. 23, 1949), for an order under Article 78, N.Y. CIV. PRAC. ACT, reviewing the Commissioner's decision; and (4) suit in New York Supreme Court, Kings County, by *The Nation Associates, Inc. v. Board of Education & Board of Superintendents* (filed Oct. 24, 1949) under Article 78, N.Y. CIV. PRAC. ACT.

71. See generally, EDWARDS, *THE COURTS AND THE PUBLIC SCHOOLS* (1933); MESSICK, *THE DISCRETIONARY POWERS OF SCHOOL BOARDS* (1949).

72. "The American faith in education has been grounded in the belief that without education the ideal of free and equal opportunity is an idle fantasy; that of all the guarantees of free development, education is the surest and the most effective. . . . He who would put the freedom of others in bond, especially freedom of inquiry and communication, creates conditions which finally imperil his own freedom and that of his offspring." John Dewey, dean of American educators, in his chapter on *Academic Freedom* in *INTELLIGENCE IN THE MODERN WORLD* 721, 722, 725 (Ratner ed. 1939). And such was the principle of a seven-point program presented by the United States Delegates to the UN

underlying the public school provision now long embodied in state constitutions, and marked a departure from prior theories concerning the education of children for citizenship.<sup>73</sup> Formerly, rearing a child was thought to be the duty of parent and Church.<sup>74</sup> That thesis, however, proved inadequate. "Church creeds and church theology" could not be subscribed to by all.<sup>75</sup> And the prevalence of poverty, illiteracy and crime, indicated the need for a more dependable system.<sup>76</sup> Consequently, by placing education under the aegis of its constitution, the State assumed the vital obligation of guaranteeing to all child-citizens the free exercise of their "largest natural ability."<sup>77</sup> Removed from the confines of sectarian indoctrination,<sup>78</sup> education in public schools could now provide the opportunity for generous moral and intellectual development, characterized by a freedom to inquire and to know.<sup>79</sup>

Freedom to Learn thus transforms a publisher's well-recognized right to speak and print freely into a school-child's right to serve as an audience. In this manner, the benefits of the First Amendment penetrate to the classroom.

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Conference on Freedom of Information. *Everyone Shall Have the Right of Freedom of Thought and Expression*, 153 PUBLISHERS' WEEKLY 1547 (1948). See also BEALE, ARE AMERICAN TEACHERS FREE? 1-21, 659-83 (1936); POLICIES FOR EDUCATION IN AMERICAN DEMOCRACY 105-6 (Educational Policies Commission of the NEA, 1946); *Proposals for Public Education in Postwar America*, 22 NEA RESEARCH BULL. 37, 41 (1944); TO SECURE THESE RIGHTS 47 (Report of the President's Committee on Civil Rights, 1947); *Tributes to the Ideal of Freedom of Expression*, 200 ANNALS 292-306 (1938); and sources cited in notes 59 and 62 *supra*.

73. An outline of the argument for free state schools is contained in CUBBERLEY, PUBLIC EDUCATION IN THE UNITED STATES 165-6 (1934).

74. *Id.* at 12-81, describing the condition of education prior to its administration by the State.

75. See the remarks of Mr. Kinney in 4 PROCEEDINGS AND DEBATES OF N.Y. CONSTITUTIONAL CONVENTION 2915 (1867-8).

76. CUBBERLEY, *op. cit. supra* note 73, at 165-6.

77. Kinney, note 75 *supra*, at 2913. Early in their history, most colonies established rudimentary school systems. In the beginning of the nineteenth century, some states passed statutes for free schools. However, ultimate creation of constitutional provisions to make the system permanent, and beyond the whim of a passing legislature, was gained only in the face of strong opposition. For a thorough history of the battle for free state schools and their control, see CUBBERLEY, *op. cit. supra* note 73, at 161-339.

78. "All schools maintained or supported wholly or in part by the public funds shall be forever free from sectarian control or influence." WASH. CONST. Art. IX, § 4. This provision, embodying the separation of Church and State demanded by the First Amendment of the Federal Constitution, note 31 *supra*, is typical of many state constitutions. For discussions of the place of religion in public education, see EDWARDS & RICHEY, THE SCHOOL IN THE AMERICAN SOCIAL ORDER 379-82 (1947); THAYER, RELIGION IN PUBLIC EDUCATION 9-41 (1947).

79. "History teaches us that we have nothing to fear from general culture. . . . Let the right of every child to a generous education be once recognized by the State and we shall lay the foundation of a civil and social polity in which men shall know their rights, and knowing dare maintain." Beals, in 5 PROCEEDINGS AND DEBATES OF THE N. Y. CON-

Administration consistent with the Bill of Rights and the Freedom to Learn is a duty incumbent on school boards.<sup>80</sup> For only the school as a miniature Holmesian marketplace where children gather is conducive to education for enlightened citizenship.<sup>81</sup> To impose uniformity of opinion on the young citizenry here would be no less unlawful than elsewhere in society. Recognizing this constitutional equality of school children, the Supreme Court has consistently<sup>82</sup> disallowed any ideological coercions in education towards "some end thought essential." States may not forbid the teaching of school subjects in a foreign language.<sup>83</sup> *Public* school education may not be compelled;<sup>84</sup> nor conditioned on saluting the flag.<sup>85</sup> "Freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."<sup>86</sup>

### *Book-Banning and Constitutional Limitations*

With the school's constitutional fabric thus spun, the device of book-

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STITUTIONAL CONVENTION 3811 (1867-8). And see EDWARDS & RICHEY, *op. cit. supra* note 78, at 360.

80. "The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 637 (1943).

81. "If you want to teach democracy, you must practice it." Lieberman, *Should the School Press Be Free?* 24 CALIF. J. OF SECONDARY EDUC. 340 (1940). The author advocates a free school press as the only policy for putting democratic principles preached in the classroom into practice. Yet, see the N.Y. Times, Nov. 15, 1949, p. 23, col. 2: "Pupil Editors Deny Their Press Is Free—Cite many instances of faculty censorship."

82. Except for their decision in *Minersville School District v. Gobitis*, 310 U.S. 586 (1940) (first flag salute case), overruled by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943).

83. *Meyer v. State of Nebraska*, 262 U.S. 390 (1923). The circumstances here were compelling in favor of the "coercion." Children of foreign families were being reared in their mother tongue (German) both at home and private school. In order to assure an adequate knowledge of English, several mid-western states passed statutes providing that no person could teach any subject in any language other than English, prior to the 8th grade. Holding the legislation violative of the Fourteenth Amendment, Justice McReynolds declared on behalf of the Court that while the State might do very much to improve the quality of its citizens, fundamental rights must constantly be respected. Protection of the Constitution extended to those of all tongues. "A desirable end cannot be promoted by prohibitive means." *Id.* at 401.

84. *Pierce v. Society of Sisters*, 268 U.S. 510 (1925) (Oregon statute requiring all children between ages of eight and sixteen to attend public school held unconstitutional as an obvious attempt to prohibit private elementary schools without due process of law).

85. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). See note 80 *supra* and note 118 *infra*.

86. *Id.* at 642.

banning can be brought into focus. Although children have a right to inquire, and competing viewpoints the right to be heard, a school board cannot buy all that is published. In making these decisions, the board may employ a variety of criteria, all within its legitimate discretion: size of print, price, and educational value to children are but a few.<sup>87</sup> Mere failure to select a particular book could be attributed to any of many explanations: "other books were better" would be reason enough. The burden of proving that non-purchase was equivalent to censorship of opinion would be well-nigh unsurmountable.

But when literature is removed from the school,<sup>88</sup> or a magazine subscription is discontinued,<sup>89</sup> censorship is easier to prove. Here a specific fact situation is created to which the constitutional Freedom to Learn can be applied.

A ban imposed solely because of the author's point of view is an unconstitutional abuse of the school board's discretion. Those school authorities who bar library entrance to a *Soviet Information Bulletin*,<sup>90</sup> for example, are denying in practice the freedom so proudly preached in the classroom. And suspending a magazine subscription because of disfavored opinion places a premium on conformity<sup>91</sup> in a society which thrives on its differences, and in an educational system dedicated to free inquiry. To so license a school board is to ordain John Stuart Mill's infallible judge of Truth;<sup>92</sup> such in-

87. The various factors and procedures employed in the selection of textbooks are discussed in the sources cited in note 10 *supra*. Library materials, and their suitability factors, are treated by MARTIN, *op. cit. supra* note 23.

88. Various removals are cited in notes 49-54 *supra*.

89. As in the case of *The Nation*. See note 25 *supra*.

90. These objects of the most recent wave of banning have, in some instances, been removed by the Superintendent of Schools without even informing the local school board. One board president, after being informed by a reporter of the suppressive action, declared: "How in hell can we make policies if we don't know what's going on? You can quote me." N.Y. Herald Tribune, Dec. 10, 1949, p. 1, col. 6-7 ("Soviet Embassy Bulletin Banned by High Schools in Washington"). And see N.Y. Times, Dec. 14, 1949, p. 19, col. 6 ("More Schools in U.S. Bar Russian Tracts").

91. Evidently, this demand for "conformity" lies at the root of most bannings. For in an American public school, constantly imbuing its students with the traditions and ideals of democracy, of what subversive moment is a Communist propaganda leaflet, plainly labelled? What manner of faith in our system of government is evidenced by authorities who would allow none to criticize it? And what have they achieved by making a martyr of the magazine which criticized a sacred institution? Will these actions eliminate dissenters? Will they convince anyone of the error in the proscribed opinions? "The way to fight ideas is to show that you have better ideas. No idea is any good unless it is good in a crisis." Hutchins, quoted approvingly by Brubacher, *Loyalty to Freedom*, 70 SCHOOL & SOCIETY 369, 373 (1949). And see Commager, *Who is Loyal to America*, 195 HARPER'S 193 (1947) (the "new loyalty" is conformity—an uncritical and unquestioning acceptance of America as it is).

92. The logic of Mill's argument seems irresistible.

"First, if any opinion is compelled to silence, that opinion may, for aught we can certainly know, be true. To deny this is to assume our own infallibility.

congruity to the First Amendment<sup>93</sup> can merit no presumption of constitutionality.<sup>94</sup>

### *Standing to Sue*

Despite the unconstitutional criterion<sup>95</sup> employed in book-banning, a legal sanction must be predicated on some plaintiff's standing to sue. Necessarily, a judicially cognizable injury must be shown. At least three potential plaintiffs—the school-child, the taxpayer, and the publisher—have plausible claims to such injury. To date, their ability to maintain suit is untested.<sup>95</sup>

*The School-Child.* The educational provision of a state constitution<sup>97</sup> lays the basis for a suit by its young beneficiary.<sup>98</sup> Though the extent of the

"Secondly, though the silenced opinion be an error, it may, and very commonly does, contain a portion of truth; and since the general or prevailing opinion on any subject is rarely or never the whole truth, it is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied.

"Thirdly, even if the received opinion be not only true, but the whole truth; unless it is suffered to be, and actually is, vigorously and earnestly contested, it will, by most of those who receive it, be held in the manner of a prejudice with little comprehension or feeling of its rational grounds. And not only this, but, fourthly, the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct; the dogma becoming a mere formal profession, inefficacious for good, but cumbering the ground, and preventing the growth of any real and heartfelt conviction, from reason or personal experience." Mill, *On Liberty* (1859) in CRAIG, *THE BANNED BOOKS OF ENGLAND 7-8* (1937).

93. ". . . are we to have a censor whose imprimatur shall say what books may be sold, and what we may buy? And who is thus to dogmatize religious opinion for our citizens? Whose foot is to be the measure to which ours are all to be cut or stretched? Is a priest to be our inquisitor? Or shall a layman, simple as ourselves, set up his reason as the rule for what we are to read, and what we must believe? . . . If M. de Becourt's books be false in its facts, disprove them; if false in its reasoning, refute it. But, for God's sake, let us freely hear both sides, if we choose." Letter from Thomas Jefferson to Nicholas Dufief, Philadelphia bookseller (1813), quoted in Boyd, *Subversive of What?* *Atlantic Monthly*, Aug. 1948, p. 19, 20.

And the Supreme Court has recently concurred. Substitution of the judgment of community lawmakers or officials for that of the individual in the area of free speech and press, is unconstitutional. "In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields, the tenets of one man may seem the rankest error to his neighbor. . . . But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion. Justice Roberts in *Cantwell v. Connecticut*, 310 U.S. 296, 310 (1940). *Accord*, *Martin v. City of Struthers*, 319 U.S. 141 (1943).

94. See *United States v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938).

95. That the use of an unconstitutional criterion to achieve a legitimate end is actionable, see Hale, *Unconstitutional Conditions and Constitutional Rights*, 35 *COL. L. REV.* 321 (1935). This action is briefly explained under *The Publisher*, page 950 *infra*.

96. But the test is not far off. For the two separate legal proceedings instituted by *The Nation*, see note 70 *supra*.

97. See note 4 *supra*.

98. Essentially, the proscription of schoolbooks most directly affects the child. "The

child's legal interest therein has never been judicially defined, it appears to offer the most appropriate vehicle for vindicating the Freedom to Learn. Where there is no provision for direct appeal from the school board's decision, the book ban may be brought to the court's attention in a mandamus petition<sup>99</sup> by the parent on behalf of his child.<sup>100</sup> Clearly, the plaintiff cannot claim an interest in the particular book or magazine.<sup>101</sup> Rather, the school board's interdiction will be shown to deprive the child of his justifiable right "to inquire and to know."<sup>102</sup> For if banning is inconsistent with the duty to educate, then the school board can be deemed to have exceeded its discretion.<sup>103</sup>

*The Taxpayer.* When a book or periodical is bought and then banned, a citizen's interest is more than parental. The state's system of free education is supported by the taxpayer's dollars. He pays for a full education, requiring access to many topics of discussion and shades of opinion. If children are deprived of the full benefits of that system, then the school patron should have a right to complain.<sup>104</sup> Specifically, he might request an injunction against the school board's waste of money;<sup>105</sup> for if literature is removed from a library shelf, the purchase price goes out the window; and a set of textbooks banned from the classroom implies a sizeable expenditure to replace them. In both cases, discarding usable literature bought with public funds could indicate misuse of public funds.

*The Publisher.* When disfavored opinion causes the publisher's product to be barred from the schools, a tiny area of circulation is deprived of the benefits of a free press.<sup>106</sup> In addition to the discrimination against the pub-  


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 school is for her benefit and instruction. The education is given to her, and if wrongfully deprived thereof, the loss of such deprivation falls on her." *Donahoe v. Richards*, 38 Me. 376, 378 (1854).

99. *E.g.*, N.Y. CIV. PRAC. ACT Art. 78, under which *The Nation* is suing. See notes 20 and 70 *supra*. For the preference of mandamus over an injunctive action, see *School Dist. No. 1, Reno County v. Shadduck*, 25 Kan. 467 (1881); *Harley v. Lindemann*, 129 Wis. 514, 109 N.W. 570 (1906).

100. *E.g.*, *People of Illinois ex rel. McCollum v. Board of Education*, 333 U.S. 203 (1948); *Coggins, Jr. by Coggins, Sr. "next friend" v. Board of Education*, 223 N.C. 763, 28 S.E.2d 527 (1944).

101. *I.e.*, no one could seriously contend that a *Soviet Information Bulletin*, *The Nation*, or even *The New York Times*, was so "indispensable" to a public school that the courts could require its purchase.

102. See page 946 *supra*.

103. See sources cited in note 71 *supra*.

104. *Wright v. School Dist. No. 27*, 151 Kan. 485, 99 P.2d 737 (1940) (taxpayer could enjoin school board from using tax funds to support school teaching sectarian doctrines). *Accord*, *Judd v. Board of Education of Union Free School Dist. No. 2*, 278 N.Y. 200, 15 N.E.2d 576 (1938).

105. *Harvey v. Board of Public Instruction*, 101 Fla. 273, 133 So. 868 (1931) (injunction granted to prevent disposition of school property without adequate consideration); *McLaughlin v. Lansford Borough School Dist.*, 335 Pa. 17, 6 A.2d 291 (1939). See *Lewis v. Board of Education*, 247 App. Div. 106, 108, 286 N.Y. Supp. 174, 176 (1st Dep't 1936).

106. In the future, a publisher desirous of having his publication purchased by schools

lisher, there may also be economic consequences. Once the ban is effected, and announced in the public press, other school boards may be prompted to a hasty, similar action.<sup>107</sup> Affixing the label of "communist," "anti-Semitic," "-Negro," or "-Catholic," always seems to create a front-page presumption seldom erased by a later, back-page acquittal.<sup>108</sup> And the initial splurge of inquisitiveness which might have momentarily increased the publisher's sales, could end up in a loss of trade due to a boycott by the "insulted" community segment.<sup>109</sup>

This discrimination, whether or not it results in economic loss to the publisher, may give rise to a suit for reinstatement based on constitutional grounds.<sup>110</sup> While a newspaper or magazine subscription may be validly discontinued for a variety of reasons, suspension on the single ground of "disapproval of opinions expressed" affords the publisher a unique cause of action, based on the use by the state of an unconstitutional criterion.<sup>111</sup> To be sure, a private individual is free to buy or reject what he pleases, regardless of stated or unstated reasons. An organ of the State, however, is

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will have to go easy on criticism of "things held sacred" by the school board. And the ludicrous criteria, cited in note 18 *supra*, if rigidly enforced, might cause schoolbook authors to write in utopian terms. Numerous instances of intellectual restraints imposed on authors, publishers and teachers alike are noted in BEALE, *ARE AMERICAN TEACHERS FREE?* (1936). And California has even codified censorship: "The governing board of any school district may exclude from schools and school libraries all books, publications, or papers of a sectarian, partisan, or denominational character." CALIF. CODE § 19072 (1943). See also CALIF. CODE § 8272 (1943) and § 11719 (1943); N.Y. EDUC. LAW Art. 15, § 704.

See *Associated Press v. United States*, 326 U.S. 1, 20 (1945).

107. This precise situation occurred in Massachusetts shortly after New York City banned *The Nation*, note 26 *supra*.

108. Even to top-flight newspapers, charges of "subversion" always seem more noteworthy than the accused's ultimate vindication. For an application of this principle to "subversive" literature, see N.Y. Herald Tribune, Oct. 8, 1949, *page* 1, col. 2, 3: "Scarsdale Group Asks Schools to Bar Leftist Writers' Books." The article proceeds to recount how a "self-appointed Committee of Ten, whose members feel that the Board of Education has failed in the proper execution" of its schoolbook selection task, "have so far demanded . . . that books by Howard Fast, Anna Louise Strong and other 'Communists or Communist-apologists' be investigated and barred from use." On October 15, the late city edition of the Tribune ran a lengthy article "81 in Scarsdale Oppose Banning Textbooks for Authors' Views" on *page* 12. And when the Board's final judgment came, it was only *page* 22 of the Tribune's late city edition of November 8 that declared "Scarsdale Bars Ideological Ban for Textbooks."

109. Although no statistics are available, it seems reasonable to assume that a publication publicly banned by a fair-sized school system will be less likely to be adopted by other systems, once the "stigma" gets around. And see note 26 *supra*, for a "ban on a ban."

110. The ramifications of this cause of action are contained in a most illuminating opinion by Judge Edgerton, dissenting in *Joint Anti-Fascist Refugee Committee v. Clark*, 177 F.2d 79, 84-91 (D.C. Cir. 1949) (defendant organization placed on Attorney-General's "subversive" list resulted in loss of reputation, members, contributions and civil rights, without due process of law, but *held* not entitled to judicial relief).

111. See Hale, *supra* note 95; note 112 *infra*.



not so at liberty; it must act within the confines of the Fourteenth Amendment.<sup>112</sup> Here, equal protection of the laws guarantees all citizens against discrimination by the State on grounds of belief.<sup>113</sup> The school library which admits journals of public opinion cannot legally condition their entrance on a pledge to refrain from printing certain views.<sup>114</sup> Similarly, then, revocation of the right to enter cannot be predicated on official disinclination toward these views. "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion."<sup>115</sup>

### *The Role of the Court*

Reviewing the merits of a book ban places the court in an apparent dilemma: the sacrosanct province of administrative discretion ought not be circumscribed by the judge *qua* non-expert. School boards, however, are chosen not as educational experts but as lay representatives of their community;<sup>116</sup> and even if they do develop a general educational expertise, the

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112. ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. AMEND. XIV. See *Ex parte Virginia*, 100 U.S. 339, 347 (1880): "The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws."

113. For an excellent analogy, see *Danskin v. San Diego Unified School District*, 28 Cal.2d 536, 171 P.2d 885 (1946). Plaintiffs, officers and members of the San Diego Civil Liberties Committee (ACLU), had filed an application with the school board for permission to hold their public meeting—on the theme of the "Bill of Rights in Postwar America" in a school auditorium. Their request was denied for failure to comply with two district rules: (1) "no public meeting . . . held on the school property will be permitted to reflect in any way upon citizens of the United States because of their race, color, or creed"; (2) "The Governing Board may require that it be furnished reasonably in advance with a complete program, with copies of all speeches. . . ." Plaintiffs had also refused to subscribe to an alternative requirement, namely an oath that they did not advocate nor were "affiliated with any organization which advocates or has as its object . . . the overthrow of the present Government. . . ."

The Court granted plaintiffs' mandamus petition compelling the board to grant them to use the auditorium free of these conditions. "The state is under no duty to make school buildings available for public meetings. . . . If it elects to do so, however, it cannot arbitrarily prevent any members of the public from holding such meetings. . . . Nor can it make the privilege of holding them dependent on conditions what would deprive any members of the public of their constitutional rights. A state is without power to impose an unconstitutional requirement as a condition for granting a privilege even though the privilege is the use of state property." 28 Cal.2d 536, 545, 171 P.2d 885, 891 (1946).

*Accord*, *Hannegan v. Esquire*, 327 U.S. 146 (1946) (second class mailing privileges); *Goodman v. Board of Education*, 48 Cal. App.2d 731, 120 P.2d 665 (1941) (auditorium use).

114. *Ibid.*

115. Justice Jackson in *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

116. See page 930 *supra* and notes cited thereon.

decision to ban books because of a disfavored view has little to do with expert knowledge. Thus, where their actions encroach on educational freedom, the judge-citizen is soundly qualified to take notice.<sup>117</sup> Judicial disavowal of authority to review, on grounds of a supposedly available legislative remedy, or a reluctance to interfere with the school board's administrative discretion, serves to abdicate a grave responsibility.<sup>118</sup>

By ordering rescission of the book ban, the judiciary can vindicate a principle without restraining any of the school board's legitimate activities. *The Nation* restored to the board's approved list compels none of its schools to subscribe.<sup>119</sup> A textbook put back in the classroom may still be removed for good cause: "outdated" or "another book is better" will suffice; "opinion," however, will not.

Because a myriad of subterfuges are available, the efficacy of legal action may seem doubtful. Suppose, for example, that *The Nation* had been quietly dropped from the approved list, and in response to queries the Board declared that "The print was poor and harmful to children's eyes." If the excuse were at all plausible, any attempt to challenge the real motive in court might well end in failure. But the significance of such potential evasions need not be regarded with despair: availability does not imply rampant use. Once a legal precedent condemning book-banning is established, it will serve as a deterrent to future school boards. Citizens who serve for the community's welfare are not inclined to evade the law.

#### CONCLUSION

Suppression of opinion in a public school is the antithesis of education. It finds justification neither in law nor in theory. Administratively, its

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117. In the past, courts have generally been loathe to enforce principles of academic freedom. It is a sad commentary on the legal history of academic freedom in the United States that of its three most famous tests, two resulted in complete denial. See the Bertrand Russell case, *Kay v. Board of Higher Education of the City of New York*, 173 Misc. 943, 18 N.Y.S.2d 821 (Sup. Ct. 1940) (removal of Russell from professorship, without a hearing, because of moral views stated in past writings), discussed incisively by Hamilton, *Trial By Ordeal, New Style*, 50 YALE L.J. 778 (1941); reply *contra* thereto by Kennedy, *Portrait of a Realist, New Style*, 10 FORD. L. REV. 196 (1941); Note, *The Bertrand Russell Litigation*, 8 U. OF CHI. L. REV. 316 (1941). And see *Scopes v. State*, 154 Tenn. 105, 289 S.W. 363 (1927) (teaching of evolution barred as a denial of divine creation), criticized by Keebler, *THE TENNESSEE EVOLUTION CASE* (1925). The flag salute cases, ultimately vindicating an aspect of academic freedom, are discussed in note 118 *infra*.

118. The Supreme Court's about-face on the issue of compulsory flag-saluting illustrates a recognition of this responsibility. In the earlier case, the majority believed that "the courtroom is not the arena for debating issues of educational policy. . . . Where all effective means of inducing political changes are left free from interference, education in the abandonment of foolish legislation is itself a training in liberty." Justice Frankfurter in *Minersville School District v. Gobitis*, 310 U.S. 586, 598-600 (1940), overruled by *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943). Evidently some "foolish legislation" infringes on rights too sacred to be left to the processes of political change.

119. See note 25 *supra*.

inherent evil is an incapacity to draw the line.<sup>120</sup> Once a book-banning precedent is established, future exclusions are made simpler. A board which removes books critical of Catholics today must reasonably respond to the injured cries of Jews and Negroes, perhaps even Democrats and Republicans tomorrow.

Alternatively, a positive approach to the challenges of intolerance and hostile ideology appears necessary. A recent study conducted by the American Council on Education indicates that current teaching materials are "guilty of failing to come to grips with basic issues in the complex problems of human relations."<sup>121</sup> Perhaps school boards might better devote their energies towards establishment of school programs wherein basic controversial issues would be openly studied and discussed.<sup>122</sup> Such programs would afford the greatest opportunity for the cultivation of critical judgment and resistance to "subversion."

But for those who have less faith in the Freedom to Learn, an exemplary legal sanction is urgent. Its compelling moral will sound loud and clear: The school board may burn its fingers with the matches reserved for books.

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120. One court has attempted to draw such a line. See the decision in the *Oliver Twist* case, *supra* note 46, in which the *author's motive* was held to be controlling. But the wisdom of such a subjective criterion is doubtful. For a finding that Dickens or Shakespeare was actuated by a malicious intent would make their books, objectively viewed, not the slightest bit better or worse. The words on the page, not the author's unexpressed design, provide the index for impressing the reader.

121. INTERGROUP RELATIONS IN TEACHING MATERIALS 34 (American Council on Education, 1949).

122. New Jersey has recently sanctioned such a program. N.Y. Herald Tribune, Dec. 4, 1949, §1, p. 66, col. 1: "The New Jersey State Board of Education yesterday urged public school teachers to discuss 'controversial questions' in their classrooms. The board, however, warned teachers to present both sides of all controversial issues and to avoid going into such subjects 'beyond their own depth.'"