Moral Autonomy, Censorship, and the Enlightened Community

DAVID WEISSBORD AND PAUL MCGREAL

ABSTRACT

IN LIGHT OF THE WAVE of attacks on constitutional freedoms and rights in the 1980s, it is perhaps an opportune moment to reflect on the arguments offered in support of broad discretion granted to local school boards in determining the contents of school library shelves. Students, especially those in secondary school, are guaranteed constitutional rights; those rights, however, are balanced against the competing interests of a community in general or a school board in particular. In this article we will examine this balance as it has been struck in the courts and we will argue that a more enlightened conception of community interest would involve narrower discretion in school board and community actions.

INTRODUCTION

There are three ways in which the government may manipulate a library's holdings. First, a librarian, school board, or local government can create a biased literary selection in its libraries through the systematic addition of books catering to a particular ideological perspective (hereinafter referred to as the "addition problem"). Through careful forethought, government can prevent politically and socially "incorrect" ideas from entering libraries in the first place, hence avoiding the need to engage in noticeable and controversial removal of those books at a later date. The industrious government censor can avoid public clamor against the librarian's actions if he/she can plan ahead and carefully screen books he/she

David Weissbord, Department of Philosophy, Stetson Hall, Williams College, Williamstown, MA 01267
Paul McGreal, Southern Methodist University, Dallas, TX 75222
LIBRARY TRENDS, Vol. 39, Nos. 1 & 2, Summer/Fall 1990, pp. 51-68

finds objectionable. The efficient censors are thus rewarded for their efforts with little or no public opposition. (The conscientious censor has also been rewarded by the United States Supreme Court. In *Board of Education v. Pico,* Associate Justice Brennan stated that the addition of books to libraries did not present constitutional problems as did the removal of books from libraries. For an article that shows the logical inconsistency of Brennan's position see Van Geel [1983]. "The Search for Constitutional Limits On Governmental Authority to Inculcate Youth.") The addition problem—because it occurs continuously, gradually, and covertly—poses an insidious threat to our libraries and liberties.

A second type of manipulation is the labeling of books and other library material by the government (hereafter referred to as the "labeling problem"). The labeling problem occurs when the government attempts to characterize the content of a book or issues a warning with regard to its subject matter. By labeling such material, the government maintains the appearance of noncensorship since the material remains available to the public, while sending a message that the public interprets as official disapproval. (An example of such government action is the Foreign Agents Registration Act [FARA] which allows the Department of Justice to label some foreign material entering the United States as "political propaganda." What FARA in fact does is to allow the government to place a non-neutral label on foreign films entering the United States. The label of political propaganda is to be given to all foreign films "reasonably adapted to...prevail upon, indoctrinate, convert, induce, or in any way influence a recipient or any section of the public...with reference to the political or public interests, policies, or relations of a foreign government or political party or foreign policy of the United States" [Tribe, 1988]. In popular usage, "propaganda" has a much more negative connotation than the standard in FARA. Lawrence Tribe of Harvard Law School finds FARA's labeling provision troublesome because "the word 'propaganda' has long been an explosive, value-laden term with such pejorative connotations that the registration process necessarily does more than simply label the source of a film of foreign origin; rather, it almost certainly discourages audiences from viewing the film by branding tit as a product of half-truths and distortions" [p. 810]. The FARA label stigmatizes a work with an apparent mark of official government disapproval.)

A third type of manipulation is the removal of books from library shelves (hereafter referred to as the "removal problem"). Selective addition and removal can be differentiated on the basis of the effect they have on public attitudes. With removal, the public knows what material has been removed because the government's actions are

affirmative and overt. The result is that specific material (the removed material) is branded with the official stamp of government disapproval. Thus the full effect of removal may be to close off a large segment of the population from the removed material. The perceived evils of the material may generate the attitude either: (1) that the government would not have removed the material if it was worth reading, or (2) that since the government does not approve of the book, I should not read it, even if I want to: if I do read it I might be labeled subversive or anti-American. While some educated adults may be able to assess critically and reject the government's actions, impressionable children and less informed/concerned individuals may uncritically accept the government's assessment of the removed material.

Selective addition, on the other hand, works no such broad slanting of public perception. The public still has access to the material not selectively added; however, there is no longer the stigma of seeking material banned by the government as there is with the removal problem. We believe that removal poses a greater magnitude of harm because it carries the added threat of a *de facto* complete removal of the material that is not a danger with selective addition.

Some instances of removal, or what is in many cases outright banning, of books have culminated in landmark legal cases. Some of these cases provide an excellent starting point and context for an extended analysis of the rather uneasy balance struck between community interest and individual liberty. These cases raise fundamental questions concerning the very nature and function of school libraries in our society and they help to more clearly define the role of school libraries in maintaining a fully functioning representative democracy with an electorate capable of full and meaningful political participation.

The Cases

In *Evans v. Selma Union High School* (Bosmajian, 1983, pp. 3-5), the California State Supreme Court decided that a high school district was permitted to purchase twelve copies of the Bible in the King James version for the Selma Union High School Library. The plaintiff claimed that the King James version of the Bible is a book of sectarian character and, as such, should not be purchased for the library of a public school. It was argued that purchase of it would be contrary to constitutional provisions against discrimination or preference and against public aid of any religious sect, church, or creed. And it was argued that such purchase would be contrary to statutory provisions in the state prohibiting use, or distribution, of any publication of a sectarian, partisan, or denominational character.

The court argued, however, that the King James version of the Bible was not sectarian but was, instead, a "widely accepted translation of the Bible," a "recognized classic" of literature (p. 4). More important, the court noted the following: "The mere act of purchasing a book to be added to the school library does not carry with it any implication of the adoption of the theory or dogma contained therein, or any approval of the book itself, except as a work of literature fit to be included in a reference library" (p. 5). This work's classic stature and widespread approval and readership were taken as sufficient evidence of what constitutes "fitness" or "appropriateness." In subsequent cases, we see less consensus on the question of a book's status and a corresponding argument to prevent a book's appearance on library shelves.

In *Rosenberg v. Board of Education of City of New York* (Bosmajian, 1983, p. 5), the New York Supreme Court decided that *Oliver Twist* and *The Merchant of Venice* cannot be banned from New York City schools, libraries, or classrooms. There were three main grounds adduced for the ruling: (1) there is a "public interest in a free and democratic society [based upon free inquiry and learning that] does not warrant or encourage the suppression of any book at the whim of any 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" (p. 5). The exception noted is when a book is written maliciously with the purpose of promoting "bigoted hatred" against a particular racial or religious group. (2) If evaluation of any literary work were based on a requirement that it be free from derogatory reference to any religion, race, and so on, endless litigation would probably ensue. (3) Censorship and suppression are not particularly effective at removing religious and racial intolerance; in fact, they may lead instead to "misguided readings and unwarranted inferences" (p. 5). Arguing that there was no "substantial reason" which would compel the suppression of the two books, the court found that the Board of Education acted in the best interests of the school system.

What constitutes an "unduly sensitive person" is left unclear, as is what would constitute a "whim" of such a person. When does a whim become a good argument? When does an unduly sensitive person become a reasonably tolerant but reasonably offended one? How does one determine authorial intent to malign? Should intent be necessary, or could we reasonably point to consequences (i.e., to the fact that persons are maligned)? These are questions that become central in subsequent cases.

In *President's Council v. Community School Board* (1972), we see the convening of the first federal court ever to adjudicate the

conflicting claims of high school students and a local school board. The case concerns the removal by a school board of *Down These Mean Streets,* a novel by Piri Thomas in which there is a violent and ugly depiction of a Puerto Rican youth growing up in the East Side barrio of New York City. There are descriptions of criminal violence, sex, and drug shooting; the presumed educational value of the work (in this educational setting) is to acquaint the predominantly white, middle-class junior high school students of Queens with the harsh life in Spanish Harlem (Bosmajian, 1983, p. 18). The school board removed the book in light of complaints from parents that the vulgar language and explicit sexual descriptions in the book would have an adverse moral and psychological effect on eleven- to fifteen-year-old children. The plaintiffs (parents, teachers, and children) challenged this action in federal district court claiming that there was a violation of their First Amendment rights and arguing that the book was valuable educationally and had no adverse effect on the development of the children. The court rejected the plaintiffs' claims and asserted that the school board had acted permissibly. The court reasoned that the board had not prohibited the book's discussion in class, parents could borrow the book for their children, and there was only a "miniscule" intrusion of the board on any First Amendment constitutional right (Bosmajian, 1983, p. 19). The issues in this case are complex and space does not allow a detailed comment. Some of the claims made in various petitions for a writ of certiorari are noteworthy—although the writ was denied. It is to those claims we now turn.

Some Salient Reasons Offered for and Against Granting the Writ

1. The U.S. Supreme Court ought to decide to what extent school professionals should be at the mercy of politically responsible lay boards of education in determining what their students may read, learn, and have access to in the schools.
2. Parents, students, and professionals ought to be able to rely on the judiciary when school libraries are stripped of politically disfavored books by a shifting majority of the school board.
3. The federal courts ought to prevent our nation's schools from becoming instruments of majoritarian propaganda.
4. Constitutional principles of academic freedom limit the power of school boards even over allegedly educational matters.
5. The removal of the book deprived students of their First Amendment right to know.
6. The students claim no unqualified First Amendment right of access to books but make, instead, three claims: (a) they no longer have

access to a book previously available to them; (b) their right to know has been impaired; and (c) there is no compelling state interest justifying that impairment (pp. 21-24). The unlimited power of selection or banning gives the transitory majority of a board great opportunities to impose their personal, social, and political views on the teachers and public of the school district.

Dissenting from the U.S. Supreme Court's decision to deny certiorari, Justice Douglas wrote:

> What else can the School Board now decide it does not like? How else will its sensibilities be offended? Are we sending children to school to be educated by the norms of the School Board or are we educating our youth to shed the prejudices of the past, to explore all forms of thought, and to find solutions to our world's problems? (Bosmajian, 1983, p. 35)

There were fascinating arguments presented in a brief in opposition to the petition for certiorari. Some main points included the following:

1. The power of selection of books for educational purposes must include the "power to choose between books and to exclude those which are found inadequate, irrelevant, or otherwise inappropriate for the particular children to be served, and not merely the power to exclude those books which have been held to be illegal for sale to minors" (Bosmajian, 1983, p. 26).
2. The limitation to the librarian's right to choose the selection of books does not violate the librarian's professional freedom, as the library remained in possession of the book and she may lend it to parents who request it.
3. "That a parent may disagree with that [librarian's right to choose] does not give him a constitutional right to compel the purchase or retention of any particular book, or to compel that it be available directly to students rather than to their parents" (Bosmajian, 1983, p. 27).
4. The students have not been deprived of any "right to know." There has been no ban on the discussion of any field of study.
5. The age of the children (eleven to fifteen) is sufficiently immature to warrant some limitation on the kind of books made freely available to them (p. 27).

Minarcini v. Strongsville City School Dist. (Bosmajian, 1983, pp. 43-47) presents the case of a school board removing Kurt Vonnegut's *Cat's Cradle* and Joseph Heller's *Catch-22* from the school library against the faculty recommendation that authorized them as library books or textbooks. Further, the board passed resolutions limiting discussions of the books in class and their use as supplementary reading.

After a trial in district court, the judge dismissed Minarcini's original complaint finding that the school board's actions had not violated rights protected by the First and Fourteenth Amendments. The case was then appealed to the U.S. Court of Appeals, Sixth Circuit.

The court of appeals sided with the high school students, invoking concepts of academic freedom and a First Amendment right to know and, correspondingly, to have access to information. The students, then, could establish a prima facie constitutional violation upon the removal of a book from the school library.

The court's discussion of the book banning issue contained critical factual information. First, both Minarcini and the school district agreed that the banned books were of some "literary value" and that none of those books contained "obscenity as defined in the Supreme Court's cases (*Miller v. California,* 1973). (The Supreme Court announced its obscenity standard in the 1973 case *Miller v. California,* 413 U.S. 15: "The basic guidelines for the trier of fact must be: (a) whether the 'average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest, . . ; (b) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (c) whether the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." Thus, by conceding that the banned books were of literary value, the school district also admitted that the material was *not* obscene under (c) of the Miller standard.) With these admissions, the court had to look in the minutes of the school board's meeting concerning the offending books to find the motivation behind the district's actions. The minutes reflected the school board's judgment that Vonnegut's writing was "completely sick," and that the book was "written by the same character (Vennegutter) who wrote, *using the term loosely, God Bless You Mr. Rosewater.*" The court concluded from these statements that "the School Board removed the books because it found them *objectionable* in content" (Bosmajian, 1983, p. 45).

Minarcini highlights the conflict that arises in any instance of the removal problem: the student's interest in receiving continued exposure to a variety of literary materials is pitted against the government's interest in providing a "proper" education. Each side deserves some weight. The pivotal task in evaluating the removal problem is to strike the correct balance between student and government interests. In the *Minarcini* case, the school board found the banned material to be "objectionable." In striking a balance, we need to examine the substantive content of this "objectionable"

standard (e.g., social mores, community values, national standards, individual preferences) as well as what variety is sufficient to protect students from a "pall of orthodoxy" in school curricula. (Associate Justice William Rehnquist of the United States Supreme Court, in his dissent in *Board of Education v. Pico, infra.* [the next removal problem case we will look at], used the phrase "pall of orthodoxy" to describe the educational atmosphere the government would have to create in order for him to feel that students' interests were being harmed.) Further analysis of the student government conflict will be delayed until after we review the issues in the first removal problem case to come before the U.S. Supreme Court.

Board of Education, Island Trees Union Free School Dist. v. Pico (Bosmajian, 1983, pp. 93-118), arose from the attempt by a local New York school board to remove books from the shelves of high school and junior high school libraries. Several members of the school board had attended a conference sponsored by Parents of New York United (PONY-U) where they received a list of books that school board members described as "objectionable" and "*improper* fare for school students" [emphasis added]. (Associate Justice Brennan's majority opinion in *Pico* described PONY-U as "a politically conservative organization of parents concerned about education legislation in the State of New York" [Bosmajian, 1983, p. 94]). However, the school board did "concede that the books [on the PONY-U list] are not obscene" (*Pico v. Board of Education,* 479 F. Supp. 387, 392 [EDNY 1979]). Nine of the books on the PONY-U list were found in the Island Trees High School. (The nine books in the high school library were: *Slaughterhouse-Five* by Kurt Vonnegut, Jr.; *The Naked Ape* by Desmond Morris; *Down These Mean Streets* by Piri Thomas; *Best Short Stories of Negro Writers* edited by Langston Hughes; *Go Ask Alice* of anonymous authorship; *Laughing Boy* by Oliver LaFarge; *Black Boy* by Richard Wright; *A Hero Ain't Nothin' But a Sandwich* by Alice Childress; and *Soul on Ice* by Eldridge Cleaver.) After appointing a committee to recommend to the board whether the books on the PONY-U list should be retained, taking into account the books' "'educational suitability,' 'good taste,' 'relevance,' and appropriateness to age and grade level" (*Pico v. Board of Education,* 1979, at 857), the school board ignored the committee's recommendation to keep five of the books and ordered all nine books removed from school shelves. (Of the other four books, the committee recommended that one "be made available to students only with parental approval" [*Pico v. Board of Education,* 1979, at 858]. The recommendation of a parental approval condition on book circulation can be considered a form of governmental labeling of books.) In removing the books, the school board described them as "anti-American,

anti-Christian, anti-Semetic [sic], and just plain filthy," and justified their actions by claiming that "it is our [the school board's] duty, our moral obligation, to *protect* the children in our schools from this moral danger as surely as from physical and medical dangers" (*Pico v. Board of Education,* 1979, Supp. 387, 390 [emphasis added]).

The U.S. Supreme Court ruled, in a confusing plurality opinion, that school boards could not remove disfavored books from school libraries with "absolute discretion." The Court, while embracing the notion that school boards have a substantial legitimate role to play in the determination of school library content, argued that boards could not play that role if they did so in a "narrowly partisan or political manner" (Bosmajian, 1983, p. 98). The key for the Court was in determining the motivation behind the school board's actions. If the board's *intent* is to deny students access to ideas with which the members of the board disagreed, and if the *intent* is the decisive factor in the board's decision, then and only then does the board violate First Amendment rights of the students. The rationale seems to be based on an aversion to "prescribed orthodoxy." Permitted censorship would involve books "pervasively vulgar" or educationally unsuitable, not books thought inimical to the board's moral, political, religious, or social taste. (This case did not affect the addition or labeling of books but rather concerned solely their removal.)

The tension between student and governmental interests in *Minarcini* are equally present in *Pico.* The books in both cases were *not* claimed to be obscene (and thus not automatically denied the protections of free speech) but only found "objectionable" by the members of the school board. The delicate balance implicated in *Pico* concerns the extent to which the school board may follow its desire to "protect the children in our schools" from "objectionable" material before such efforts begin to suppress access to ideas to which students have a right. In striking this balance it will again be necessary to discuss various interpretations of "objectionable" material, an understanding of which will help to delimit the proper boundaries of the government's discretion in cases of the removal problem. (Of course this definition will also carry implications for the addition problem and the labeling problem, as will be seen later.)

Implications of School Book Bannings

We can learn a lot from the way in which the *Pico* and *Minarcini* courts handled their respective cases. These two cases placed much emphasis on the fact that book bannings in *school* libraries implicate questions of education. The courts that have grappled with the removal problem have recognized the importance of such libraries

to education when they described a school library as a "storehouse of knowledge," "a mighty resource in the free marketplace of ideas," and a place where "a student can literally explore the unknown, and discover areas of interest and thought not covered by the prescribed curriculum....Th[e] student learns that a library is a place to test or expand upon ideas presented to him, in or out of the classroom" (as cited in *Minarcini v. Strongsville School District* [Bosmajian, 1983, pp. 43-47]).

School libraries represent a relatively voluntary, informal forum (as opposed to the compulsion involved in normal class work) in which students may continue their education by seeking out material suggested implicitly or explicitly by their formal education. (The *Minarcini* court recognized a function similar to this for libraries when it stated that a teacher has a right to express an opinion about a book in class and that there exists a corresponding right on the part of the student "to hear [the teacher] and to find and read the book" [*Minarcini, supra* at 582].) Schools should teach their students how to use those "storehouses of knowledge" so that they can expand their horizons through independent exploration of library material long after the structure of the classroom is gone. If government and schools are allowed to manipulate the contents of school libraries at will, then students are sent a message that libraries exist solely to provide books essential to the immediate educational function of their school libraries, and that libraries are *not* for after school exploration and experimentation. Thus school libraries appear to serve a dual function: (1) to provide easy access to materials that will supplement students' immediate education, and (2) to teach students how to pursue reading material on their own so that they do not feel that a library's usefulness ends with their formal education but, rather, that libraries should serve as one of the foci of their ongoing informal education.

But what should the contents of these libraries be? The foregoing suggests that the contents should bear some relationship to the mission of education. We shall limit our consideration to a brief discussion of the function of education, and thus libraries, as it relates to our nation's commitment to a democratic form of government.

Education plays a large role in shaping informed citizens. The U.S. Supreme Court has long recognized the importance of education to the proper functioning of our government. (See e.g., *Meyer v. Nebraska,* 282 U.S. 390, 1923. ["education and the acquisition of knowledge as matters of supreme importance"]; *Abington School District v. Schempp,* 374 U.S. 203, 1963 ["the public schools as a most vital civic institution for the preservation of a democratic system of government"]; *Ambach v. Norwick,* 441 U.S. 68, 1789 [as a way

of communicating "the values on which our society rests"]; and *Wisconsin v. Yoder,* 406 U.S. 205, 1972 ["necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence"].) Without education we lack the tools to make use of the choices a representative government presents.

A humanistic education provides an understanding of the traditions and cultures that make up our society, an understanding that is crucial to making informed choices in the political arena. Essential to a humanistic education are many materials widely available to the public only through the country's libraries. By allowing the unfettered removal of such material from our libraries we risk an overwinnowing of our libraries and the creation of an uneducated, uninformed electorate. If such an electorate were to emerge, we would need to fear the decisions of the majority more than before, because such decisions would be uninformed and uneducated. If such majority decisions became the rule, we would have to fear the very majority rule that forms the basis of our democratic governmental system. Thus libraries and their role in education are critical to the functioning of our government and society (McGreal, 1989). (Some of this analysis draws directly from McGreal, P. [1989], "'I Don't Recall Senator,' A Critical Analysis of Robert Bork's Neutral Principles Theory" [unpublished manuscript].)

Our emphasis on providing a broad humanistic education for American citizens leads us to object strongly to any removal that does not arise from a desire to keep obscene material from younger children. The school boards in the *Minarcini* and *Pico* cases obviously felt differently. Both school boards cited a number of different criteria for what they felt were "objectionable" books, while agreeing that the books in question were not obscene. An analysis of these boards' motivations and goals, as well as the implications of their actions, is necessary to understand the harm their actions can inflict on youth.

We agree with Justice Brennan's statement in *Pico* that education in all its forms is "vitally important 'in the preparation of individuals for participation as citizens'" (*Pico v. Board of Education,* 1979, at 864). However, agreement ends with Brennan's next statement that such "preparation" includes '"inculcating fundamental values necessary to the maintenance of a democratic political system'" (*Pico v. Board of Education,* 1979, quoting *Ambach v. Norwick*), and that such values include "community values" as well as "respect for authority and traditional values be they social, moral, or political" (*Pico v. Board of Education,* 1979, quoting Brief for Petitioners). Where we advocate a broad, humanistic education for the proper preparation of informed citizens, Brennan argues that each

community must be allowed to inculcate students with its own values in order to promote democracy. And, of course, Brennan's narrower view of education implies a narrower selection of material to supplement that education in our libraries.

Other than citing Supreme Court precedent, Brennan offers little or no argument in support of his finding that community values are the proper subject of primary and secondary education. But we need not end the discussion with Brennan's silence. Patrick Devlin (1959) takes up the subject in his article "Morals and the Criminal Law."

Devlin's "Morals and the Criminal Law" was written mainly as a reply to the Wolfenden Report, also known as the Report of the Committee on Homosexual Offenses and Prostitution. Devlin asks "what part of the moral law should be embodied in the criminal" (p. 1)? Devlin's project becomes relevant to our immediate task when we rephrase the question as "what part of a community's morals should be embodied in our children's education?" Keeping the rephrased question in mind, we will explore Devlin's article, searching for arguments that support inculcation of community values.

Devlin's theory of community is stated very concisely in one paragraph.

> society means a community of ideas; without shared ideas on politics, morals, and ethics no society can exist. Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought. If the bonds were too far released the members would drift apart. A common morality is part of the bondage. The bondage is part of the price of society; and mankind, which needs society, must pay its price. (p. 10)

Devlin concludes from the above that "societies disintegrate from within more frequently than they are broken up by external pressures. There is disintegration when no common morality is observed and history shows that the loosening of moral bonds is often the first stage of disintegration, so that society is justified in taking the same steps to preserve its moral code as it does to preserve its government and other essential institutions" (Devlin, 1959, p. 13). Devlin's theory of community reduces to the view that "deviation from a society's shared morality...[is] capable in [its] nature of threatening the existence of society..." (p. 13n).

The analogy from Devlin to education becomes apparent when we recall the motivation of the school boards in removing books. Devlin would probably argue that education, and libraries that serve that purpose (and we cannot forget that nonschool libraries serve

the important function of informal, continuing self-education), should be used to inculcate the community's shared values lest that community loosen its moral bonds and disintegrate from within. Under Devlin's argument, banning books that are "objectionable," or against the community's shared values, is necessary to the survival of the community itself. The marketplace of ideas represented by libraries becomes the marketplace of "shared ideas" necessary to strengthen the bonds of society.

One reason we find Devlin's argument problematic is because of an unexplained assumption: that there exist shared ideas of a community. Devlin's assumption is difficult to maintain in a society that is irreducibly diverse such as the United States. Perhaps a majority's views ought to be considered the consensus. But such a reply assumes the legitimacy of the majority's authority to make such a decision, which is one of the initial questions posed by the removal problem. The reply also brings us to Devlin's contention that enforcement of community values is necessary for the continued existence of society.

Also implicated in this critique is Justice Brennan's assertion that "respect for authority and traditional values, be they social, moral, or political," are "fundamental values necessary to the maintenance of a democratic political system" (*Pico v. Board of Education*, 1979, quoting *Ambach v. Norwick* and Brief for Petitioners). However, Brennan recently upheld the right of individuals to burn the flag, an act that would seem to run contrary to respect for authority and traditional values. If education has as its purpose to foster that respect, then those who burn flags appear to have been failed by American education as Brennan conceives it. Wouldn't prohibiting flag burning then also promote the respect for authority Brennan sees as so necessary to democracy? Are Brennan's positions in *Pico* and the flag burning case reconcilable on this point? It is rather odd that the Constitution would protect conduct (flag burning) that works against the values necessary to the maintenance of a democratic political system. The above indicates either that flag burning should thus be considered an insidious threat to the maintenance of democracy in America, or that an education that fosters Brennan's values is not necessary in maintaining our government.

In his article "The Search for Constitutional Limits on Governmental Authority to Inculcate Youth," Tyll van Geel (1983) presents convincing empirical and theoretical arguments that refute Brennan and Devlin (pp. 262-88). In *Ambach v. Norwick*, the Supreme Court cited several studies in support of its assertion that schools

properly inculcate students. Interestingly, the relevant portions of this work contradict the Court's finding. For example, Dawson and Prewitt (*Pico v. Board of Education,* 1979) argue at one point that:

> It is doubtful...that basic political loyalties and attachments are substantially developed or altered through such formal civic education. If the civic training in the curriculum is inconsistent with what is learned about the political world from adults, peer groups, and other agents of political socialization, it may not be very effective. (p. 152)

One of the Court's authorities suggests that we should be more concerned with setting good examples for our children in the political realm than with teaching them what they should do.

Patrick Devlin's argument that society is held together by shared values is met and turned back by several studies discussed by Van Geel. The first study, by Ronald Rogowski, draws from economic utility theory. Rogowski argues that a person will choose to support the present form of government over alternative forms of government only if the present form of government maximizes her expected utility. (This notion is consistent with John Rawls's difference principle, according to which social and economic inequalities are just if and only if such inequalities give rise to advantages [expected and real] of the representative person in the least well-off group in society [see Rawls, 1971].) Individuals derive a measure of utility from outcomes that they desire. Many favorable outcomes will all have positive utility values.

Under Rogowski's theory, the cement that holds the bonds of society together is expected utility and not shared ideas. The utility maximization theory depends on individuals being self-interested actors. For such individuals to maximize their expected utility, they would have to be within a government that allows the greatest probability of (freedom to pursue) their preferred outcomes. Rogowski's theory implies that a community is held together by assuring freedom to pursue personal preferred outcomes rather than Devlin's idea of emphasis on shared ideas.

If freedom is one of the elements that holds society together, then we should be concerned about preparing our young to use that freedom wisely. For this task, access to varied forms of human discourse and ideas is necessary. And this education should begin as early as possible.

Some Tentative Conclusions

Students are recognized to have a legitimate claim to First Amendment rights. The nation, individual states, local communities, and individual school boards are thought to have a legitimate indoctrinative interest in permitting, and in some cases encouraging, public schools to transmit particular values to its students. Judicially,

the problem has been one of developing a coherent doctrine under which the various fact patterns could be subsumed. There have been commentators who have suggested that this lack of coherence reflected a fundamental incompatibility of First Amendment values and the values basic to public education; that what was most basic was the indoctrinative character of education; and that the U.S. Supreme Court ought to recognize the priority of education's mission whenever that mission is to be weighed against First Amendment rights. (Tussman [1977] argues that the state has an important "teaching power" which involves inducting children into the community, and thereby makes notions such as children's free speech or state ideological neutrality irrelevant and condemns the Supreme Court's *Tinker and Barnette* opinions as "weaken[ing] the tutelary power of public authority" [pp. 51-85, 167]. Diamond [1981] argues that the Court is wrong in trying to reconcile public education with First Amendment values because the school's indoctrinative functions should preclude recognition of children's first amendment rights. Goldstein [1976] argues that the scope of permissible state indoctrinative interests in public education should preclude any in-class expressive activity by teachers that is contrary to the wishes of the school authorities [taken from Kamiat, 1982/83, p. 499].) Other commentators, supported in part by the *Minarcini* and *Pico* lower court decisions, have argued that, in such a conflict, library censorship violates a student's individual right to have access to information or that censorship is unjustified given its "chilling effect" on the overall in-school expression of students and teachers.

Proponents on each side of this debate, however, attempt to validate their position on the strength of an appeal to an ideal of communal self-government. If indeed there is such an (often tacit) appeal, the question becomes more readily defined: namely, is emphasis on individual rights or community indoctrinative interest the best means of attaining the end of communal self government? If indeed communal self government is and ought to be the end toward which both a healthy respect for fundamental liberties and justificatory indoctrinative interest can be invoked, then part of our problem is solved.

This claim, of course, is rather controversial. Many proponents of the Bill of Rights adopt a much more individualistic and atomistic perspective, arguing that liberties are basic given the nature of the individual and her capacities (e.g., a Kantian approach), or that fundamental rights ought to be respected given the beneficial consequences to the greatest number of individuals over time (a variant of rule utilitarianism). Interestingly, though, each approach can be employed by those who argue for an ideal form of communal

self-government. However, one might remain agnostic on the question as to whether Kantian or utilitarian grounds are more justifiably invoked to support basic rights so long as the ultimate foundation for such rights rests on a vision of communal self-government, moral education, and the value of self-direction and respect for various conceptions of the good.

Justice Brennan, in his plurality opinion in *Pico,* claimed that the "public schools are vitally important in the preparation of individuals for participation as citizens" and, in that very sentence, continues by noting that the schools are also important "as vehicles for inculcating fundamental values necessary to the maintenance of a democratic system" (Bosmajian, 1983, p. 95). Here, for the first time in these cases, we see judicial recognition of the view that participation as citizens and maintenance of a democratic system are the basis for evaluating conflicting claims. But, of course, how much weight one gives to participation or system can shift the balance in these censorship cases. We have seen some ways in which one may emphasize one value or the other. The central question to ask about this conflict in values is: "to what end participation or system?" or "according to what criteria may we resolve this set of conflicting values?"

We would argue that this entire debate ought to be seen in light of one fundamental value: moral self-direction and self-expression. Rather than thinking of all values as subordinate to communal self-government (Kamiat, 1983), we would suggest all values, including communal self-government, should be seen as often a necessary means to moral autonomy, responsibility, and expression. (This claim is somewhat stronger than that of Rosemarie Tong's: "To the degree that we are able, we are required to take part in governing ourselves. We must do so not only because values such as justice, freedom, minority rights, and even life itself will be protected only if people are vigilant and active, but also because such participation is a form of moral self-expression. By thinking and speaking, by deciding and acting, we reaffirm that we are morally responsible persons" [Tong, 1986, p. 135].) In this way there is a self-sustaining dialectic of civic action and participatory community building that would nourish freedom and moral equality and create the context within which moral self-expression can take place. (The goal, then, would be to create a form of political community similar to that sketched by Benjamin Barber [1984, chs. 8 & 9].)

The main problem, then, rests in deciding how one ought to adjudicate the type of conflict evident in the kinds of cases discussed earlier. Let's focus on the *Pico* decision to see how the aforementioned considerations could be used in arguing the case for the students.

The U.S. Supreme Court's plurality opinion in *Pico* maintained that there are "special characteristics of the school library" that limit the state's pursuit of indoctrinative interests. Such limitations may not be evident in curriculum decisions; but the library has a unique role to play in providing a context for student freedom "to test or expand upon ideas," for the "fostering [of] individual self-expression," and for "affording public access to discussion, debate, and the dissemination of information and ideas" (Bosmajian, 1983, pp. 96-99). Now one might argue (as the Court in part does) that the above benefits of an unfettered library collection and the general access to ideas make "it possible for citizens generally to exercise their rights of free speech and press in a meaningful manner" (Bosmajian, 1983, p. 97). Or one might argue (as the Court in part does) that "such access prepares students for active and effective participation in the pluralistic, often contentious society in which they will soon be adult members" (Bosmajian, 1983, p. 97). The first appeal (to the freedom to exercise rights of free speech) is just to assume that such rights, if not absolute, should always trump state interests. That, however, is to beg the fundamental question at stake in these cases and, as such, is an unsatisfactory way to proceed. The second appeal (to preparation for active and effective participation in a pluralistic and contentious society) is not question begging but is, nonetheless, inadequate. For it remains to be shown whether in fact an unfettered library collection would best accomplish that goal. It would seem equally plausible to assume that the transmission of societal values through a careful censorship policy in the schools would equally serve the end of "active and effective participation."

If, however, we shift the focus away from those two concerns to a conception of moral flourishing for which a societal context is created, it becomes, or so we would argue, harder to maintain that censorship is justified. There is both individual and community benefit in respecting each person's attempt at (moral) self-realization and conception of good: individual benefit insofar as individuals are given a context in which autonomous moral agency and self-direction are viewed as central to moral growth; collective benefit insofar as the community is more likely to progress and flourish with morally self-realized individuals. Individuals and communities are more likely to realize these ends by affording students: (1) exposure to a vast range of (often competing and potentially subversive) ideas, and (2) experience with autonomous choice. Such access to ideas and experience with choice are important means to the limited goal of communal self-government and are a vital means to the more expansive goal of moral self-realization. If the preceding considerations are compelling, it would follow that future court adjudication

in school library censorship cases ought to focus more on the value of moral development and less on the virtue of participatory government.

ACKNOWLEDGMENTS

Special thanks to Bruce Bassara for many helpful suggestions on an earlier draft of this essay, to Louise Gluck and Holly Baumgardner for editing, and to Shirley Bushika for typing.

REFERENCES

Ambach, Commissioner of Education of the State of New York v. Norwick, 441 U.S. 68 (1979).

Barber, B. (1984). *Strong democracy: Participatory politics for a new age.* Berkeley, CA: University of California Press.

Bosmajian, H. A. (Ed.). (1983). *Censorship, libraries, and the law.* New York: Neal-Schuman Publishers, Inc.

Devlin, P. (1959). The enforcement of morals (Maccabaean lecture in jurisprudence). *Proceedings of the British Academy, XLV,* 129-151.

Diamond, D. (1981). The first amendment and public schools: The case against judicial intervention. *Texas Law Review, 59*(3), 477-528.

Foreign Agents Registration Act of 1938, as amended, 20 U.S.C. § 611 (1982).

Goldstein, S. R. (1976). The asserted constitutional right of public school teachers to determine what they teach. *University of Pennsylvania Law Review, 124*(6), 1293-1357.

Kamiat, W. (1983). Notes: State indoctrination and the protection of non-state voices in the schools: Justifying a prohibition of school library censorship. *Stanford Law Review, 35*(3), 497-535.

McGreal, P. (1989). *'I don't recall senator,' a critical analysis of Robert Bork's neutral principles theory.* Unpublished manuscript.

Meyer v. Nebraska, 262 U.S. 390 (1923).

Miller v. California, 413 U.S. 15 (1973).

Pico v. Board of Education, Island Trees Union Free School District, 474 F. Supp. 387 (E.D. N.Y. 1979).

President's Council, District 25 v. Community School Board, No. 25, 409 U.S. 998 (1972).

Rawls, J. (1971). *A theory of justice.* Cambridge, MA: Harvard University Press.

School District of Abington Township, Pennsylvania v. Schempp, 374 U.S. 203 (1963).

Tong, R. (1986). *Ethics in policy analysis.* Englewood Cliffs, NJ: Prentice-Hall Press, Inc.

Tribe, L. (1988). *American constitutional law.* Mineola, NY: Foundation Press.

Tussman, J. (1977). *Government and the mind.* New York: Oxford University Press.

van Geel, T. (1983). The search for constitutional limits on governmental authority to inculcate youth. *Texas Law Review, 62*(2), 197-297.

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