



1-1-1968

Book Reviews

Birch Bayh

Edward J. Murphy

Follow this and additional works at: <http://scholarship.law.nd.edu/ndlr>



Part of the [Law Commons](#)

Recommended Citation

Birch Bayh & Edward J. Murphy, *Book Reviews*, 43 Notre Dame L. Rev. 796 (1968).

Available at: <http://scholarship.law.nd.edu/ndlr/vol43/iss5/5>

This Book Review is brought to you for free and open access by NDLScholarship. It has been accepted for inclusion in Notre Dame Law Review by an authorized administrator of NDLScholarship. For more information, please contact lawdr@nd.edu.

BOOK REVIEWS

WATER POLLUTION CONTROL AND ABATEMENT. Edited by Ted L. Willrich and N. William Hines. Ames: Iowa State University Press. 1967. Pp. xi, 194. \$4.95.

CONTROLLING POLLUTION: THE ECONOMICS OF A CLEANER AMERICA. Edited by Marshall I. Goldman. Englewood Cliffs: Prentice-Hall, Inc. 1967. Pp. xiii, 175. \$4.95.

It is perhaps the saddest of commentaries on our current civilization to say that, of all the requirements of twentieth century living, those that contribute most to sustaining life itself are among the ones most threatened and, seemingly, most neglected. I am referring, of course, to air and water—two elements that are absolutely necessary for all of us. Despite the fact that these two crucial life-elements are fast becoming poisoned and unusable, there is every indication that the situation may get worse before it improves.

The outstanding contribution of both these volumes is that, while frankly and honestly admitting the growing air and water crisis, they steadfastly refuse to accept either its inevitability or its irreversibility. The various authors collectively recognize the immense complexity of the problems, but seek to reduce those complexities into manageable categories and concepts. In doing so, they ask hard questions: What is air and water pollution? Why is there such a high level of pollution? What can we do to reduce these levels? What will happen if we fail?

The Willrich and Hines volume, which is a collection of essays produced for the 1965 Iowa State University-University of Iowa sponsored water quality control conference, is an exploration of water quality control from several important perspectives. Beginning with a broad statement on the scope and challenge of the water pollution problem, the authors divide the overall task into several specific areas: the physical, scientific and engineering aspects of the problem; the economics of water quality control; the legal and regulatory aspects; and the political realities. Finally, the volume includes statements on water quality control problems in the state of Iowa, and analyses of the pollution problem by several major water users such as municipalities, industries, and agriculture. These latter sections provide an excellent balance to the overall presentation.

Throughout, the book advocates the premise that pollution control is a fundamentally local matter that requires effective interrelationship of at least three factors:

- (1) a sincere state commitment to clean waters manifested in a workable regulatory scheme, (2) high levels of knowledge and dedication on the part of the state officials charged with administration of the control program, and (3) public understanding of the nature of the pollution problem and support for the control efforts.¹

¹ **WATER POLLUTION CONTROL AND ABATEMENT** vii-viii (T. Willrich & N. Hines ed. 1967).

The major thrust of this work is directed toward establishing these three factors in the mind of the reader. This is not to say, however, that the conference did not recognize the necessity and desirability of federal assistance; rather, emphasis is placed on the role of national aid as a supplement or a support to local efforts. One of the major tasks to which the book addresses itself is the development of a quality control program that would permit permanent solutions to the water pollution problem at the lowest possible cost to both public and private interests. Another is the instillation of appreciation for the immense complexity of the problem. Both of these tasks are effectively executed. I unhesitatingly recommend this book for both layman and technician.

Controlling Pollution: The Economics of a Cleaner America, on the other hand, is a much more specialized analysis. It concentrates primarily upon the theoretical and practical problems faced by those who wish to approach solutions within the framework of costs and benefits. The underlying question that pervades the entire volume is how such an affluent society as our own can best eliminate or control the serious consequences of pollutants which, as much as anything else, are products of that abundance.

Economically, the problem is one of "diseconomy," *i.e.*, the near impossibility of valuing the resources of water and air to a point where private production costs will more nearly approximate those social costs borne through pollution. "Diseconomy" arises from the fact that the cost of air and water to those who add to pollution levels is negligible, while the remainder of society, which seeks to use this same water and air, finds the cost extremely high, not only in terms of health and general property maintenance, but also in terms of the less apparent costs such as the use of tax monies for water treatment. If such an approximation of private production costs and social costs could be more fully achieved, the problem of the enormous expenditures involved in quality control programs could be more easily met, at least partially, through the operation of pricing mechanisms within a supply and demand economy.

The volumes are complementary in many respects, though each makes its own unique contribution. Both agree that the fundamental question of water and our quality control is whether a democratic, highly developed political system can discover and implement a formula through which the resources of air and water can be allocated equitably, *i.e.*, without undue hardship to either the public or the private sectors of the society. In seeking such a formula, the writers in both books seem to agree that the core difficulties are those concerned with classification of observable data, measurement of effluent discharge, and methods of treatment and prevention. Finally, there is agreement that one of the most important things that must, and can, be done in the near future is the formulation of use-criteria and the establishment of standards designed to achieve the levels of quality desired. Both volumes attack this problem and make some very useful suggestions. Fortunately, recent congressional action has recognized this need and has taken positive steps toward its fulfillment.²

The essays in both books are extremely understandable, yet demonstrate a highly sophisticated appreciation of this crucial area of concern. Each book

points clearly at what may well be the basic problem and the key to its ultimate solution — a public that has hardly begun to realize the enormity and danger of the crisis now facing our national air and water resources. The cost of effectively meeting this crisis will be high. It must be paid. These volumes offer the reader a most reasonable and persuasive discussion of how money and energy could best be allocated.

*Birch Bayh**

EDUCATIONAL FREEDOM. Edited by Daniel D. McGarry and Leo R. Ward. Milwaukee: The Bruce Publishing Company. 1966. Pp. viii, 226. \$6.50.

In last year's public debate on the proposed New York constitution, the one issue that overshadowed all others was the substitution of first amendment language for the so-called Blaine Amendment. This is but one more indication that law and policy makers will increasingly be pressed to define and delineate the power of legislative bodies to enact education laws providing benefits for students attending nongovernment schools. Whatever the ultimate decision, it is clear that basic issues will be studied, discussed, voted upon and litigated.

There has emerged in this area of public concern both a new sense of urgency and a new style of argument. The urgency is evidenced by the realization that sharply rising costs threaten the very existence of a large segment of private education. This is true even as regards heavily endowed institutions of higher education. And while the traditional arguments centering upon the constitutionality and desirability of assisting educational *institutions* continue to be voiced, there is, more and more, a discussion of the many complex problems in terms of the students themselves. The Elementary and Secondary Education Act of 1965,¹ hailed as a monumental compromise of competing interests, is illustrative. To obviate standard objections predicated upon institutional aid considerations, the Act focuses upon the ultimate and primary beneficiaries — the students.

It is likely that the same forces that produced the federal compromise will be exerted at the state level, and, predictably, similar responses will be forthcoming. There is evidence that this is already happening.² But should a general

* United States Senator from Indiana. Senator Bayh is a member of the Air and Water Pollution Subcommittee of the Senate Committee on Public Works.

1 79 Stat. 27 (1965), codified in scattered sections of 20 U.S.C. (Supp. I, 1966).

2 Recent examples include: bus service in New Jersey, N.J. STAT. ANN. § 18:14-8 (Cum. Supp., Supp. 1967), Ohio, OHIO REV. CODE ANN. § 3327.01 (Page Current Service 1967), Pennsylvania, PA. STAT. ANN. tit. 24, § 13-1361 (Supp. 1967), and Wisconsin, Wis. STAT. ANN. § 40.53 (Supp. 2, 1967); auxiliary education and welfare services in Michigan, MICH. STAT. ANN. § 15.3622 (1968); textbooks in New York, N.Y. EDUC. LAW § 701 (McKinney Supp. 1967), and Rhode Island, R.I. GEN. LAWS ANN. § 16-23-2 (Supp. 1968); grants to college students in Michigan, MICH. STAT. ANN. § 15.2097(31)-(40) (1968), New Jersey, N.J. STAT. ANN. § 18:22-14.19 (Cum. Supp. 1967), New York, N.Y. EDUC. LAW § 601 (McKinney Supp. 1967), Pennsylvania, PA. STAT. ANN. tit. 24, §§ 5151-59 (Supp. 1967), and Wisconsin, Wis. STAT. ANN. § 39.32 (1967); and tax credits for college contributions in Indiana, IND. ANN. STAT. § 64-2606(i) (Supp. 1967). At the moment, strong efforts are being made in Louisiana, Michigan, New Jersey and Rhode Island to pass "grant"

legislative pattern develop, reflecting a determination to assist all students in some way, the as yet unanswered constitutional questions will take on even greater significance.

When one turns to the decisions of the United States Supreme Court, the dominant impression gained is that the Court has simply not delineated the area of impermissible legislative assistance to all students, including the millions in nonpublic schools. Eventually the Court will speak its mind.³ Meanwhile, interested parties must proceed without the desired guidelines. Yet if and when federal constitutional guidance is provided, there will still be the task of testing the various legislative proposals against a multitude of state constitutional provisions that by specific language and by judicial interpretation, are more restrictive than the first amendment.⁴

The editors' avowed purpose in this book is to state "the case for government aid to students in independent schools."⁵ Two of the contributors address themselves specifically to the "legal" aspects of the "case."⁶ But the "case" is built upon a great deal more than the usual exegesis of judicial holdings and dicta. The matter is placed in historical context;⁷ the philosophical, political, and educational aspects are explored;⁸ there are valuable chapters of a comparative nature that discuss the experience of other countries;⁹ finally, there are expositions of the practical means of implementation and of the forces working for a change in the status quo.¹⁰

The relevance of all this to the "policy" decisions that legislatures must reach is self-evident. But the pertinence of this analysis to "constitutional" questions that will confront the courts ought not be ignored. One is reminded

legislation for students attending elementary and secondary schools. An imaginative proposal presently before the Pennsylvania legislature would establish a "Nonpublic School Authority" empowered to purchase "secular educational services" from nonpublic schools. "In effect, the State of Pennsylvania would be contracting with private institutions to educate children in the compulsory subjects . . ." *Freedom in Education*, Summer, 1967, at 1, col. 2.

3 The Court will have ample opportunity to do so in two pending cases, *Flast v. Gardner*, 271 F. Supp. 1 (S.D.N.Y.), *prob. juris. noted*, 389 U.S. 895 (1967), and *Board of Educ. v. Allen*, 20 N.Y.2d 109, 228 N.E.2d 791, 281 N.Y.S.2d 779 (1967), *prob. juris. noted*, 389 U.S. 1031 (1968). The former concerns the participation by parochial school students in benefits granted by the Federal Elementary and Secondary Education Act of 1965; the latter is an attack upon the New York textbook law under which students attending nonpublic schools may benefit.

4 For a comprehensive survey of state precedent, see C. ANTIEAU, P. CARROLL, & B. BURKE, *RELIGION UNDER THE STATE CONSTITUTIONS* (1965). See also D. BOLES, *THE TWO WORDS: COMMENTARIES AND CASES IN RELIGION AND EDUCATION* (1967).

5 EDUCATIONAL FREEDOM iii (D. McGarry & L. Ward ed. 1966) [hereinafter cited as McGarry & Ward].

6 Blum, *Our Federal Constitution and Equal Justice in Education*, in *id.* at 138; Brown, *State Constitutions and Religion in Education*, in *id.* at 163.

7 Brickman, *Historical Background for Freedom in American Education*, in *id.* at 1.

8 Britt, *Rights and Roles of Parents, Church and State in Education*, in *id.* at 40; Snapper, *Contributions of Independent Education*, in *id.* at 103; Ward, *Pluralism in Education in a Free Society*, in *id.* at 23.

9 Cunningham, Drouin, & Mittlemann, *Educational Freedom in England and Wales, Northern Ireland and Scotland, France, Democratic Czechoslovakia (to 1938), and Israel*, in *id.* at 85; McGarry, *International Panorama: World Survey of Aid to Independent Education*, in *id.* at 56; Palmer, *Freedom and Equity in Dutch Education*, in *id.* at 65.

10 Corley, *Objections to Aid Answered*, in *id.* at 184; Duggan & Duggan, *Fight for Freedom*, in *id.* at 196; McDonough, *Economy of Government Aid to Independent Education: A Taxpayers' Savings Plan*, in *id.* at 122.

of the constitutional battles concerning the validity of various types of social legislation earlier in the century and of the more recent *Brown v. Board of Education*,¹¹ a celebrated instance of constitutional law being derived from so-called "extralegal" sources. Extrinsic data supporting the reasonableness or unreasonableness of legislative policy has had an acknowledged impact upon resultant constitutional doctrine.

What are some of the circumstances that will doubtless have a legislative impact and may also influence judicial opinion in the area of government assistance to nonpublic school students? First, there are immediate, practical considerations. One out of every seven elementary and secondary school students attends a nonpublic school.¹² It is understandable that a legislature intent upon improving the quality of education within its state would be interested in the welfare of all students, including those not in public schools. For these nonpublic school students are genuine, bonafide students. They are complying with the state's compulsory education laws, and they contribute, along with their public school counterparts, to society's educational well-being. Moreover, at a time of sharply increasing expenditures for education and contemporaneous resistance to higher taxes, there is strong inducement for legislative action calculated to preserve the viability of the private education sector.

Second, while the tensions and fears that prompted the more restrictive state constitutional provisions and court decisions have not dissipated completely, they are much less pronounced today. For one thing, far from viewing the private school as a threat to the public school, many regard the competition as beneficial to both.¹³ Just as competition in other fields tends generally to an increase in product quality, and monopoly begets complacency and quality decline, so it is in education as well. In addition, the enormity of the educational task is such as to make imperative the utilization of all available resources, private and public.

Third, there is a growing body of literature that places educational pluralism on a par with religious pluralism as a *sine qua non* of a free society.¹⁴ One ought to affirm both freedom in religion and freedom in education. It is not

11 347 U.S. 483 (1954).

12 See 1967 INFORMATION PLEASE ALMANAC 352 (D. Golenpaul ed. 1960).

13 Significant in this respect is a United States Chamber of Commerce task force report on economic growth and opportunity published in March, 1967. The task force, which was composed of 100 corporate executives under the chairmanship of Erwin Canham of *The Christian Science Monitor*, stated that, "[i]f all parents, at every income level, could choose between sending their children to public schools and sending their children to approved private schools at public expense, both public and private education would improve. . . ." *Competition in Education*, in THIRD REPORT OF THE TASK FORCE ON ECONOMIC GROWTH AND OPPORTUNITY OF THE CHAMBER OF COMMERCE OF THE UNITED STATES, quoted in Educational Freedom, Fall-Winter, 1966-67, at 6. Emphasizing the value of diversity and freedom of choice, the task force observed: "We take this diversity for granted in scholarship, in politics, and in the abundance and variety of the commercial market-place. Why should we settle for the single choice in education?" *Id.* at 4. They offered a specific recommendation:

The plan we suggest for introducing private competition into the school system is relatively simple. It involves offering the parents of all pupils the option of sending their children to public schools or accepting vouchers which would be redeemable for tuition at approved schools. *Id.* at 5.

See also Friedman, *The Role of Government in Education*, in ECONOMICS AND THE PUBLIC INTEREST 127 (R. Solo ed. 1955).

14 The book contains a useful bibliography of this material. McGarry & Ward 209-21.

accidental that there has been more agreement regarding the desirability of pluralism and diversity in the realm of higher education than at the grade and high school levels. For the pattern of higher education in this country has included many private groups operating colleges and universities, whereas in the lower grades most of the private schools are under the auspices of the Catholic Church. It can hardly be denied that to a considerable degree the opposition to aid for nonpublic school students stems from this fact. But the situation here is changing dramatically. At the present time Catholic school enrollment is declining, whereas the enrollment in Protestant and other private schools is increasing.¹⁵ It is estimated that by the middle of the next decade, projecting present trends, the number of students in other private schools will equal those in Catholic schools.¹⁶ If this should occur, it will doubtless have a solid legislative impact. It would obviously be much easier to sustain a case for educational pluralism if, in fact, such pluralism already existed.

For a variety of reasons it is becoming politically expedient for a legislator to support aid for all students. Indeed, in some cases it is politically inexpedient not to do so. And while there may be but minimal agreement on reasons for so acting, there is an evident desire to solve the problem. If and when a consensus is reached as to the desirability of a solution, there remains, to be sure, a difficult task of implementation. But that the task is not impossible is attested by the numerous imaginative proposals that have already been advanced.¹⁷

15 *E.g.*: "More and more Jewish parents are sending their children to Orthodox day schools — which in the U. S. have expanded from 49 elementary and high schools in 1945 to 339 today." *TIME*, January 19, 1968, at 58.

16 Between 1937 and 1952 the number of Protestant schools rose from about 2000 to 3000, while the ten-year period from 1952 to [sic] 1962 alone saw the addition of more than 2700 schools. This gives the Protestant church-related schools an enrollment of half a million, with a sustained 4% yearly rate of growth. While all this relatively unpublicized growth was taking place it is interesting to note that the Catholic parochial schools show a drop in enrollment in 1966. If this trend continues, it is projected that Protestant and Catholic school enrollment will be approximately equal by 1977. Mecklenborg, *The Protestant Church-Related School*, Freedom in Education, Summer, 1967, at 2, col. 3.

17 See notes 2 & 13 *supra*. The following, which pertains to the financing of higher education, is quoted from the commencement address of Dean Phil C. Neal of the University of Chicago Law School at Muskingum College on June 11, 1967:

There is another path, quite as compatible with heavy reliance on public support, that will not cause us to tip the balance so sharply in favor of publicly operated institutions. This is the path that points toward the individual rather than the institution as the immediate beneficiary of public support. In detail such a plan might take different forms, but in principle the method is so simple and its advantages so conspicuous that it seems somewhat remarkable we have not embraced it more fully already. We have indeed made some beginnings along this line, notably in the GI Bill provisions for the education of veterans and in the student loans available under the National Defense Education Act. But the amount of aid to education that goes through these channels is still minute as compared with public expenditures for direct support of institutions and special projects. The outlines of a system built on this principle are clear: Let every qualified student have made available to him from the public treasury, if he wants them, the funds he needs for education — preferably on the basis of a long-term loan but perhaps with a minimum amount in the form of outright grant. Let him take his money and go where he will or can. Let every college be what it chooses to be or is capable of being. Let it determine its own size, set its own tuition, choose its own students, find its own version of truth and goodness in education. Let its place in the academic sun be determined, not by its power to win political influence or administrative favor nor by dubious claims to equal treatment, but by the needs and preferences of the students it seeks to attract by its success in fulfilling that mission.

All of the foregoing facets of the question are treated in this book. In their Introduction the editors express the hope that the book would help to make "our fellow citizens, legislators, and judges more familiar with some of the considerations involved" ¹⁸ It would, and, hopefully, it will.

*Edward J. Murphy**

¹⁸ McGarry & Ward vi.

* Professor of Law, University of Notre Dame.

Pages 803-808 are Intentionally Blank.

