

Constitutional Law: The Black Armbands Case: Freedom of Speech in the Public Schools

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Repository Citation

Russell M. Ware, *Constitutional Law: The Black Armbands Case: Freedom of Speech in the Public Schools*, 52 Marq. L. Rev. 608 (1969).
Available at: <http://scholarship.law.marquette.edu/mulr/vol52/iss4/13>

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Constitutional Law: The Black Armbands Case—Freedom of Speech in the Public Schools: In an age of growing student restiveness and dissent, the United States Supreme Court in *Tinker v. Des Moines Independent Community School District*¹ has expanded the applicability of constitutional free-speech guarantees to the public school setting. The petitioners, 6, 13, and 15 years old, were suspended from the Des Moines, Iowa, public school system for wearing black armbands to school in violation of a school district rule, which had been passed in anticipation of such conduct. They had worn the bands to protest the war in Vietnam and to publicize their desire for an extended truce. Their complaint against the school officials seeking injunctive relief and nominal damages² was dismissed by the United States District Court,³ which found the regulation to be a reasonable one. The dismissal was affirmed when the Court of Appeals for the Eighth Circuit divided 4-4 on the question.⁴ The Supreme Court reversed and remanded, distinguishing regulations governing the wearing of armbands from those governing the style of dress, the length of hair, or the conduct of group demonstrations. The Court found the wearing of armbands to be the type of symbolic act "closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment."⁵

In the past, the Court has applied other provisions of the First and Fourteenth Amendments to the teacher-pupil relationship and to the operation of public educational facilities. The Court has invoked the First Amendment to invalidate programs of compulsory symbolic speech and declaration of belief,⁶ to prohibit state-fostered religious exercise,⁷ and to strike down certain statutory restrictions on private

¹ 393 U.S. 503 (1969).

² 42 U.S.C. § 1983 (1964) (providing for civil redress for deprivation under color of law of a right or privilege secured by the Constitution or laws of the United States).

³ 258 F. Supp. 971 (S.D. Iowa 1966).

⁴ 383 F.2d 988 (8th Cir. 1967).

⁵ 393 U.S. at 505-06.

⁶ *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943), where a regulation on compulsory flag saluting as a prerequisite for public school attendance was held invalid as applied to children of Jehovah's Witnesses in that it "invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control." *Id.* at 642.

⁷ *Epperson v. Arkansas*, 393 U.S. 97 (1969) (Arkansas statute forbidding the teaching of evolution in the public schools held violative of the First Amendment, which was said to prohibit a state from tailoring curricula to promote any particular religious dogma); *Engel v. Vitale*, 370 U.S. 421 (1962) (daily classroom invocation of God's blessing held inconsistent with the "Establishment of Religion" clause of the First Amendment); *Illinois ex rel. McCollum v. Board of Educ. of School Dist. No. 71*, 333 U.S. 203 (1948) ("released time" program, whereby school children were relieved of the legal duty to attend school upon condition that they receive religious instruction in the school building during school hours, held an unconstitutional promotion of religious education).

school curricula.⁸ In addition, the Court has found associational freedom to be offended by an overly inclusive faculty loyalty oath⁹ and by a requirement of disclosure of every associational tie as a condition for school employment.¹⁰ Mere membership in a subversive group has been held to be a constitutionally insufficient justification for dismissal of a public school teacher.¹¹ Recently, in *Pickering v. Board of Education*,¹² the Court upheld and clarified the right of a teacher to publicly criticize school board policy. *Tinker* represents the application of the First and Fourteenth Amendments to the symbolic speech of a public elementary school student.

The various constitutional provisions involved in the school cases were applied in a number of different ways. While the First Amendment bar to establishment of religion was held to be absolute,¹³ other provisions were clearly being applied "in light of the special characteristics of the school environment."¹⁴ For example, the need for harmony among co-workers and the need for maintenance of a good working relationship with immediate superiors have been held to be valid considerations in determining whether a teacher's dismissal for criticizing the school board is a violation by the state of the teacher's freedom of speech.¹⁵ But *Tinker* goes further. *Tinker* not only recognizes the special needs of the school environment (here it is a need for discipline and decorum) but also indicates the weight to be given such considerations, and formulates a test to be applied when free speech of students conflicts with school policy. The Court adopted the language of *Burnside v. Byars*,¹⁶ which the lower court had specifically declined to accept, and held:

Certainly where there is no finding and no showing that engaging in the forbidden conduct would "materially and substantially interfere with the requirements of appropriate discipline in the operation of the school," the prohibition cannot be sustained. *Burnside v. Byars*, 33 F.2d at 749.¹⁷

⁸ *Meyer v. Nebraska*, 262 U.S. 390 (1923) (a freedom to acquire knowledge was said to be included in the "liberty" protected by the Fourteenth Amendment); *Bartels v. Iowa*, 262 U.S. 404 (1923).

⁹ *Weiman v. Updegraff*, 344 U.S. 183 (1952) (the failure to distinguish between knowing and innocent membership in offensive organizations held violative of due process).

¹⁰ *Shelton v. Tucker*, 364 U.S. 479 (1959).

¹¹ *Keyishian v. Board of Regents*, 385 U.S. 589 (1967) (intent to further unlawful aims held to be prerequisite for firing). See also *Whitehill v. Elkins*, 389 U.S. 54 (1967); *Baggett v. Bullitt*, 377 U.S. 360 (1964); *Cramp v. Board of Pub. Instruction*, 368 U.S. 278 (1961).

¹² 391 U.S. 563 (1968).

¹³ *Epperson v. Arkansas*, 393 U.S. 97 (1969).

¹⁴ 393 U.S. at 506.

¹⁵ *Pickering v. Board of Educ.*, 391 U.S. 563, 570 n.3.

¹⁶ 363 F.2d 744 (5th Cir. 1966).

¹⁷ 393 U.S. at 509.

Perhaps the greatest significance of *Tinker* is its evidence of a judicial willingness to scrutinize public school disciplinary regulations for constitutional validity, and to measure the regulations in such terms as to give in-school activities constitutional protection comparable to that given activities conducted off the school premises. "It can hardly be argued," the Court said, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the school-house gate."¹⁸ Specifically, the notion that small disruptions are a price willingly paid to protect pure speech was clearly seen as just as applicable to the school environment as it is to society as a whole.

Justice Black, in dissenting, felt the decision was a usurpation of discretionary authority of school officials "wholly without constitutional reasons."¹⁹ Curiously, though, he rested much of his criticism on the grounds that the Court "is resurrecting the old reasonableness-due process test."²⁰ He claimed that "[T]he doctrine that judges have the power to hold laws unconstitutional upon the belief of judges that they 'shock the conscience' or that they are 'unreasonable,' 'arbitrary,' 'irrational,' 'contrary to fundamental 'decency,'" or some other flexible term without precise boundaries"²¹ has been rejected. He cited *Ferguson v. Skrupa*²² for a history of the doctrine and a clear statement of its demise.²³ Yet the cases cited by Justice Black dealt not at all with the freedom of speech, but with social and economic legislation.²⁴ His call for judicial modesty in this area therefore seems untenable, at least insofar as he relies on *Ferguson* for authority.²⁵

¹⁸ *Id.* at 506.

¹⁹ *Id.* at 525.

²⁰ *Id.* at 520.

²¹ *Id.* at 519-20.

²² 373 U.S. 726 (1963).

²³ 393 U.S. at 519: "*Ferguson v. Skrupa* . . . was able to conclude in 1963: 'There was a time when the Due Process Clause was used to strike down laws which were thought unreasonable, that is, unwise or incompatible with some particular economic or social philosophy.

. . . .

The doctrine that prevailed in *Lochner* [*Lochner v. New York*, 198 U.S. 45 (1905)], *Coppage* [*Coppage v. Kansas*, 236 U.S. 1 (1915)], *Adkins* [*Adkins v. Children's Hospital*, 261 U.S. 525 (1923)], *Burns* [*Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924)], and like cases—that due process authorizes courts to hold laws unconstitutional when they believe the legislature has acted unwisely—has long since been discarded."

²⁴ *Lochner v. New York*, 198 U.S. 45 (1905), overturned laws setting maximum hours of work in bakeries; *Coppage v. Kansas*, 236 U.S. 1 (1915), concerned the outlawing of "yellow dog" contracts; *Adkins v. Children's Hospital*, 261 U.S. 525 (1923), concerned women's minimum wage laws; *Jay Burns Baking Co. v. Bryan*, 264 U.S. 504 (1924), dealt with a law fixing the weight of loaves of bread.

²⁵ The judicial modesty shown in the review of economic legislation has clearly not been accepted as proper in the First Amendment field. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice. These rights rest on firmer foundation." *Thomas v. Collins*, 323 U.S. 516, 530 (1945). For a list of cases discussing this "preferred position"

But has there been a change in the amount of discretion given local officials in the operation of the schools, as Justice Black contends? This case, standing alone, has probably not unduly lessened it. Note that *Tinker* involved the reasonable anticipation of a level of disruption insufficient to warrant curtailment of speech.²⁶ A companion case to *Burnside* (and one which the Supreme Court cited),²⁷ *Blackwell v. Issaquena County Board of Education*,²⁸ in which the Court of Appeals upheld a curb on symbolic speech, involved punishment for button-wearing where substantial disruption was already occurring. How closely the Court would examine a school official's prediction that a clearly serious disorder would occur unless a free-speech curb were imposed is therefore still unclear. The opinion goes no further than to imply that such anticipation need only be not unreasonable.²⁹ However, if, as *Tinker* holds, a tiny disruption will not warrant invasion of a right as fundamental as freedom of speech, it seems but a small and logical step to conclude that an official's prediction of material disruption must include a showing of more than a mere possibility of such disturbance. There seems no reason why the "likelihood" or "imminence" of the disruption is not deserving of a measure as rigorous as that which tests the size of the disturbance. Should that step be taken, the discretion exercised by school administrators very clearly would be lessened. If a regulation can be sustained by merely a not unreasonable fear of some type of disruption, only a patently arbitrary rule would ever come under judicial scrutiny. The test of which *Tinker* may supply the first half, however, could only be applied by an independent examination of the facts surrounding the official's exercise of discretion.

It is interesting to speculate about the applicability of *Tinker* to future controversies.³⁰ It can be foreseen that the Court will be called upon to decide whether other liberties claimed to be protected under the Bill of Rights and Fourteenth Amendment are entitled to protection in the public school setting as comprehensive as that given free speech

of the freedom of speech, see *Kovacs v. Cooper*, 336 U.S. 77, 90-94 (1949) (concurring opinion of Frankfurter, J.).

²⁶ 258 F. Supp. at 973: "It was not unreasonable in this instance for school authorities to anticipate that the wearing of armbands would create *some type of classroom disturbance.*" (emphasis added).

²⁷ 393 U.S. at 505 n.1.

²⁸ 363 F.2d 749 (5th Cir. 1966).

²⁹ 393 U.S. at 514: "As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."

³⁰ Even before *Tinker*, a District Court in the Fifth Circuit had held the "material and substantial disruption" standard of *Burnside* to be applicable to speech at a state college. *Dickey v. Alabama State Bd. of Educ.*, 273 F. Supp. 613 (D.C. Ala. 1967). *Tinker* has been applied in a case concerning an anti-war advertisement in a high school paper. *Zucker v. Panitz*, 299 F. Supp. 102 (S.D. N.Y. 1969).

by *Tinker*. The validity of hair length regulations, for example, has already been challenged in lower federal courts and has given rise to a clear conflict of opinions. A recent decision giving constitutional protection to a student's distinctive hair style is *Breen v. Kahl*.³¹ That case rejected two other recent decisions, *Ferrell v. Dallas Independent School District*³² and *Davis v. Firment*³³ which, on facts similar to *Breen*, found hair length regulations constitutionally permissible. *Breen* did not pass on the question of whether long hair was a form of "expression" entitled to First Amendment protection,³⁴ but instead found the right to choose one's personal appearance to be one of those constitutional rights which are unenumerated but implicit in the Bill of Rights.³⁵

What effect will *Tinker* have on the resolution of such a question? An argument that *Tinker* reinforces the *Breen* holding would encounter the hurdle of getting Supreme Court recognition of personal appearance as a constitutionally protected right.³⁶ Nevertheless, the degrees of protection given the rights involved in both *Tinker* and *Breen* were much the same. *Tinker* demanded a showing of a "material and substantial disruption," while *Breen* held that school regulations curtailing a constitutional right must bear "a substantial burden of justification,"³⁷ and that those regulations are valid only if the distraction they prevent is "aggravated . . . frequent . . . general . . . [and] persistent."³⁸

³¹ 296 F. Supp. 702 (W.D. Wis. 1969).

³² 392 F.2d 697 (5th Cir. 1968).

³³ 269 F. Supp. 524 (E.D. La. 1967).

³⁴ Both *Ferrell* and *Davis* held that even if wearing a distinctive hair style were seen as a form of expression, the regulations they reviewed were valid. However, the reasoning of neither court on this point seems compelling. *Ferrell* applied *Burnside v. Byars* to give a protection seemingly less rigorous than that given to free expression by the Supreme Court in *Tinker*. The Court of Appeals' analysis of *Burnside* and *Blackwell* omitted any mention of the need for a showing of "material and substantial disruption." *Davis*, citing *Cox v. Louisiana*, 379 U.S. 536 (1965), said that the expression involved was not "pure," and so upheld the regulation. Yet what *Cox* was distinguishing from "pure" speech was "conduct such as patrolling, marching, and picketing." *Cox v. Louisiana*, 379 U.S. 536, 555. A distinctive haircut, if it is expression, seems far more like an armband than like a demonstration.

³⁵ The District Court's reasoning in overturning the suspensions can be summarized as follows: (1) the right of an adult to present himself to the world as he pleases is a highly protected freedom and therefore any restriction on it must carry a "substantial burden of justification," 296 F. Supp. at 706; (2) a high school student is entitled to similar constitutional protection, *Id.* at 708; and (3) there was too little evidence of distraction of others or impairment of the performance of the non-conformists to carry the substantial burden of justification, *Id.* at 709.

³⁶ The District Court in *Breen* cited *Griswold v. Connecticut*, 381 U.S. 479 (1965), for the proposition that "specific guarantees in the Bill of Rights have penumbras formed by emanations from those guarantees that help give them life and substance," *Griswold v. Connecticut*, 381 U.S. at 484, and held freedom of appearance to be such a penumbral right. *Breen v. Kahl*, 296 F. Supp. 702, 705-06.

³⁷ *Breen v. Kahl*, 296 F. Supp. 702, 706.

³⁸ *Id.* at 709.

These decisions have been couched in terms of the proper scope of judicial review and may have considerable impact on the public school scene. Where school disciplinary regulations directly curtail highly protected personal rights, no presumption of constitutionality will obtain. Each regulation, when challenged, will be subject to close judicial examination with the burden of proof on school authorities to show compelling reasons for the rules.³⁹

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³⁹ Justice Harlan, dissenting, objected to placing the burden on the school officials. "I would, in cases like this, cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns . . ." 393 U.S. 503, 526 (dissenting opinion).