1969

Mary Beth Tinker Takes the Constitution to School

Theodore F. Denno

Recommended Citation
Theodore F. Denno, Mary Beth Tinker Takes the Constitution to School, 38 Fordham L. Rev. 35 (1969).
Available at: http://ir.lawnet.fordham.edu/flr/vol38/iss1/11
MARY BETH TINKER TAKES THE CONSTITUTION TO SCHOOL

THEODORE F. DENNO*

I. INTRODUCTION

It is entirely appropriate that the most recent issue involving symbolic speech and the extent of its protection under the freedom of speech and assembly clauses of the first amendment arose in a public school. Since about the middle of the last century, "[a]lthough public school systems materialized slowly, public education and democracy were . . . considered inseparable." The Supreme Court in Tinker v. Des Moines Independent Community School District\(^2\) has taken a significant and decisive step toward further development of the basic proposition of tying public education to the system of constitutional freedoms. The number of prior cases dealing with the extent of civil rights within the schools is surprisingly small. For instance, there are only a few cases dealing with a teacher's freedom of speech as a matter of law, and the number of cases dealing specifically with the school pupil as the subject of constitutional rights is virtually nil.

In a recent article on the subject of academic freedom, it was stated that the rights of both teachers and students to be free from restraint in classroom speech have received almost no legal recognition. In support of this finding the author cites but three cases, not one of which directly involves the matter of student-first amendment relations.\(^3\) The article points out, however, that the courts have dealt with the problem of beatle haircuts (in which a conceivable first amendment question might have been decided but was not),\(^4\) high school secret societies,\(^5\) and the participation of married high school students in extracurricular activities.\(^6\) It appears, therefore, that Tinker is a pathfinder in that children themselves, claiming the common rights of citizenship within their institutional/

---

* Professor of Political Science, State University of New York at Cortland.


legal school environment, have been recognized by our supreme constitutional tribunal as proper subjects for those rights. Reading the decision and noting the vigorous dissent of Mr. Justice Black, it will scarcely be doubted that "[t]he Court's holding in this case ushers in ... an entirely new era in which the power to control pupils by the 'elected officials of state supported public schools ...' in the United States is in ultimate effect transferred to the Supreme Court." One presumes, however, that in our constitutional system, in questions of primary right the "ultimate effect" has always been one of the powers and duties of the Supreme Court. It is reasonable to assert that prior to the Tinker decision the primary freedom in public schools had been that of administrators from judicial interference. In fact, until recently the issue of student rights had apparently not been considered important enough to be met in legal battle. After citing the cases of Epperson v. Arkansas and Parker v. Board of Education, both of which "present compelling claims of a violation of academic freedom, [and] the refusal of the courts ... to grant judicial relief, ..." the article adopts the then acceptable dictum that school children were not proper subjects of the first amendment. The Supreme Court, however, while not granting certiorari in Parker, did grant "judicial relief" in Epperson, thereby invoking a direct and sharp implication of constitutional values. Leaving itself further argument for the vastly more important issue of the Constitution in the schools, the Court in Epperson found that it "need not take advantage of the broad premise which the Court's decision in Meyer furnishes. ..." In Meyer v. Nebraska, one of the landmark cases relied on in formulating the Tinker rule, the Supreme Court stated that:

The desire of the legislature to foster a homogeneous people with American ideals prepared readily to understand current discussions of civic matters is easy to appreciate. . . . But the means adopted, we think, exceed the limitations on the power of the State and conflict with rights assured to plaintiff in error. The interference is plain enough and no adequate reason therefor in time of peace and domestic tranquility has been shown.

While the Epperson decision itself was not surprising, simply outlawing a state statute which forbade the teaching of evolution—both an

---

7. 393 U.S. at 515 (Black, J., dissenting).
8. 81 Harv. L. Rev., supra note 3, at 1052.
11. 81 Harv. L. Rev., supra note 3, at 1053.
12. 393 U.S. at 105-06.
14. Id. at 402.
15. 393 U.S. at 104.
obvious invasion of free speech and an attempt to foster fundamentalist religious concepts—its tone was sharp. "Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the first amendment's mandate in our educational system where essential to safeguard the fundamental values of free speech and inquiry and of belief." This statement was a suitable overture to the extension of the "fundamental values" to the school child himself, and in itself constitutes a conclusive answer to Black's dissenting questions of "whether students and teachers may use the schools at their whim as a platform for the exercise of free speech . . . and whether the Courts will allocate to themselves the function of deciding how the pupils' school day will be spent." Where school officials are constitutionally illiterate the courts may give them lessons with "care and restraint."

Absent an excess of authority, the courts will find no more power in Tinker to interfere with the discretionary acts of school officials than they had before:

[C]ourts follow the general rule that they will not interfere with the actions of a school board involving the exercise of judgment or discretion if the board acts in good faith, in the absence of evidence that the board abused its authority and acted arbitrarily, capriciously, fraudulently, or without proper authority.

Within the meaning of "proper authority" must now be included full regard for the rightful exercise of free speech by pupils. This is a clarification and extension of procedure begun as long ago as 1925.

In Gitlow the Court said that the [fourteenth] amendment protects those specific guarantees of the Bill of Rights which are regarded as fundamental, not merely convenient or "nice to have"—formal rights, as the Court called them. The Court began by classifying freedom of speech and press as fundamental.

It may very well be that the Supreme Court has moved to place our constitutional and judicial system more nearly in line with the ever-deepening public dilemma, debate and division over what one author calls the existentialist/essentialist argument. This is a profound and constantly reappearing issue standing most obviously between the adolescents

---

16. Id.
and the more or less socially settled mature. Revolving around two deeply divergent psychic postures, it is evoking in education a constantly wider collision in the form of school/campus movements, student drug culture, the expanding ranks of disaffection, noncommitment and social indifference of the young. For the Court to recognize a legitimate forum where this deep cleavage may be given voice is perhaps a demonstration of its ability to move not only to meet a public need but also to attempt to accommodate the ancient institutions of the law to contemporary social affairs. The situation has not yet been fully concretized, but in ideology, at least, the law stands squarely in the path of the debate. On the one hand is the rational, objective, impersonal, quantitative, perceptible; on the other is the willful, subjective, personal, qualitative, susceptible. The difference is that between knowledge and understanding, fact and conviction, Verstand and Gemüüt, intellect and affection, society and community, mind and heart, Gesellschaft and Gemeinschaft, external and internal, etc., etc.

The law is a process of intellect; its foundation is rationalism and logic; its obvious ideal is a mechanistic objectivity such as symbolized in the "scales of the law." It, therefore, belongs with the first of the two sides of the above dichotomy and indeed, in many respects, stands out as its primary social exemplar. Insofar as age is concerned, professional servants of the law belong predominantly to the "over thirty" group with power obviously concentrated considerably on the far side of that boundary. Increasingly, youth belongs to the second side of the dichotomy, thus establishing the dividing line across the generation gap. If the Court in the Tinker case has made even a late and rather formal move to recognize the gap, to permit a form of public dialogue across it, to allow the sides to show themselves, then it has served the nation perhaps better than it knows.

Who would have thought the Supreme Court of the United States, designed as the citadel of proprietary conservatism by the founding fathers, would become the most liberal of the branches of the federal government in the second half of the twentieth century? The issue between the essentialists and existentialists is vastly more than education or philosophy. In fact it is scarcely philosophy at all. It is breaking out all over the nation in terms of the draft, the Vietnamese war, the civil rights issue, which is the moral matter of the black man in the American society, the condition of the poor, etc., etc.—the whole establishment/anti-establishment question. This issue is not a fad or passing phase of social development. It is basic to the whole future. Beyond its immediate forms and phenomenological outbursts this problem goes to the very marrow of social life. The demand for effective, humanistic meaning in life is now so broadcast, gathering power daily, that history's future is more than ever
clouded in mystery. It is almost impossible to get the meaning of this issue across to millions and millions of professional people. Communication is part of the gap. The sides speak wholly different languages based on widely divergent Weltanschauungen. As it now stands institutionalized, the question is rationalism itself.21

II. STATE POWER TO REGULATE FREE SPEECH

There is nothing in the Tinker opinion to suggest that the Court has in any way inhibited the regulatory and sovereign functions of the states within the bounds of constitutional prerogative. On the contrary, there is explicit language strongly confirming state power, especially in the schools. Citing the Epperson and Meyer cases, the majority states that “[t]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.”22 When the first amendment rights are “abused . . . to incite to violence and crime . . . [t]he people through their legislatures may protect themselves against that abuse.”23 The right to the use of streets and parks “must be exercised in subordination to the general comfort and convenience, and in consonance with peace and good order”24 which is the duty of the state. “The power and the duty of the State to take adequate steps to preserve the peace and protect the privacy, the lives, and the property of its residents cannot be doubted.”25 The state’s legitimate interest in peace and harmony is affirmed.26 But, “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity”27 and “legislative judgment” to promote “the preservation and protection of peace” in the presence of first amendment rights should be “narrowly drawn.”28

Once the power of the state to control the public peace, regulate its facilities and maintain the public convenience is affirmed within narrow, specific limits, it is also affirmed that in doing so the state may not foreshorten the rights of citizens. Disturbing the peace, misusing facilities and creating a genuine public inconvenience is abuse and not an exercise

22. 393 U.S. at 507.
26. See Davis v. Francois, 395 F.2d 730 (5th Cir. 1968).
of these rights. "But the legislative intervention can find constitutional justification only by dealing with the abuse. The rights themselves must not be curtailed."\textsuperscript{29} This dictum of the inviolability of first amendment freedoms coupled with the permission to control abuses, narrowly defined, arising in connection with their exercise, has remained constitutional doctrine. Thus, as stated in \textit{Hague v. CIO},\textsuperscript{30} free assembly and the communication of "thoughts between citizens . . . must not, in the guise of regulation, be abridged or denied . . . ."\textsuperscript{31} In \textit{Edwards v. South Carolina}\textsuperscript{32} the terms of constitutionality were exact:

We do not review in this case criminal convictions resulting from the evenhanded application of a precise and narrowly drawn regulatory statute evincing a legislative judgment that certain specific conduct be limited or proscribed.\textsuperscript{33}

Very recently the rule has been stated in terms relating to speech and conduct, with the Supreme Court declaring that speech may not be regulated under the guise of regulating conduct.\textsuperscript{34} Moreover, the New York Court of Appeals stated that:

\[T\]he constitutional guarantee of free speech covers the substance rather than the form of communication and . . . the right to employ a particular mode of expression will be vindicated only if it has been outlawed, not because of any legitimate State interest, but solely for the purpose of censoring the underlying idea or thought.\textsuperscript{35}

Addressing the constitutional question of free symbolic expression raised in a case of draft card burning, the Supreme Court formulated four tests, all of which had to be satisfied to justify governmental regulation of first amendment guarantees:

1) Is it within the constitutional power of the government?
2) Does it further an important or substantial governmental interest?
3) Is the governmental interest unrelated to the suppression of free expression?
4) Does the incidental restriction go no further than is essential to the furtherance of the governmental interest?\textsuperscript{36}

This case affirmed that not all modes of communication of ideas by con-

\begin{itemize}
\item \textsuperscript{29} DeJong v. Oregon, 299 U.S. 353, 364-65 (1937).
\item \textsuperscript{30} 307 U.S. 496 (1939).
\item \textsuperscript{31} Id. at 515-16.
\item \textsuperscript{32} 372 U.S. 229 (1963).
\item \textsuperscript{33} Id. at 236.
\item \textsuperscript{34} Amalgamated Food Employees Local 590 v. Logan Valley Plaza, Inc., 391 U.S. 308 (1968).
\item \textsuperscript{36} United States v. O'Brien, 391 U.S. 367, 377 (1968).
\end{itemize}
duct come under the "freedom of expression" which is constitutionally protected.\textsuperscript{37}

If the power of the state, under the tenth amendment, and the nature of dual sovereignty, is universally recognized in the field of education and if that power extends to compulsory attendance of children,\textsuperscript{38} and to control of personnel and curriculum, the issue present in \textit{Tinker} is not state power per se. Nor is the issue that of the constitutionally acknowledged rights of individuals. It is the delicate question of which of these rights shall have preference and under what circumstances. In \textit{Tinker} we see one more example of the Supreme Court's difficult function of ruling between two long recognized and accepted constitutional rights. Since the Second World War this task has occupied a great deal more of the time and attention of the justices. In \textit{Tinker} an attempt is made to deal with the contemporary nature of schools, to define in some limited fashion what a student is before the law, and to view the state, together with its public educational institutions, in terms of their de facto relations with the living world. This is certainly not the last case and rule on the question but it will stand as a landmark inasmuch as it is the first time the position of the general school child is upheld against a specific claim of state power,\textsuperscript{39} despite the repeated assertion made in \textit{Prince v. Massachusetts}\textsuperscript{40} that "[t]he power of the state to control the conduct of children reaches beyond the scope of its authority over adults . . . ."\textsuperscript{41} Yet the Court in \textit{Prince}, the opinion so often relied on to support the special case of childhood, apprehends the dilemma in \textit{Tinker} by reminding us that "[i]t is the interest of youth itself, and of the whole community, that children both be safeguarded from abuses and given opportunities for growth into free and independent well-developed men and citizens."\textsuperscript{42} Here is the juxtaposition of the recognized extraordinary power of the state to protect the child against the public need for "free and independent well-developed men and citizens."\textsuperscript{43} In other words, permissible limitations on constitutional rights exercised by students in school poses a more difficult problem than the ordinarily difficult question of setting priorities on acknowledged rights. The flavor of this question comes out in Mr. Justice Stewart's concurring opinion:

\textsuperscript{37} Id.
\textsuperscript{39} In \textit{West Virginia State Bd. of Educ. v. Barnette} 319 U.S. 624 (1943), the position of the schoolchild was vindicated. The case involved, however, a very limited sectarian interest, not the right of the "general" student.
\textsuperscript{40} 321 U.S. 158 (1944).
\textsuperscript{41} Id. at 170.
\textsuperscript{42} Id. at 165.
\textsuperscript{43} Id.
Although I agree with much of what is said in the Court's opinion, and with its judgment in this case, I cannot share the Court's uncritical assumption that, school discipline aside, the First Amendment rights of children are co-extensive with those of adults. Indeed, I had thought the Court decided otherwise just last term in *Ginsberg v. New York*.... I continue to hold the view I expressed in that case: "[A] State may permissibly determine that, at least in some precisely delineated areas, a child—like someone in a captive audience—is not possessed of that full capacity for individual choice which is the presupposition of First Amendment guarantees."

As we shall see below, the "captive audience" phrase is not in the character of a mere aside to the students involved. The *Ginsberg* decision, after quoting *Prince v. Massachusetts*, goes somewhat further regarding children and first amendment "protected freedoms," without much determination of precisely what is meant. In some circumstances state power extends "even where there is an invasion of protected freedoms...." The contrast this affords to *Tinker* is unmistakable, making it all the more probable that the Court is consciously, if guardedly, moving toward extending the first amendment to the school under terms requiring proof of need, before the state's power will be permitted to curtail the freedoms. Is *Tinker* a prelude to establishing plenary constitutional rights for school children absent a proven power and necessity to restrict them?

III. THE TINKER CASE

The facts of the *Tinker* case were not in dispute. Several children of the Des Moines school district, with the encouragement of their parents and other adults, planned to wear black armbands to school in the days before the Christmas holiday of 1965 to protest American involvement in Vietnam. School authorities learned of the plan and moved to prevent its execution by announcing a new regulation that prohibited the wearing of armbands on school property. A refusal to remove an armband would incur suspension from school until the armband was removed. Given the opinion of the students and their parents regarding the immorality of the American position in the Vietnamese war plus the apparent panic of school officials, a clash was almost inevitable. The Tinker children defied the new regulation, deliberately wore the black armbands, refused to remove them and were duly suspended from school. Their father brought an action to enjoin the officials from disciplining the children. The issue was in one sense pure in that it did not involve anything of substance other than the public/political symbolism of wearing the armband. There

---

44. 393 U.S. at 514-15 (citations omitted).
was no long hair, short skirt or disruptive conduct charge.\textsuperscript{47} The district court acknowledged that “[t]he wearing of an armband for the purpose of expressing certain views is a symbolic act and falls within the protection of the first amendment’s free speech clause.”\textsuperscript{48} It also declared that, “[a] subject should never be excluded from the classroom merely because it is controversial.”\textsuperscript{49} But it went on to say that “actions of school officials in this realm should not be limited to those instances where there is a material or substantial interference with school discipline. School officials must be given a wide discretion,”\textsuperscript{50} and so the court concluded that “[t]he school officials involved had a reasonable basis for adopting the armband regulation.”\textsuperscript{51} Thus the specific terms of \textit{Burnside v. Byars},\textsuperscript{52} a federal court of appeals decision holding that a regulation is without force unless the action controlled is shown to “materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,”\textsuperscript{53} was rejected. \textit{Burnside} had been decided a few months before \textit{Tinker} but in the Fifth Circuit and, therefore, its decision was not binding on the \textit{Tinker} court in the Eighth Circuit. In the court of appeals the \textit{Tinker} case was argued twice, but resulted in a divided bench (4 to 4) which left the district court result standing, a judgment in favor of the state’s power to regulate.\textsuperscript{54}

\textit{Tinker} presented the Supreme Court with nearly an ideal situation on which to decide a constitutional issue. For all practical purposes there were no disturbing overtones. The claimed personal right was that of symbolic speech versus the claimed public right in the state of plenary power to regulate its schools in conjunction with an acknowledged superior right of control over children. The Court, of course, recognized the clean, simple nature of the question:

Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities. . . . Our problem involves direct, primary First Amendment rights akin to “pure speech.”\textsuperscript{55}

By thus equating the wearing of armbands with pure speech, the Court avoided the difficult problem of establishing criteria for determining

\textsuperscript{47} This summary of the facts is taken from the Court’s opinion and the lengthy dissent of Justice Black.
\textsuperscript{49} Id. at 973.
\textsuperscript{50} Id.
\textsuperscript{51} Id.
\textsuperscript{52} 363 F.2d 744 (5th Cir. 1966).
\textsuperscript{53} Id. at 749.
\textsuperscript{54} 383 F.2d 988 (8th Cir. 1967).
\textsuperscript{55} 393 U.S. at 507-08.
which kinds of symbolic conduct are therein included. The district court had granted that much, and there was no doubt in the settling of the case. The meaning attached to the emblems was announced long before its use and was plain to all. Symbolic speech and the extent of its freedom was not the question. It was the schoolchild's right, therefore, that faced

56. The term "pure speech" was used in Cox v. Louisiana, 379 U.S. 536, 555 (1965) to note that the first and fourteenth amendments afford freedom "to those who communicate ideas by pure speech," meaning verbal expression as distinguished from action. The Court's view of a symbol as akin to "pure speech" gives recognition to a form of symbolic speech or symbolic conduct which attempts to set the symbol and any accompanying conduct in separate constitutional categories, the same as the right and its abuse. The pure symbol is the plain and simple communication of ideas and has constitutional protection, but the accompanying conduct is, of course, legitimate matter for state concern. Yet the isolation of the two in practice and even for the purpose of a legal test is exceedingly difficult. The Supreme Court has not yet tried to specify which kinds of conduct can be considered expression and thus entitled to protection. See the extensive Note, Symbolic Conduct, 68 Colum. L. Rev. 1091 (1968) for a detailed analysis of the question. The Note points out that the courts have gone no further than the common sense symbolic equivalent to speech. "The cases dealing with nonverbal expression indicate that the courts are willing to accord protection to symbolic conduct when it can be clearly classified as speech or its equivalent. Once speech is found to exist, the court will require, through a balancing test, that state regulation accommodate the individual's interest in expression." Id. at 1104 (footnote omitted). We have then a series: pure speech, symbolic speech, symbolic action, pure action. It is obvious that none of these categories exist alone. Speech, verbal or symbolic, always takes place in some actional setting; the symbolic factor in action cannot be easily separated from the action itself. One end of the spectrum emphasizes communication, which may not be controlled, and the other, action, which may. The principle is the ancient "marketplace of ideas" held basic to the democratic process. What tests can be devised to determine where the legitimate control interest of the state lies in the general mixture of symbols and action? So far there is no answer, as the Note shows. The authors of the Note go on to establish two criteria for the definition of symbolic speech or conduct as pure speech: "[f]irst, the actor must be motivated only by the desire to communicate. Second, the conduct must be capable of being understood by others as communication." Id. at 1109 (footnote omitted). Aside from the quite probable difficulties courts would experience in trying to apply these two rules, they amount to a definition, somewhat expanded, of speech. The problem turns on the basic character of communication itself: all speech is symbolic and therefore, purely ideational in form; but form is not matter, it is content. Content is immune to control if it does not induce actions the state is constitutionally empowered to prohibit, bringing us right back to the kernel of the matter, namely, some practical guide to measure the violence potential in a communications situation.

As a very recent instance of symbolic action, the case of United States v. Berrigan, 283 F. Supp. 336 (D. Md. 1968) points up the question vividly. There was no contesting the facts that the defendants poured blood on records of the Selective Service System with a manifest symbolic intent that would probably pass for speech under the test rules mentioned above. But could anyone imagine any court in this country accepting the actions of invading government offices and ritually pouring blood over official documents as pure and simple speech protected by the first amendment? The decision in the case found for the government's contention of criminal violation of law in spite of, and following, an important summary of the status of symbolic speech.
the nation's highest bench. Is he wholly a passive object in his tutelage to the state or is he a legitimate subject of the constitution?

Rather than moving to define symbolic speech and/or action, the Court chose to interpret pure speech beyond a simply verbal expression. As a matter of tactics in legal maneuvers there may be reasons to prefer one move over the other, but the accomplished results are the final test. Expanding on speech is moving from known solid ground to unexplored territory rather than plunging directly into the unknown. Public acceptance, of course, is always a question in the justices' minds.

IV. SPEECH VERSUS CONDUCT

The concept of separating ideas from actions is often a good and adequate guide. For instance, a federal court struck down a Kentucky statute on sedition declaring that it was too vague, that it prohibited freedom of speech and press, and that it failed to distinguish between the advocacy of ideas and advocacy of action. In our rapidly increasing arena of social expression, political opinion and communication, protest, and spontaneous public actions, however, this simple duality test breaks down. The complete mixture of idea with action, idea that is action, and the concept of the "propaganda of the deed" does not permit application of the advocacy/action formula so prominent in our recent constitutional history.

The recent national rash of sit-ins, student activist demonstrations, political picketing, civil disobedience and organized interference demonstrates the kind of idea/action mixture now facing the courts for adjudication. To date no adequate practical formula has been developed that is capable of discriminating between permissible first amendment activity and the right of authorities to apprehend and control actual assaults on the civil peace. In the public schools the question has not yet reached the proportions of the existing issue on college campuses and governmental agencies, but there is clear evidence that it is only a matter of time.

"It is true that some types of conduct are classified as symbolic speech and have been afforded the protection of freedom of speech because symbolism in the form of a flag, a salute, or picketing, et cetera, has been recognized as 'a primitive but effective way of communicating ideas.'" Id. at 340. (citation omitted).


58. For an excellent treatment of this issue, see A. Kelly & W. Harbison, supra note 1, at ch. 32. See also D. Nimmo & T. Ungs, American Political Patterns: Conflict and Consensus ch. 15 (2d ed. 1969).

One of the forms the general first amendment problem now takes in the schools is the matter of student dress and appearance. This exemplifies the delicate nature of the whole issue. When does symbolic expression, which per se is protected, become conduct controllable by the state? Ancillary to this question is the further question: when, if ever, is expression identical to conduct and thereby controllable by the state? This is much the same as the ancient difference between form and substance, or the modern dichotomy between procedure and substance. As we have seen, the substance in expression is under absolute protection but the form and procedure are not. In instances where the form and substance are identical what will be the rule? In instances where all forms are controlled must the substance remain necessarily muzzled? In instances where the form affects tastes, mores or social values rather than the peace, health, welfare or morals of the community which side of the dichotomy shall control? There is virtually no precedent for this kind of collision.

There appears to be little statutory authority permitting school officials to directly regulate the dress and appearance of school children, although where appearance is related to behavior, regulation may be undertaken as part of the state's police power. However, the number of cases in this area is so small that no body of doctrine suggesting anything approaching adequate rules has emerged. In 1923 a state supreme court upheld the right of a school district to forbid the use of cosmetics in schools, specifically preventing a pupil from using face powder. If any proof of the proposition that times change is needed, here it is. Can anyone imagine a public school board enforcing such a regulation today? There is indeed a long list of grounds on which students have been barred from school. [C]ourts have upheld expulsion for using cosmetics, wearing objectionable clothing, smoking, serving liquor to other students, marriage, creating school bus disturbances, and even writing a letter to a newspaper in which the student was "fanatical in his [favorable] views as to atheism." A curious situation exists in the Fifth Circuit. At first the court of appeals clearly demonstrated its affirmation of the rule that only a showing of actual interference with school functions could legitimately permit curtailment of first amendment rights. But later it accepted the idea of control if interference would likely or prospectively happen. In Ferrell

---

62. Note, Constitutional Law—Public School Authorities Regulating the Style of a Student's Hair, 47 N.C.L. Rev. 171 (1968) (footnotes omitted).
v. Dallas Independent School District63 there was no evidence what-
ever that the boys who sought entrance to a high school had created
any disturbance because of their long “Beatle” style haircuts. They had
not been let in and were suing to be admitted. In its decision denying the
suit, the court referred to two somewhat similar cases decided by it two
years earlier, both cases having virtually the same question, both answers
given the same day by the same judge. The difference between the two
was the simple test of the evidential facts. In one there had been inter-
ference with the school operation and in the other there had not. This is
quite evident in the following quotes from Ferrell.

In Blackwell v. Issaquena County Board of Ed. . . . we denied school children
the right to wear freedom buttons to school. Unquestionably those wearing the buttons
were exercising their protected rights of free speech and free communication of ideas.
However, we upheld the school’s rule prohibiting the wearing of the buttons during
school hours on the ground that the evidence clearly demonstrated that such activity
interfered with the efficient operation of the school.64

The court then stated in a footnote:

Compare Burnside v. Byars . . . where the right to wear freedom buttons was not
denied the school children because there was a lack of evidence that such conduct
constituted any interference with the educational process.65

Thus a de facto physical interference with the function of the schools was
the rule established in 1966. But by 1968 in the paragraph preceding the
remarks on Blackwell, quoted above, the court stated:

The compelling reason for the State infringement with which we deal is obvious.
The interest of the state in maintaining an effective and efficient school system is of
paramount importance. That which so interferes or hinders the state in providing
the best education possible for its people, must be eliminated or circumscribed as
needed. This is true even when that which is condemned is the exercise of a consti-
tutionally protected right.66

Thus in the Ferrell case the necessity for a finding of interference was
dropped. None was found or needed. In the nature of the case none could
be found. It is to be hoped that this amazing introduction of judicial
reversal, self-recognized reversal at that, will itself stand reversed by the
Supreme Court’s Tinker decision. As one commentator noted, it appears
that the Fifth Circuit relied on the district court’s Tinker result to reach
the result in Ferrell,67 but the Tinker court, in the Eighth Circuit, had
specifically denied the rule the Fifth Circuit had laid down in Burnside

63. 392 F.2d 697 (5th Cir. 1968).
64. Id. at 703 (citation omitted) (footnote omitted).
65. Id. at 703 n.9 (citations omitted).
66. Id. at 703.
when it held that the acts of school authorities "should not be limited to those instances where there is a material or substantial interference with school discipline,"\(^68\) requiring, of course, an interference in fact and not simply in prospect. The Fifth Circuit, therefore, was induced away from its own rule by the action of a district court in the Eighth. But in the Supreme Court's decision in \textit{Tinker}, the \textit{Burnside} rule is repeatedly reaffirmed\(^69\) and appears established.

As to the right of the student to wear his hair as it suits him, the question is not only a first amendment matter but may also come under the common law right to privacy, possibly the fourth amendment's "freedom from unreasonable governmental interference," and "the right of personal security" which "'belongs as much to the citizen in the streets of our cities as to the homeowner closeted in his study to dispose of his secret affairs.'"\(^70\)

Writing in defense of his fellows, one student sums up the subject of appearance in the public schools in the precise terms of a test of fact. They [the students] seem to feel that education is too important to the person to be granted or denied on the basis of standards of personal appearance. The contention is that as long as a student's appearance does not \textit{in fact} disrupt the educational process, or constitute a threat to safety, it should not be of any concern to the school.\(^71\)

In the whole question of skirts, hair, clothes and general appearance of school children there is more than a little suggestion that the public issue which has arisen around the matter is the making of the authorities and not the students, a result of reading a form of rebellion into the youngsters' nonconformity and an expectation of disruption rather than a disruption itself.\(^72\) But in the \textit{Tinker} case it was not a question of general appearance but of the specific symbolic meaning known to all, of a particular extra article of dress that caused the collision between the students' right and the authorities'. In the words of Judge Tuttle, dissenting in \textit{Farrell}, there is striking meaning for both the general appearance and the specific symbol as evinced by the school student:


\[^69.\] 393 U.S. at 505, 509, 511. The words in \textit{Burnside} referring to the exercise of first amendment rights in schools permit the exercise of such rights if they "do not materially and substantially interfere with the requirements of appropriate discipline in the operations of the school." \textit{Burnside} v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).


\[^72.\] Id. at 155.
It seems to me it cannot be said too often that the constitutional rights of an individual cannot be denied him because his exercise of them produces violent reaction by those who would deprive him of the very rights he seeks to assert. . . .

[These students] were barred because it was anticipated, by reason of previous experiences, that their fellow students in some instances would do things that would disrupt the serenity or calm of the school. It is these acts that should be prohibited, not the expressions of individuality by the suspended students. 73

V. STUDENTS AND THE SCHOOL AUTH Authorities

Courts are not the protagonists of the school situation. The issues lie between the demands of students and the regulations of authorities. What was once a virtual automaticity upholding at every level the power of officiandom to have its way in the schools 74 has given ground to the common, widespread social questions of what are our public schools, what do we expect of them, how do they serve the community, what do we expect of the students, what kind of education do we want for them, who is to make the decisions regarding them and, lastly, where do the students themselves stand? Amid all these questions we may have forgotten the central fact that the school is “all about the student.” Does this child simply play the passive role of listening to all his masters and yielding to all in authority? Where, if anywhere, is the limit to the authority, especially where it presumes to control the student’s right to have a free mind and express it?

Whatever social burdens are borne by students as a class, the dealing with them will fall most heavily, second to the students themselves, on the school authorities charged with administering the public educational institutions. This point of social cleavage is one of rising friction behooving all of us to the most strenuous efforts to relieve it. There is no interest involved which will not be served by a bridging of the currently widening gap between the professional servants of education in the schools and the children they are charged to instruct.

It is becoming ever plainer that students will no longer be controlled by unabashed authority and force. They see too much of it in all they do. The assumptions of fear and/or convenience on the part of administrators moving them to simply order their students into one thing or another, the use of unlimited regulation and rule making from the top down, especially where it tends to infringe the ordinary rights of citizenship, and the

73. Ferrell v. Dallas Independent School Dist., 392 F.2d 697, 705-06 (5th Cir. 1968) (dissenting opinion).

74. Plasco, supra note 71; this point is strikingly emphasized in almost all articles on student legal rights, see, e.g., Brammer, supra note 59; Shoben, supra note 20; 47 N.C.L. Rev., supra note 62. In research one is constantly reminded that the field of academic rights and freedoms historically has referred to faculty or administration but not students.
arbitrary exercise of school authority over the students, are gradually becoming things of the past. It is not only by the actions of parents, interest groups and students themselves but also by court decisions that these changes are happening. School officials are, therefore, being forced to respond to control from below, i.e., the students, as well as above, i.e., the higher authorities in the community. They must also listen to courts, with the result that they frequently do not know where to place their major attention.

As in most other control situations, authority in schools flows from the top down along response lines set up by both the laws of legislatures and the laws of economics. School boards control money and jobs in addition to their legal right to make policy and rules for their schools. It is the professional school staffs, administrators and teachers, who must enforce the policies of the school board. Behind the school board stands the political community, the county, state, and so on. Behind the students stand their individual parents, and considering the generation gap, it must often be said, "far" behind. It is obvious that the prime pressures on administrators and teachers come from superior authority, certainly not students, but it must also be emphatically noted that, given the increased disaffection of students, the point of most potent cleavage is between the students and the teacher and school administrator. Authority is more conservative than freedom by nature and it is hardly surprising that school boards and central administrators have not voluntarily moved to encourage free student discussion in the schools. Our history shows quite the reverse. As in the navy where a "tight ship," run strictly according to the letter of regulations is blameless, so a "tight" school is much safer for administrators in the presence of critical, conservative school boards. It is not to the students that an accounting for the operation of the school has to be given.75

The controls used by school officials on students are not only the general forms of respect toward its elders society expects and instills in youth, including in some areas the use of physical punishment, but also the more subtle forms generally in use in adult affairs.

A ready [example] is the youngster who hates school but still tries for good grades because he needs them for later advancement. But nobody can do really well at what he dislikes or has a low opinion of. So most of these youngsters fail to make the good

75. The theme that it is easier for school officials to discipline, control and suppress students than to deal with higher authority is implicit in a great deal of the professional commentary in the education field. See, e.g., Brammer, supra note 59; Griffiths, Student Constitutional Rights: The Role of the Principal, Bull. of the Nat'l Ass'n of Secondary School Principals, Sept., 1968, at 30; Shoben, supra note 20. See also L. Garber & E. Reutter, supra note 18; Osterman, In High Schools Too, The New Republic, Apr. 5, 1969, at 13-14. The topical literature in this field is now immense.
grades. Another example is that of the many middle class parents who are highly critical of existing schools but still want their children to do well in settings which, according to them, are not fit to do well in. The miracle is that in spite of being projected into such contradictions some of our young people do quite well. Only one wonders: at what needless emotional expense?

Moreover, since "one function of elementary and even secondary education is indoctrinative—to transmit to succeeding generations the body of knowledge and set of values shared by members of the community"—it is apparent that the conformity mechanisms and pressures used in the adult world are being passed on in the schools. It is not surprising to find resultant friction, especially if many parents are themselves disturbed by the conformity process. Much of the evidence indicates that students become either "activist"—i.e., rebellious, or "docile" due to the constant conformist threat in terms of "college recommendations" and "grade point averages." The great majority at present become "bored, detached and malleable" but for the near future the activists "appear destined to become the majority of high school youth."

Courts, however, despite having "repeatedly emphasized . . . the comprehensive authority . . . of school officials . . . to . . . control conduct in the schools," are not under the same pressures as those authorities and it is inevitable that "public school students will be protected in their constitutional rights" either by the educators themselves or by the courts. "In all equity and justice, it is not enough that a segment of society—be it teachers, school board members, or administrators—disapproves of elements of pupil behavior or dress."

VI. COURTS AND THE SCHOOL AUTHORITIES

Although the procedure of the law deals exclusively with private cases where public opinion and its expression may not enter, it has been recognized since virtually the beginning of the Republic that courts, especially the United States Supreme Court, in adjudicating private issues, do make public policy. In the 1830's Alexis de Tocqueville noted in his Democracy in America that practically all public questions in the United States sooner or later take legal form and are passed upon by courts. In Thornhill v. Alabama, for example, the Court took occasion to discourse on the social

77. 81 Harv. L. Rev., supra note 3, at 1053.
78. See note 76 supra.
81. Griffiths, supra note 75, at 31, 37.
82. 310 U.S. 88 (1940).
interest in education, an interest of obvious secondary importance to
school officials responding to their immediate superiors in the system.
Speaking of "effective means whereby the interested may enlighten the
public," the Court stated that:

It is not merely the sporadic abuse of power by the censor but the persuasive
threat inherent in its very existence that constitutes the danger to freedom of
discussion.

The safeguarding of these means is essential to the securing of an informed and
educated public opinion with respect to a matter which is of public concern. . . .
Abridgment of the liberty of such discussion can be justified only where the clear
danger of substantive evils arises under circumstances affording no opportunity to test
the merits of ideas by competition for acceptance in the market of public opinion.83

One would think that the schools should be precisely the "market"
in which "to test the merits of ideas." The Court said in Chaplinsky v.
New Hampshire84 that:

There are certain well-defined and narrowly limited classes of speech, the prevention
and punishment of which have never been thought to raise any Constitutional problem.
These include the lewd and obscene, the profane, the libelous, and the insulting or
"fighting" words—those which by their very utterance inflict injury or tend to incite
an immediate breach of the peace. It has been well observed that such utterances are
no essential part of any exposition of ideas, and are of such slight social value as a
step to truth that any benefit that may be derived from them is clearly outweighed by
the social interest in order and morality.85

Are school children, the very people most importantly associated with
ideas, to be deprived of developing and expressing their opinions in a
peaceful manner under the guise of the school's need to maintain order?
The question here is not the lewd, the obscene, the profane, the libelous;
nor is it "fighting" words that incite disturbance. Precisely the reverse.
After emphasizing that the danger of granting to an official discretionary
power over the use of public places for the communication of ideas "is to
place those who assert their First Amendment rights at his mercy,"
Justice Douglas, dissenting in Adderley v. Florida86 suggested that:

[T]he power to control excesses of conduct [is] used to suppress the constitutional
right itself. [And] by allowing these orderly and civilized protests against in-
justice to be suppressed, we only increase the forces of frustration which the con-
ditions of second-class citizenship are generating amongst us.87

83. Id. at 97, 104-05.
84. 315 U.S. 568 (1942).
85. Id. at 571-72 (footnotes omitted).
87. Id. at 55-56 (dissenting opinion). The reference to "second-class citizenship" is to
that of black students who had demonstrated on the grounds of a jail against the arrest of
some of their colleagues. In Justice Black's opinion he says of the statement by the peti-
Does the state's acknowledged special interest in the child extend to holding him a "second-class" citizen before the first amendment? Is it not the special interest of the state to hold him especially a first-class citizen in that respect? School authorities cannot refuse the expression of opinions by students simply because it might inconvenience them or place them in a disadvantageous light with their superiors. As already noted, Tinker reasserted Burnside v. Byars:

[W]e must also emphasize that school officials cannot ignore expressions of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression as guaranteed to them under the First Amendment to the Constitution, where the exercise of such rights in the school buildings and schoolrooms do not materially and substantially interfere with the requirements of appropriate discipline in the operation of the school.

That the "right asserted . . . must be measured in relationship to the surrounding facts" is not simply conceded but forcefully argued. What is more appropriate for the development of young minds than the grappling with public issues "in the surrounding facts" or in a public school? That it may cause disturbance indicates there are some matters capable of evoking energetic thought and response from the young. There is value in such disturbance; the student is not to be taken as the passive, empty container into which school authorities may pour what they please. Before Tinker it was generally accepted that school authorities had broad powers in the schools. Significantly, the courts have almost always upheld the power of the educational institution or state to regulate curriculum and classroom speech. Tinker, however, severely limits that power.

In our system, state-operated schools may not be enclaves of totalitarianism. School officials do not possess absolute authority over their students. Students in school as well as out of school are "persons" under our Constitution. They are possessed of fundamental rights which the State must respect, just as they themselves must respect their obligations to the State. In our system, students may not be regarded as closed-circuit recipients of only that which the State chooses to communicate. They may not be confined to the expression of those sentiments that are officially approved. In the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views.

To justify restrictions on speech, therefore, the state must show that

---

88. 363 F.2d 744 (5th Cir. 1966).
89. Id. at 749.
92. 393 U.S. at 511.
the restriction "was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint." The fact that authorities fear disorder is not sufficient to warrant restriction of free speech. "[U]ndifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression. Any departure from absolute regimentation may cause trouble. Any variation from the majority's opinion may inspire fear... But our Constitution says we must take this risk..."

Perhaps the idea of the unavoidability of some risk had never previously been applied to the schools, but it was not new. As far back as 1939 the Court held:

In every case... where legislative abridgment of the rights [of speech and press] is asserted, the courts should be astute to examine the effect of the challenged legislation. Mere legislative preferences or beliefs respecting matters of public convenience may well support regulations directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions.

Then in *Cantwell v. Connecticut* the Court said that:

[A] state may not unduly suppress free communication of views... under the guise of conserving desirable conditions.

The essential characteristic of these liberties is, that under their shield many types of life, character, opinion and belief can develop unmolested and unobstructed.

Finally in *Terminiello v. Chicago* the meaning was made loud and clear:

[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance of an idea. That is why freedom of speech, though not absolute... is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest... There is no room under our Constitution for a more restrictive view... [The statute] permitted conviction of petitioner if his speech stirred people to anger, invited public dispute, or brought about a condition of unrest. A conviction resting on any of those grounds may not stand.

Even where it was found necessary to restrict the right in order to pre-

---

93. Id. at 509.
94. Id. at 508.
96. 310 U.S. 296 (1940).
97. Id. at 308, 310.
98. 337 U.S. 1 (1949).
99. Id. at 4-5.
serve the peace, the general rule of immunity up to that point was reiterated.

It is one thing to say that the police cannot be used as an instrument for the suppression of unpopular views, and another to say that, when as here the speaker passes the bounds of argument or persuasion and undertakes incitement to riot, they are powerless to prevent a breach of the peace.100

All kinds of speech, argument and persuasion are disturbing, possibly causing great anger among school boards and officials who see their smooth operations ruffled by mere students using the school to express themselves. But, absent open interruption within classrooms, which is not the issue, until students "pass the bounds of argument or persuasion and undertake incitement to riot" or similar overt action, they are protected. The first amendment and its freedoms of expression rest solidly on the proposition that no one, no time, no institution has a monopoly on truth, justice and the social welfare. Without the practice of free discussion, without the open invitation for the widest participation, without the recognized immunity of one's ideas offered for public appraisal, how is this, or any nation, going to assess its own condition, much less mobilize the necessary popular energies to deal with its burgeoning public problems?

Children are right in focus here; rather than being suppressed they should be encouraged to form and express views on social questions. As a recent case indicated,101 the first amendment not only guards but it also encourages the use of its freedoms. It is the duty of the public authorities to protect minorities taking advantage of free expression especially in the face of antagonistic majorities.102

Highly significant for the evaluation of school experience in the development of children's political attitudes is a recent study covering over 17,000 elementary students. It underscores what has been said here concerning the need to permit and encourage free expression of political views, since an atmosphere of political and/or opinion suppression in the schools is likely to shape the attitudes of the children. "The public school appears to be the most important and effective instrument of political socialization in the United States."103 True to the behaviorist research technique, there are few, if any, judgments of social values in the work.

102. See Edwards v. South Carolina, 372 U.S. 229 (1963). These petitioners "were convicted upon evidence which showed no more than that the opinions which they were peaceably expressing were sufficiently opposed to the views of the majority of the community to attract a crowd and necessitate police protection." Id. at 237.
There is no judgment regarding the individual or general desirability of any particular political, national or social views. There is a rather strict, clinical reporting of the observed facts and data. The social values children evince are not qualitatively weighed, but are simply, directly, "quantitatively" reported. In these terms there was found a high degree of similarity in teacher and pupil political views.

The extent of congruence in responses supports the conclusion that the school is a powerful socializing agent in the area of citizenship and political behavior. It also provides evidence that much of the basic socialization of political attitudes has taken place before the end of the elementary school years. . . . [M]any of the basic orientations are established in the pre-high school years.104

If we are bent on producing a nation of political indifferents, passives and dociles, we might well do it by establishing, or continuing, as the case all too often is, the repressive practices attached to the old aphorism that "children are to be seen and not heard," so dear to Justice Black's rather brittle views of education.105 It may be that once young children learn the rote discipline of regimental silence and passive listening that very discipline "may affect their hearts and minds in a way unlikely ever to be undone,"106 to quote the memorable words of Chief Justice Warren attempting to right the wrongs done to school children on the basis of race.

There is a great deal of evidence for the existence of continuity between childhood experience and attitudes and adult attitudes and action. . . . The argument for the importance of childhood learning for the political behavior of adults appears to have considerable validity. Of equal significance is the proposition that the socialization of children maintains basic values of the society.107

It is now beyond dispute that the constitution goes to school with the student and that the state may not interfere with the student's enjoyment of its presence. The Supreme Court in Tinker quoted at length from its earlier decision in Keyishian v. Board of Regents:108

"The vigilant protection of constitutional freedom is nowhere more vital than in the community of American schools." . . . The classroom is peculiarly the "market place of ideas." The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth "out of a multitude of tongues, [rather] than through any kind of authoritative selection."109

104. Id. at 114.
109. 393 U.S. at 512 (citation omitted).
The Court then went on to say:

If a regulation were adopted by school officials forbidding discussion of the Vietnam conflict, or the expression by any student of opposition to it anywhere on school property except as part of a prescribed classroom exercise, it would be obvious that the regulation would violate the constitutional rights of students, at least if it could not be justified by a showing that the students' activities would materially and substantially disrupt the work and discipline of the school.\textsuperscript{110}

Thus the Court has established a balancing test whereby the authorities, in order to regulate, must show that the exercise of asserted rights by the students will “materially and substantially” interfere with the school’s work and discipline. The burden of justifying curtailment, therefore, is on the state, and the presumption is with the student. Yet this finding upholding the right of free speech and encumbering its control is hardly new. Justice Brandeis wrote that officialdom must show at least “reasonable ground” to curtail the freedom. His words have the flavor of finally laying some ancient specter to rest.

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent.\textsuperscript{111}

There must be a “reasonable apprehension of danger to organized government,” therefore. State action of control “which goes beyond this need violates the principle of the Constitution.”\textsuperscript{112} The famous case of \textit{Bridges v. California}\textsuperscript{113} produced very emphatic language, interpreting the meaning of the first amendment at that time.

Moreover, the likelihood, however great, that a substantive evil will result cannot alone justify a restriction upon freedom of speech or the press. The evil itself must be “substantial” ... it must be “serious.” ... And even the expression of “legislative preferences or beliefs” cannot transform minor matters of public inconvenience or annoyance into substantive evils of sufficient weight to warrant the curtailment of liberty or expression. ... [T]he substantive evil must be extremely serious and the degree of imminence extremely high ... \textsuperscript{114}

One wonders whether evils of such a caliber could ever issue from a school where there is even a minimum of communication and respect between authorities and students. Where there is not such a minimum, a far more drastic examination of the reasons than a simple, but probably

\textsuperscript{110} Id. at 513.
\textsuperscript{111} Whitney v. California, 274 U.S. 357, 376 (1927) (concurring opinion).
\textsuperscript{112} Herndon v. Lowry, 301 U.S. 242, 258 (1937).
\textsuperscript{113} 314 U.S. 252 (1941).
\textsuperscript{114} Id. at 262-63 (citation omitted).
telltale, action of arbitrarily restricting students' free expression is necessary. It is the primary duty of schools to guide the minds and develop the experience of our children, not to muzzle their mouths as the path of least resistance in a difficult situation. The process of the blanket muzzle applied in the past is at least partly responsible for the seething state of discontent in the schools at present. No attempt was made to choose between the serious students and the plain disrupters; all were either put off alike, suppressed in their expression, or given a carte blanche fiat to speak in the classroom whenever and however they pleased. This was a complete misunderstanding of the teachings of progressive education.\textsuperscript{115}

Speaking of the "preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the first amendment," Justice Rutledge held in\textit{ Thomas v. Collins}\textsuperscript{116} that, "it is the character of the right, not of the limitation, which determines what standard governs the choice [between free exercise and control]. . . . Only the gravest abuses, endangering paramount interests, give occasion for permissible limitation."\textsuperscript{117} Far from being empowered to interfere with the freedoms, our governing bodies are established to secure them, as has been suggested above. "The dissemination of the individual's opinions on matters of public interest is for us, in the historic words of the Declaration of Independence, an 'unalienable right' [sic] that 'governments are instituted among men to secure.' "\textsuperscript{118} It is fitting that\textit{ Tinker} relies in part on\textit{ West Virginia State Board of Education v. Barnette},\textsuperscript{119} another case wherein a state thought to override the freedoms of school children, trying to force them to passively conform. The later case remarkably reaffirms the explicit terms of the earlier case where it was said, "[t]he very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of . . . officials . . . ."\textsuperscript{120}

A rather clear line of recent cases indicates that the traditional deference paid to education officials in their handling of student expression is at an explicit end. The courts will not hesitate to interfere to extend academic freedom to the students despite its traditional application to teachers.\textsuperscript{121} In 1966 the Supreme Court set aside the application of a
Louisiana statute used to convict demonstrators in a library sit-in. They were blacks determined to integrate the facility.

As this Court has repeatedly stated, these rights [free speech and assembly] are not confined to verbal expression. They embrace appropriate types of action which certainly include the right in a peaceable and orderly manner to protest by silent and reproachful presence, in a place where the protestant has every right to be. . . . The statute was deliberately and purposefully applied solely to terminate the reasonable, orderly, and limited exercise of the right to protest. . . . Interference with this right, so exercised, by state action is intolerable under our Constitution.122

The educational symbiosis of library and public school is obvious but the relationship of the pupil to the school is a much more intense and delicate one, considering the compulsory nature of attendance and purpose, age groups and communal interest in the school. Is the student to have less right where he is compelled to be than the casual library user going there of his own volition? The courts have thought not:

It is basic in our law in this country that the privilege to communicate concerning a matter of public interest is embraced in the First Amendment right relating to freedom of speech and is constitutionally protected against infringement by state officials. . . . [A]nd these First Amendment rights extend to school children and students insofar as unreasonable rules are concerned.123

Freedom of inquiry and expression is affirmed as not only necessary to the educational process but also to the broader development of our whole culture.

Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.124

Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom.125

Virtually all the public facilities and institutions in the country have been opened to the presence of the first amendment, but most of them only within the last two decades. As it stands, the list is quite impressive, beginning with sidewalks, streets and parks,126 and including picketing in

---

Part of the significance of the new decision is the clear occasion it affords to examine the new meaning of the public schools. Reference here is not to theories of education or alternatives of curriculum, organization of materials, faculty qualifications, etc., but to the social position of the public educational institutions. And within that position emphasis is almost exclusively laid on the emerging reaction and attitude. It is vastly different from the traditional assumptions which are fairly represented in Justice Black's dissent: "I think the record overwhelmingly shows that the armbands . . . took the students' minds off their classwork and diverted them to thoughts about the highly emotional subject of the Vietnam war." Here we see the picture of students doing as Black doubtless imagines they should, namely, obediently bending their minds to their classwork and then, by the presence of the black armbands abandoning their minds and the classwork to take up the "highly emotional" war. Aside from the Court's statement that there was "no evidence whatever of petitioners' interference, actual or nascent, with the schools' work or of collision with the rights of other students to be secure and to be let alone," the split on the meaning of the school is apparent. The students are experientially, emotionally, communally starved in the presence of impersonal, quantified classwork. The dissent continues:

And I repeat that if the time has come when pupils of state-supported schools, kindergartens, grammar schools, or high schools, can defy and flaunt orders of school officials to keep their minds on their own schoolwork, it is the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary. The next logical step, it appears to me, would be to hold unconstitutional laws that bar

129. Wolin v. Port Authority 392 F.2d 83 (2d Cir. 1968).
134. 393 U.S. at 518.
135. Id. at 508.
Thus we have the classic view of the student as a passive subject of the adult system represented in the state’s officials. Perhaps it is as much as anything a tribute to our success in education, despite the stultifying mechanistic process, that the students are now, at an early age, capable of realizing and evaluating their own condition. The Court seemed to touch the real issue when it noted that they were “not enclaves of totalitarianism;” officials do not have “absolute authority” over students who are “persons” under the Constitution, and these students do not have to submit their minds exclusively to the materials approved for them by the state bureaucracies of their integrated elders. Perhaps it is worth wondering at this point whether Justice Black and the other Justices of the Court, personally remember a happy and carefree childhood. So few adults now realize that that condition of childhood has all but vanished. Being themselves so heavily planned and structured, they tend to map out the whole of every day for their children, leaving virtually no room for the bursting spontaneity of the very young. We have here an exact parallel to the tragic disappearance of the natural landscape and the reduction of the urban environment to a boring routine of measured time, straight lines, a constant mechanical din and regimental conformity even in our pollution rates. We break what is human and happy in the child when we insist on an integrated training almost from birth. It is no wonder they question our values.

“Good grades” and concentration upon studies are seen by the adolescent community, and rightly so, as acquiescence and conformity to adult constraints. Social affairs, extracurricular activities, and athletics are activities of their “own,” activities in which they can carry out positive actions on their own, in contrast to schoolwork, where they carry out “assignments” from teachers. Such demands are galling to any community that feels itself at all autonomous.

To this could be added volumes on the students’ resentment of the regimentation and busy work atmosphere of the public schools. In this highly pluralistic, individualistic society affording everyone so many means of personal and mass communication but demanding so much conformity as the price of its high productivity, it can come as a surprise to no one that the school, as the site of massed childhood’s attention and obedience, is giving way to creativity, commitment, emotional attachment to public issues in a way not seen before by the adult generations. The fact is that

136. Id. at 518.
137. Id. at 511.
the character of our public schools has changed and is still changing away from the information transmission belt institution run on the basis of an impersonal, efficient bureaucracy toward a community of students who learn by the experience and contact of each other and the faculty in terms of personal, social, national and international matters of intellectual, emotional and artistic interest. The present school horizon is completely out of sight of the little red schoolhouse of the "3R's."

The rigid trilogy of the state, the teacher and the pupil remains, however. The first hires the second to impart the information to the third. In the area of public education this is the essentialist attitude as it has been handed down from the proprietary, rugged individualist, frontier world of Thomas Jefferson, wherein children grew up in the invariable image of their personal forebears, generation after generation. What so sharply separates the current generation from their predecessors is their breaking with tradition and their discovery, perhaps due to their own despair in the face of the regimented certainties of the past, that they have more feeling for each other than they can ever have for the "lost generation" of those over thirty. What is it that can move an educator to the trenchant words, "I believe that happy adolescents are mythical creatures"? There are so few adults who can see the wringer through which our children are forced that few will understand when he adds, "[t]he problems most of them feel are agonizing, as any trusted counselor can attest." 139

A society which is too proud to listen to its children, too afraid that they may "disturb" it, is probably a society too afraid to look itself in the eye. During the course of history there was probably precious little difference between Mary Beth Tinker's message of the black armband and the twelve year old boy who spoke to the elders in the temple. This time the men in the black robes got wise. How will it be with the rest of us?

139. Brammer, supra note 59, at 17.