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Student Expression on Campus and Interference with the "Rights of Others"

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NOTE

STUDENT EXPRESSION ON CAMPUS AND INTERFERENCE WITH THE "RIGHTS OF OTHERS"

INTRODUCTION

October 15, 1969 was a date historically distinguished by the first Vietnam Moratorium. On this occasion college students and others around the nation observed a suspension of normal activities as a means of emphasizing their opposition to the American role in the Vietnam War. Many students chose to manifest their dissent in symbolic fashion by wearing black armbands to school, and their right to do so ultimately became the subject of litigation in several localities. Given the applicable case law relating to administrative restriction of student protest, the response of the courts was predictable in its vindication of this form of expression wherever there was reason to anticipate it would have minimal disruptive potential.[1]

On the campus of the University of Wyoming a different kind of conviction gave rise to a contemporaneous protest which likewise was expressed symbolically and resulted in legal action.[2] In this instance, however, the object of the protest was the racial policy of the Mormon Church, which prohibits black members from becoming church officers or rising to the priesthood.[3] Viewing this as a deliberate relegation to second-class status, black students at Wyoming initiated a plan to publicize their opposi-

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[1]*Compare* Butts v. Dallas Indep. School Dist., 436 F.2d 728 (5th Cir. 1971) (wearing of armbands on Moratorium Day protected) *with* Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971) (wearing of armbands on Moratorium Day prohibited because of large enrollment of students from military families and resultant potential for violence).

[2]Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970), *vacated in part*, 443 F.2d 422 (10th Cir. 1971), 333 F. Supp. 107 (D. Wyo. 1971), *aff'd*, 468 F.2d 1079 (10th Cir. 1972).

[3]Note, *Wearing of Black Armbands by State University Football Players Would Violate Establishment of Religion Clause*, 19 KAN. L. REV. 316, 321 (1969), *citing* CHURCH OF JESUS CHRIST OF THE LATTER DAY SAINTS, DOCTRINE AND COVENANTS § 116 (1960). As summarized here by a quotation from the *New York Times*, blacks are "figuratively relegated to the back pew." N.Y. Times, Dec. 29, 1965, at 15, col. 1.

This is apparently the only other published comment on the legal issues arising out of the Wyoming armband protest. Although three other decisions were rendered in *Williams* subsequent to the publication of the article, it remains a useful source for the researcher, particularly on the jurisdictional and procedural issues of the case. *See generally* Comment, *The Authority of a College Coach: A Legal Analysis*, 49 ORE. L. REV. 442 (1970).

tion in conjunction with an upcoming football game to be played on October 18, 1969 with Brigham Young University, a school owned and operated by the Mormon Church.

In anticipation of this occasion, the Black Student Alliance at Wyoming drafted a letter to William D. Carlson, President of the University, and Lloyd Eaton, head football coach, articulating its objection to the scheduling of athletic contests with Brigham Young, and calling for others to offer symbolic support to this position by "a black arm band worn throughout any contest involving BYU."[4] This letter was subsequently published by the school newspaper and the campus community was thereby made aware of the planned protest.

On Friday, October 17, a group of 14 black football players met with Coach Eaton to discuss their intention to wear armbands during the game the next day. Since they were already wearing armbands, however, Eaton dismissed them from the team for violation of a coaching rule which prohibited participation by Wyoming football players in any protest or demonstration.[5] An emergency meeting of the Board of Trustees of the uni-

[4]Brief for Defendants-Appellees at 3, 4, Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972).

[5]According to Coach Eaton, campus protest "was getting to be quite a popular thing," and so he imposed this coaching rule to "be prepared for it" and "keep our young men out of it," since "they are here to get an education . . . ." *Id.* at 49. In essence, Eaton "told them that it was not 'Cowboy football' to protest or demonstrate, meaning that they should not deviate from the main group." *Id.* at 6.

In that this coaching rule purported to restrict important first amendment rights and applied to players even when they were off the field, it would appear clearly invalid as a prior restraint, especially since no criteria were set up to determine its applicability in a given case and no procedural safeguards were established for review of the coach's decision.

At the trial, Eaton sought to explain the rule by reference to the need for unity on a football team. *Id.* at 50. In this instance, however, administrative regulation in the interest of "unity" would seem to be merely a prescription for the abridgment of student athletes' freedom of speech. *See* Quarterman v. Byrd, 453 F.2d 54, 59-60 (4th Cir. 1971); Vail v. Board of Educ., 354 F. Supp. 592, 597-98 (D.N.H. 1973): "The regulation assailed by the plaintiffs is a blanket prohibition . . . . It does not reflect any reasonable, constitutional standards of the First Amendment as applied to the orderly administration of high school activities."; Dunn v. Tyler Indep. School Dist., 327 F. Supp. 528, 533 (E.D. Tex. 1971): "The regulation in issue here fails . . . [the required precision of regulation], since it arbitrarily prohibits all boycotts, sit-ins, stand-ins, and walk-outs without limiting its proscription to such activities involving misconduct or those which present a material and substantial disruption of the educational environment."; Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967); Aldrich, *Freedom of Expression in Secondary Schools*, 19 CLEV. STATE L. REV. 165, 169 n.20 (1970); Nahmod, *Black Arm Bands and Underground Newspapers: Freedom of Speech in the Public Schools*, 51 CHI. B. REC. 144,

versity was then convened for that evening, and this body upheld the dismissal of the players after a complete review of the facts. As the basis for their action, the board members reasoned that the players were irrevocably committed to wearing their armbands during the game, and that the constitutional mandate of separation of church and state prohibited university accession to this action.[6]

The athletes then filed a civil rights suit[7] in the United States District Court for the District of Wyoming, naming various officials of the university as defendants and praying for a temporary restraining order to have themselves reinstated to the team. In addition, they sought damages, permanent injunctive relief, and a declaratory judgment to the effect that the actions of the defedants had abridged their constitutional right of free expression. Upon an evidentiary hearing, the temporary restraining order was denied, and the court subsequently granted defendants' motion to dismiss as to the other claims.[8]

The United States Court of Appeals for the Tenth Circuit affirmed the judgment of the district court with respect to the dismissal of claims against the State of Wyoming and the claims for money damages against the named State officers. The judgment was vacated, however, with respect to the dismissal of claims against State officers for equitable and declaratory relief, and further proceedings were ordered.[9] On remand, the district court held that "[t]he rights of the Plaintiffs to freedom of speech . . . cannot be held paramount to the *rights of others* to practice their religion free from state-supported protest . . ." and again dismissed the complaint.[10]

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148 (1969); Van Alstyne, *The Student as University Resident*, 45 DENVER L.J. 582, 593 n.24 (1968): "[C]olleges should be most clear and confined and provide for the least general administrative discretion with respect to rules applied to first amendment interests . . . . Vague, overly broad, or standardless rules in this area are regarded as unconstitutional per se due to their chilling effect on these preferred freedoms."; *Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1131 (1968): *Hammond* "made it clear that a rule requiring prior administration approval of all campus demonstrations was an unconstitutional restraint on student first amendment rights; a fortiori, a *flat ban* on all campus demonstrations would be impermissible." (emphasis added).

[6]Brief for Defendants-Appellees at 14, 15, Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972).

[7]Under 28 U.S.C. §§ 1331, 1343 (1970) and 42 U.S.C. § 1983 (1970).

[8]Williams v. Eaton, 310 F. Supp. 1342 (D. Wyo. 1970).

[9]Williams v. Eaton, 443 F.2d 442 (10th Cir. 1971).

[10]Williams v. Eaton, 333 F. Supp. 107, 115 (D. Wyo. 1971) (emphasis added). The

Upon a renewed appeal, the Tenth Circuit upheld the trial court on two disputed factual interpretations.[11] It then observed that "stemming from state and federal law there is strong support for a policy restricting hostile expressions against religious beliefs of others by representatives of a state or its agencies."[12] For this reason, the court continued, it would be unnecessary to decide "whether approval of the armband display would have involved state action or a violation of the religion clauses," since the university's decision was a "*reasonable* regulation of expression" in the interest of "protect[ing] against invasion of the *rights of others* by avoiding a hostile expression to them by some members of the University team."[13] In accordance with this holding, the decision of the trial court was affirmed.

I. THE STANDARD FOR STUDENT EXPRESSION

As authority for its emphasis on protecting the "rights of others" in *Williams*, the Tenth Circuit relied on *Tinker v. Des Moines Independent Community School District*.[14] Since *Tinker* serves as the landmark decision on student expression, the rule established there was clearly controlling as to the legal issues presented in *Williams*. In order fully to understand that rule, however, it is necessary first to discuss two Fifth Circuit cases,

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court also found that under the bylaws of the National Collegiate Athletic Association, it was no longer possible to reinstate the plaintiffs to the team, since by this time (2 years after the incident) they had all either exhausted their eligibility or left the university. It should be noted, however, that "[w]hen controversies present what are essentially recurring issues of public interest they are not mooted because the most recent particular occasion for consideration of the issue has come and gone." Women Strike for Peace v. Hickel, 420 F.2d 597, 604 (D.C. Cir. 1969).

[11]The facts in dispute were: (1) the contention by plaintiffs that one of the reasons for wearing the armbands was to protest alleged name-calling and "cheap shots" in the previous year's game with Brigham Young, and (2) the plaintiffs' disagreement with testimony by various school officials that the athletes had refused to play again for the University of Wyoming so long as Eaton remained football coach. Williams v. Eaton, 468 F.2d 1079, 1081-83 (10th Cir. 1972).

[12]*Id.* at 1083.

[13]*Id.* at 1084 (emphasis added).

[14]393 U.S. 503 (1969) [hereinafter cited as Tinker v. Des Moines]. The *Tinker* protest was initiated in December, 1965 by three children (ages 13-15), who testified that their "purpose in wearing the arm bands was to mourn those who had died in the Viet Nam war and to support Senator Robert F. Kennedy's proposal that the truce proposed for Christmas Day, 1965 be extended indefinitely." Their plans had become known to school officials in advance, and a regulation was adopted "prohibiting the wearing of armbands on school premises." 258 F. Supp. 971, 972 (S.D. Iowa 1966). When the students chose to wear the bands despite the regulation, they were suspended and "did not return to school until after the planned period for wearing armbands had expired . . . ." 393 U.S. at 504.

Burnside v. Byars[15] and *Blackwell v. Issaquena County Board of Education*,[16] on which *Tinker* was primarily based.

In *Burnside*, the Fifth Circuit had considered the right of black students at a segregated Mississippi high school to wear "freedom buttons" on school property "as a means of silently communicating an idea and to encourage the members of their community to exercise their civil rights [of registration and voting]."[17] The school administration had responded by enacting a regulation which prohibited the wearing of political buttons by students, because such insignia "didn't have any bearing on their education" and might create a commotion.[18] The court, however, reasoned that "[t]he right to communicate a matter of vital public concern is embraced in the First Amendment right to freedom of speech and therefore is clearly protected against infringement by state officials,"[19] except where "the exercise of such rights in the school buildings and schoolrooms . . . materially and substantially interfere[s] with the requirements of appropriate discipline in the operation of the school."[20] And since here "the presence of 'freedom buttons' did not hamper the school in carrying on its regular schedule of activities,"[21] the disciplinary regulation was enjoined.

Although decided by the same court on the same day and based on a factual situation comparable to that in *Burnside*, *Blackwell* reached a different conclusion. There, several months after the *Burnside* protest, black students at a neighboring high school again wore "freedom buttons." This time, however, the students "conducted themselves in a disorderly manner, disrupted classroom procedure, interfered with the proper decorum and discipline of the school and disturbed other students who did not wish to participate in the wearing of the buttons."[22] Concluding that, "as distinguished from the facts in *Burnside*," there had been "an unusual degree of commotion, boisterous conduct, [and] a collision with the rights of others," the court held that

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[15]363 F.2d 744 (5th Cir. 1966).

[16]363 F.2d 749 (5th Cir. 1966).

[17]363 F.2d at 747 (footnote omitted).

[18]*Id.* at 746-47. Note the similarity of this reasoning to that of Coach Eaton in Brief for Defendants-Appellees, *supra* note 5.

[19]363 F.2d at 747.

[20]*Id.* at 749.

[21]*Id.* at 748.

[22]363 F.2d at 753.

here a material and substantial interference with the work of the school *had* resulted.[23] The decision of school officials to suspend participating students in the interest of restoring order was therefore sustained.[24]

When the armband protest in *Tinker* came under consideration, the United States District Court for the Southern District of Iowa made explicit reference to the standard evolved in *Burnside* and *Blackwell*. It observed, however, that "it is the view of [this] Court that actions of school officials . . . should *not* be limited to those instances where there is a material or substantial interference with school discipline,"[25] thus rejecting the Fifth Circuit standard. Instead the court decided to apply a simple test of *reasonableness*[26] under which it upheld the authority of school officials to prohibit the wearing of armbands on campus.[27]

The Eighth Circuit was equally divided on the case, and it therefore affirmed without issuing an opinion as to the appropriate test to be applied.[28] Upon appeal, however, the Supreme Court chose to sanction the analysis developed by the Fifth Circuit. Characterizing the communication of student opinion as a "direct, primary First Amendment right,"[29] the Court concluded that the wearing of an armband for this purpose was constitutionally protected as expression "closely akin to 'pure speech.' "[30] Consequently, it was held that this form of expression could not be restricted by school officials "in the absence of a specific showing of constitutionally valid reasons . . . ."[31] But, the Court cautioned, "*conduct* by the student, in class or out of it, which for any reason . . . materially disrupts classwork [or school activities] or involves substantial disorder or invasion of the *rights of others* is, of course, not immunized by . . . freedom of speech."[32]

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[23]*Id.* at 754. It is important to note that the interference the court found in this case was based entirely on *physical*, rather than symbolic, conduct.

[24]*Id.*

[25]Tinker v. Des Moines, 258 F. Supp. 971, 973 (S.D. Iowa 1966) (emphasis added).

[26]*Id.* This is not unlike the approach taken in *Williams*. 468 F.2d at 1084.

[27]258 F. Supp. at 973.

[28]Tinker v. Des Moines, 383 F.2d 988 (8th Cir. 1967).

[29]393 U.S. at 508.

[30]*Id.* at 505.

[31]*Id.* at 511.

[32]*Id.* at 513 (emphasis added), *citing* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966). Note the concurrence of Mr. Justice White to the effect that "the Court continues to recognize a distinction between communicating by words and communicating by acts or conduct . . . ." *Id.* at 515.

Having thereby adopted the Fifth Circuit standard for student expression, the Court applied it to the facts in *Tinker* and held that school officials could not under the circumstances have "forecast substantial disruption of or material interference with school activities" or the rights of others.[33] Accordingly, the decision of the district court, and implicitly its reliance on the reasonableness test, was overturned.

II. "RIGHTS OF OTHERS" EXCEPTION

The "rights of others" exception to *Tinker* has received very little judicial explication since first enunciated in 1969. Though "not a model of clarity or preciseness,"[34] the available authority seems to have construed it so as to refer to *physical* interference with the "substantially educational functions"[35] of the school and the safety and educational rights of other students.[36] In short,

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[33]*Id.* at 514.

[34]Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 (2d Cir. 1971).

[35]*The Supreme Court, 1968 Term*, 83 HARV. L. REV. 62, 161 (1969).

[36]*Tinker* warned against interference with "the rights of other students to be secure and to be let alone." 393 U.S. at 508. This somewhat vague statement apparently derived from the *Blackwell* fact pattern, where a symbolic protest degenerated into violent disorder, physical coercion, and substantial disruption of school activities. In deciding *Blackwell*, the Fifth Circuit had made specific reference to West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943), where "the Court was careful to note that the refusal of the students to participate in the [flag salute] ceremony did not interfere with or deny rights of others to do so . . . ." 363 F.2d at 754. In direct contrast, the court concluded, the *Blackwell* students had evidenced "disregard for the orderly progression of classroom instruction, and their complete disregard for the rights of their fellow students." *Id.* at 753.

Other cases which have interpreted the "rights of others" exception have discussed it in terms of a student's right to pursue his education unimpeded by those protesting. When the above quotation from *Tinker* was written, therefore, it seems probable that the court had the educational rights and the safety of others primarily in mind. *See, e.g.*, Esteban v. Central Mo. State College, 415 F.2d 1077, 1087, 1089 (8th Cir. 1969) (discusses student interference with the rights of others in a case involving "[d]estruction to property, threats to others, frightening passersby, and intrusions upon their rights of travel"), *citing* Barker v. Hardway, 399 F.2d 638 (4th Cir. 1968), *cert. denied*, 394 U.S. 905 (1969) (students suspended for "*[d]estructive* interference with the rights of others") (emphasis added); Evans v. State Bd. of Agric., 325 F. Supp. 1353 (D. Colo. 1971) (relied on the "rights of others" exception in a situation presenting substantial potential for physical disruption and interference with the safety of others); Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 71 Cal. 2d 551, 455 P.2d 827, 78 Cal. Rptr. 723 (1969): "[I]t is imperative that the courts carefully differentiate in treatment those [students and teachers] who are violent and heedless of the rights of others as they assert their cause and those whose concerns are no less burning but who seek to express themselves through peaceful, orderly means." 455 P.2d at 836, 78 Cal. Rptr. at 732.

See also Denno, *Mary Beth Tinker Takes the Constitution to School*, 38 FORDHAM L. REV. 35, 47 (1969) (discusses the necessity of finding "physical interference" with school

judicial attention has focused on preventing interference with the "educational process,"[37] taking care that, despite the naturally distractive nature of some student expression, nonparticipating students will not be obstructed in the normal pursuit of their academic or extracurricular activities.[38]

A. *"Rights"*

The underlying rationale of *Tinker* is that the constitutional rights of students are generally coextensive with those of adults, *except* where there exists a "sufficient *educationally* oriented reason," arising from "circumstances attributable to the school environment," which "make[s] necessary more restrictive measures than generally permissible under the First Amendment . . . ."[39] For example, a student's right to free speech on campus stops short of the point where he interferes with school work or disrupts normal school activities.[40] "*This* is [the] substantive evil . . . school officials have a right to prevent."[41] The authority school

functions); Leahy, *"Flamboyant Protest," The First Amendment and the Boston Tea Party*, 36 BROOKLYN L. REV. 185, 203 (1970) (limits authority of school officials to prevention of "disorder on the campus and substantial interference with school work"); *The Supreme Court, 1968 Term, supra* note 35, at 160-61: "School authorities must be allowed to protect the primary educational function of teaching in the classroom and the secondary functions of school administration which necessitate maintenance of at least minimal order outside the classroom. Schools must also insure the physical safety of their students." For a discussion of the application of the "rights of others" exception in *Williams*, see note 57 *infra*.

[37]Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438, 442 (5th Cir. 1973); Sword v. Fox, 446 F.2d 1091, 1096-98 (4th Cir. 1971); Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 703 & n.9 (5th Cir. 1968); Veed v. Schwartzkopf, 353 F. Supp. 149, 152 (D. Neb. 1973); Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970).

[38]*See, e.g.*, Esteban v. Central Mo. State College, 415 F.2d 1077, 1089 (8th Cir. 1969); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 751, 753 (5th Cir. 1966).

[39]Antonelli v. Hammond, 308 F. Supp. 1329, 1336-37 (D. Mass. 1970) (emphasis added). *See* Tinker v. Des Moines, 393 U.S. 503, 506 (1969); Comment, *Freedom of Expression in Student Demonstrations*, 22 U. FLA. L. REV. 168, 174 (1969).

[40]Jones v. State Bd. of Educ., 397 U.S. 31, 33-34 (1970), *withdrawing cert. as improvidently granted to* 407 F.2d 834 (6th Cir. 1969) (Douglas, J., dissenting); Murray v. West Baton Rouge Parish School Bd., 472 F.2d 438, 442 (5th Cir. 1973): "Although a student does not discard his First Amendment rights upon entering the school house door, . . . the First Amendment does not give individual students the right to disrupt openly the educational process in order to press their grievances."; Ferrell v. Dallas Indep. School Dist., 392 F.2d 697, 703 (5th Cir. 1968); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966); Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1041-43 (1969): "It seems to me . . . that a university is not obliged to tolerate interference with 'any lawful mission, process, or function of the institution,' or, in a simpler phrase, that 'the normal activities of the University' are protected." For pre-*Tinker* cases to the same effect, *see* Van Alstyne, *supra* note 5, at 588 n.11.

[41]Leahy, *supra* note 36, at 203 (emphasis added). *See* Scoville v. Board of Educ., 286 F. Supp. 988, 991 (N.D. Ill. 1968).

officials have over the exercise of constitutional rights by students is limited, therefore, to insuring the normal functioning of the educational process.[42]

Under *Tinker*, then, a student does not forfeit his freedom of speech at the arbitrary discretion of a school official, or simply because his expression is school-related in that it arises on campus.[43] If the exercise of a constitutional right does not substantially interfere with school activities, a student is generally free to express his opinions just as if off-campus.[44] And the burden of establishing that disruptive interference is on the regulating authority (school officials).[45]

But where simple expression of opinion is transformed into *action* constituting a substantial physical interference with normal activities or with the lives of others, school authorities may take reasonable steps to restore order.[46] Even silent or symbolic protest may be restrained if substantially likely to generate *conduct* which might reasonably result in violence.[47] In the ab-

[42]Sullivan v. Houston Indep. School Dist., 307 F. Supp. 1328, 1340 (S.D. Tex. 1969): "The schools . . . should be able to control those activities which relate to or affect education."; Goldstein, *The Scope and Sources of School Board Authority to Regulate Student Conduct and Status: A Nonconstitutional Analysis*, 117 U. PA. L. REV. 373, 387 (1969): "[A] school board has that power, and only that power, over student conduct and status which is properly related to its function of educating the pupils in its charge."

[43]Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966): "[S]chool officials should be careful in their monitoring of student expression in circumstances in which such expression does not substantially interfere with the operation of the school."

[44]Wood v. Davison, 351 F. Supp. 543, 546 (N.D. Ga. 1972): "Although University administrators once had an almost unrestricted power to deal with students under the theory of in loco parentis, it is now clear that constitutional restraints on authority apply on campuses of state supported institutions with fully as much sanction as public streets and in public parks."; American Civil Liberties Union v. Radford College, 315 F. Supp. 893, 896 (W.D. Va. 1970); Antonelli v. Hammond, 308 F. Supp. 1329, 1336-37 (D. Mass. 1970) (noted there was no specific showing that the harm from controversial speech was greater on campus than on other public property, therefore no justification was shown for a stricter standard on campus); Wright, *supra* note 40, at 1042.

[45]Tinker v. Des Moines, 393 U.S. 503, 509 (1969); Vail v. Board of Educ., 354 F. Supp. 592, 597 (D.N.H. 1973); Hanover v. Northrup, 325 F. Supp. 170, 172 (D. Conn. 1970); Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970); Nahmod, *supra* note 5, at 148; *The Supreme Court, 1968 Term, supra* note 35, at 158; Comment, *Right of Free Speech*, 11 WM. & MARY L. REV. 275, 277 (1969).

[46]Farrell v. Joel, 437 F.2d 160 (2d Cir. 1971); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

[47]Melton v. Young, 465 F.2d 1332 (6th Cir. 1972) (Confederate flag patch worn in integrated school with tense racial situation); Guzick v. Drebus, 431 F.2d 594 (6th Cir. 1970); Hill v. Lewis, 323 F. Supp. 55 (E.D.N.C. 1971); Hernandez v. School Dist., 315 F. Supp. 289 (D. Colo. 1970). *But see* Tinker v. Des Moines, 393 U.S. 503, 510 (1969), where

sence of this kind of potential for disruption, however, the *content* of the protest alone cannot afford justification for restraining speech.[48] In effect, then, any intereference with the "rights of

Mr. Justice Fortas commented that "some [students] even wore the Iron Cross, traditionally a symbol of Nazism." Though certainly mistaken as to its symbolism, Fortas' words indicate he thought of the Iron Cross as antisemitic and potentially provocative, yet he apparently did *not* consider it an invasion of the rights of other (Jewish) students.

Note also that the impermissible conduct must arise with the *demonstrators* themselves, rather than with the audience:

> Even if the record showed . . . some threat of violence by hostile spectators, it would not constitute a proper basis for restraining [the demonstrators'] otherwise legal first amendment activity.

National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1014 n.4 (4th Cir. 1973), *citing* Gregory v. Chicago, 394 U.S. 111 (1969); Kunz v. New York, 340 U.S. 290 (1951); Terminiello v. Chicago, 337 U.S. 1 (1949); Collin v. Chicago Park Dist., 460 F.2d 746, 754-55 (7th Cir. 1972); Hurwitt v. City of Oakland, 247 F. Supp. 995, 1001 (N.D. Cal. 1965); Williams v. Wallace, 240 F. Supp. 100, 109 (M.D. Ala. 1965). *See also* Watson v. Memphis, 373 U.S. 526, 535 (1963): "[C]onstitutional rights may not be denied simply because of hostility to their assertion or exercise."; Pickings v. Bruce, 430 F.2d 595, 598 (8th Cir. 1970): "Such statements may well increase the tensions within the College and between the College and the community, but this fact cannot serve to restrict freedom of expression."; Comment, *supra* note 39, at 173: "In order to punish demonstrators the school must further show that the disruption was made by the demonstrators themselves rather than by others reacting to the protected expression. Justice Fortas emphasized the importance of this distinction [in *Tinker*] in his reference to [*Burnside* and *Blackwell*]."

[48]*See, e.g.*, National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973). In dealing here with the right of a political group to assemble in a public school auditorium for the purpose of communicating racist and anti-semitic views, the court quoted Communist Party v. Subversive Activities Control Bd., 367 U.S. 1, 137 (1961) (Black, J., dissenting), to this effect:

> I do not believe that it can be too often repeated that the freedoms of speech, press, petition and assembly guaranteed by the First Amendment must be accorded to the ideas we hate or sooner or later they will be denied to the ideas we cherish.

For further general comment on this point, *see* Healy v. James, 408 U.S. 169 (1972); Police Dep't v. Mosley, 408 U.S. 92, 95-96 (1972); Cohen v. California, 403 U.S. 15, 21, 24 (1971); Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971); Jones v. State Bd. of Educ., 397 U.S. 31, 33 (1970) (Douglas, J., dissenting): "The leaflet now censored may be ill-tempered and in bad taste. But we recognized in *Terminiello v. Chicago* . . . that even strongly abusive utterances or publications not merely polished and urbane pronouncements of dignified people, enjoy First Amendment protection."; Brandenburg v. Ohio, 395 U.S. 444, 456 (1969) (Douglas, J., concurring): "One's beliefs have long been thought to be sanctuaries which government could not invade."; Street v. New York, 394 U.S. 576, 592 (1969): "[A]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers."; Tinker v. Des Moines, 393 U.S. 503, 508-09 (1969); Cox v. Louisiana, 379 U.S. 536, 551 (1965): Persons may not "be punished merely for peacefully expressing unpopular views."; New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964); Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949); West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 632-34 (1943): "Symbolism is a primitive but effective way of communicat-

others" must generally arise from the *mode* or vehicle of communication, rather than the *message* sought to be communicated.[49]

Thus the *Tinker* guideline for student expression is really an adaptation to the school environment of the traditional standard for free speech, maintaining the essential distinction between

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ing *ideas*." (emphasis added); Goguen v. Smith, 471 F.2d 88, 98, 103 (1st Cir. 1972): Government may not "subject individuals to punishment for feelings and words—clearly protected First Amendment activities . . . ."; Russo v. Central School Dist., 469 F.2d 623, 633-34 (2d Cir. 1972); Shanley v. Northeast School Dist., 462 F.2d 960, 970, 971 (5th Cir. 1972); Kalemba v. Turk, 353 F. Supp. 1101, 1103 (N.D. Ohio 1973); Channing Club v. Board of Regents, 317 F. Supp. 688, 691 (N.D. Tex. 1970): "That the language is annoying or inconvenient is not the test. Agreement with the content or manner of expression is irrelevant; first amendment freedoms are not confined to views that are conventional, or thoughts indorsed [*sic*] by the majority."; Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970): A "restriction . . . reasonably related to the educational process" is permissible. "But to tell a student what thoughts he may communicate is another matter."; Buckley v. Meng, 35 Misc. 2d 467, 23 N.Y.S.2d 924 (Sup. Ct. 1962); Wright, *supra* note 40, at 1043, 1051-52.

Banks v. Muncie Community Schools, 433 F.2d 292 (7th Cir. 1970) provides a good illustration of the general irrelevance of *content* with specific regard to symbols. There the court rejected plaintiffs' argument that *Tinker* "precludes a school from compelling minority pupils 'to endure [offensive] official symbols at a tax supported institution which they are compelled to attend.' " *Id.* at 298. As noted by expert testimony, this school's "official symbols [Confederate flag, "rebels," etc.] represented a system that enslaved [black students'] ancestors." *Id.* at 297. Yet the court held that, despite their offensive nature, "the adoption of symbols by the majority of the students is merely the exercise of their first amendment right of free speech and the state has not insinuated itself into *private* acts of discrimination." *Id.* at 298 (emphasis added).

Of course, this general rule is subject to traditional exceptions—defamation, obscenity, and "fighting words"—where expression *can* be restricted on the basis of content:

> The First Amendment protects the communication of *ideas*, not all communication. Incitement to illegal action, libel, obscenity, and "fighting words," while communicative, do not express *ideas* and do not merit First Amendment protection.

Deeds v. State, 474 S.W.2d 718, 720 (Tex. Crim. App. 1972). Clearly the *Williams* protest was intended to express "ideas" within the ambit of constitutional protection.

[49]*See, e.g.*, Cohen v. California, 403 U.S. 15, 19 (1971): Governmental interference with a person's expression "can be justified, if at all, only as a valid regulation of the manner in which he exercised that freedom, not as a permissible prohibition on the substantive message it conveys."; Women Strike for Peace v. Morton, 472 F.2d 1273, 1380 (D.C. Cir. 1972): "It has always been thought that citizens have an *absolute* right to speak when their *mode* of communication in no way interferes with the rights of others." (emphasis added); Shanley v. Northeast School Dist., 462 F.2d 960, 971 n.8 (5th Cir. 1972): "The more active the methodology of expression, the more inherent its potential interference."; Kalemba v. Turk, 353 F. Supp. 1101, 1104 (N.D. Ohio 1973): "The even more surprising aspect of the case is that the greatest harm which could be shown to result from the wearing of the armbands at issue was that . . . [some] would experience emotional displeasure" in viewing the demonstrators. "Moreover, the displeasure shown is one which was not related to the wearing of armbands themselves but to the unpopular ideas symbolized by the armbands."

expression and *action* likely to cause disruption[50]— "a de facto

[50]T. EMERSON, TOWARD A GENERAL THEORY OF THE FIRST AMENDMENT 115 (1966): "The whole theory rests upon the general proposition that expression should be free and unrestrained, that the state may not seek to achieve other social objectives through control of expression, and that the attainment of such objectives can and must be secured through regulation of action." *See* Brandenburg v. Ohio, 395 U.S. 444, 445 (1969) (Douglas, J., concurring): It is the difference between "free speech" and "free speech plus." Expression "can be regulated only on the 'plus' or 'action' side of the protest."; Tinker v. Des Moines, 393 U.S. 503, 515 (1969) (White, J., concurring); Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966): "[T]he mere presence of . . . political symbols is not calculated to cause disturbance sufficient to warrant their exclusion from school premises unless there is some student *misconduct* involved." (emphasis added); Denno, *supra* note 36, at 55: "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 . . . until students 'pass the bounds of argument or persuasion and undertake incitement to riot' or similar overt *action*, they are protected." (emphasis added); Wright, *supra* note 40, at 1043: "Expression cannot be prohibited because of disagreement with or dislike for its *contents* . . . . Expression can be prohibited if it takes the form of *action* that materially and substantially interferes with the normal activities of the institution or invades the rights of others." (emphasis added).

On this same point, consider the absence of any discussion in *Williams* on the distinction between regulating expression and regulating conduct. Aside from *Tinker*, *Williams* cited only one other student speech case, Sword v. Fox, 446 F.2d 1091 (4th Cir. 1971), apparently for the proposition that a university need only meet a standard of *reasonableness* in governing demonstrations on its campus. Yet *Sword* specifically related the test of reasonableness to preserving order on campus, preventing interference with school activities, and maintaining normal administrative operations. The "rights of others" exception was not mentioned, and the decision even emphasized that the contested policy on demonstrations in school buildings (presumably sit-ins), unlike the regulation in *Williams*, did "not purport to pass on the *purpose* of the demonstrations" (*i.e.*, the message sought to be communicated) in determining its claim to protection. Sword v. Fox, *supra* at 1097 (emphasis added). (In this respect, note that the regulation *overturned* in *Tinker* also "was directed against 'the principle of the demonstration' itself," since "[s]chool authorities simply felt that 'the schools are no place for demonstrations' . . . ." 393 U.S. at 509 n.3).

In effect, then, the *Williams* court failed to acknowledge that the *content* of student dissent cannot be regulated by a standard of mere reasonableness. (See the discussion in note 53 *infra* on "clear and present danger.") A reasonableness test can be applied only with respect to conduct accompanying the dissent or substantially likely to be incited by the views to be expressed. (See the cases cited in note 47 *supra*.) This distinction has been summarized as follows:

> The extent to which expression may be restricted varies somewhat, depending on whether the limitation sought is to be placed on the expression itself (meaning *content*) or on *conduct* which is incidental to the expression (meaning time, place, manner and duration).
>
> The standard devised for direct regulation of *expression* . . . provides that the exercise of the expression sought to be limited must interfere to a *substantial and material* degree with [normal school activities or the rights of others].
>
> The standard devised for regulation of *conduct* [and] which inciden-

physical interference with the function of the schools . . . ."[51] Thus, as characterized by one commentator:

> The Supreme Court, in *Tinker*, continues the application of basic principles laid down in *Dennis v. United States* and *Cantwell v. Connecticut* where it is apparent that for speech, symbolic or verbal, to be the proper subject of state abridgment, there must not only be some "substantial state interest" at stake, but such speech (or conduct amounting to speech) must inevitably lead to *acts* adverse to the state interest sought to be protected . . . .
>
> . . . A "silent, passive expression of opinion, unaccompanied by any disorder or disturbance" will not be enough to justify prohibition.[52]

Tinker may therefore be viewed as merely "a school-related version of the . . . 'clear and present danger' rule," where speech with an inevitable tendency to produce action constituting immi-

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tally limits speech . . . provides that *reasonable* restrictions . . . are recognized . . . .

Channing Club v. Board of Regents, 317 F. Supp. 688, 691 (N.D. Tex. 1970) (emphasis added) (cites *Tinker, Blackwell,* and *Burnside*). *Channing* went on to comment that the restriction there prohibiting distribution of a student-published newspaper on campus was constitutionally invalid as "a direct limitation by the State on the content of the expression, rather than an incidental restriction of time, place and manner of distribution." *Id.* Wyoming school officials likewise framed their decision in terms of the hostile *content* of the *Williams* protest. In upholding their action, the Tenth Circuit repeated this emphasis on the "hostile expression" symbolized by the armbands, and chose to "sustain the Trustees' decision . . . as a *reasonable* regulation of expression under the limited circumstances involved . . . ." 468 F.2d at 1083-84 (emphasis added). Unlike *Sword*, therefore, the *Williams* court did rely on the *purpose* of the expression, yet phrased its opinion as if it were merely *following Sword* in regulating the time and place for the expression.

In summary, *Tinker* established that wearing an armband as a symbol of one's opinion is "closely akin to 'pure speech.' " 393 U.S. at 505. It is therefore subject to restriction only under the constitutional standard for regulating "pure speech." This standard recognizes the need for the state, under a test of reasonableness, to serve an "impartial traffic function" in minimizing the interference of the expression with normal school activities. Nahmod, *Beyond Tinker: The High School as an Educational Public Forum*, 5 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 278, 294 (1970). Mere reasonableness, however, cannot be used as the standard for evaluating the purpose or content of the expression. For that end, the views expressed must be shown to "interfere in a '*material and substantial*' way with the administration of school activity . . . or with the rights of other students." Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973) (emphasis added). For the most recent comment on this point by the Supreme Court, *see* Papish v. University of Mo. Curators, 410 U.S. 667, 670 (1973): "The mere dissemination of ideas—no matter how offensive to good taste—on a state university campus may not be shut off in the name alone of 'conventions of decency.' " Here the "petitioner was dismissed because of the disapproved *content* of the newspaper rather than the time, place, or manner of its distribution."

[51]Denno, *supra* note 36, at 47 (emphasis added).

[52]Comment, *supra* note 45, at 276-77 (emphasis added) (footnotes omitted), *quoting* Tinker v. Des Moines, 393 U.S. 503, 508 (1969).

nent danger of " 'material and substantial disruption' of the operation of the school" is the evil sought to be avoided.[53]

It would seem to follow, then, that the University of Wyoming may restrict silent protest of the type in *Williams* only where the expression will give rise to that kind of action school officials have authority to prevent. Yet the *Williams* panel specifically stated, "[w]e do not base our holding on the presence of any *violence* or disruption. There was no showing or finding to that effect . . . ."[54] Instead the court pointed to the need for protecting "against invasion of the rights of others by avoiding a hostile expression to them . . . ."[55] The question necessarily arises, then, whether others have a right to avoid "hostile expression," including the expression of opinion on their religious beliefs.[56]

Interestingly, *Williams* cited no case of any kind where silent, symbolic expression, in the absence of violence or disruptive potential, has been held to violate the rights of others.[57] Indeed,

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[53]Abbott, *The Student Press: Some Second Thoughts*, 16 WAYNE L. REV. 989, 992-93 (1970). An earlier article by the same author defined the "clear and present danger" rule as follows:

> As originally stated, the test was "whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." Schenck v. United States, 249 U.S. 47, 52 (1919). The Supreme Court subsequently restated the test as follows: "In each case, [courts] must ask whether the gravity of the 'evil' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger." Dennis v. United States, 341 U.S. 494, 510 (1951).

Abbott, *The Student Press: Some First Impressions*, 16 WAYNE L. REV. 1, 19-20 n.72 (1970). For more recent comment on the test, *see* Brandenburg v. Ohio, 395 U.S. 444 (1969).

See also National Socialist White People's Party v. Ringers, 473 F.2d 1010 (4th Cir. 1973); Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971); Scoville v. Board of Educ., 425 F.2d 10, 13 (7th Cir. 1970); Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749, 754 (5th Cir. 1966) (cited with approval in *Tinker*); Sullivan v. Houston Indep. School Dist., 333 F. Supp. 1149, 1159 n.11 (S.D. Tex. 1971); Channing Club v. Board of Regents, 317 F. Supp. 688, 691 (N.D. Tex. 1970); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969); Hammond v. South Carolina State College, 272 F. Supp. 947, 950 (D.S.C. 1967) (cited with approval in *Tinker*); Divine, *A Note on Tinker*, 7 WAKE FOREST L. REV. 539 (1971); Leahy, *supra* note 36, at 203; Wright, *supra* note 40, at 1042; Comment, *supra* note 39, at 173.

[54]Williams v. Eaton, 468 F.2d 1079, 1084 (10th Cir. 1972) (emphasis added).

[55]*Id.*

[56]As previously stated, the burden is clearly on the state to provide authority for its position that an armband protest under the conditions in *Williams* would have violated the rights of those exposed to the demonstration. (See cases cited note 45 *supra*.)

[57]And a complete review of cases which have subsequently cited *Tinker* has revealed

none. Ironically, another case originating in Wyoming, Jergeson v. Board of Trustees, 476 P.2d 481 (Wyo. 1970), is one of the few to have interpreted the "rights of others" exception in somewhat similar fashion to the approach taken in *Williams*. There an article written for a high school newspaper by a class of journalism students expressed opinions critical of disciplinary measures taken by certain teachers. Rather than evaluating these student opinions on the basis of their effect on the educational functions of the school, the Wyoming Supreme Court held that they "collide[d] with the rights of others, namely the teachers" involved. *Id.* at 485.

In *Tinker*, however, it was held that school officials "must be able to show that [their] action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular [or hostile] viewpoint." 393 U.S. at 509. Moreover, the general interpretation of the *Tinker* standard runs strongly counter to the *Jergeson* analysis. *See, e.g.*, Healy v. James, 408 U.S. 169, 180 (1972); Pickering v. Board of Educ., 391 U.S. 563, 568 (1968): The "suggest[ion] that teachers [or students] may constitutionally be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest in connection with the operation of the public schools in which they work . . . has been unequivocally rejected . . . ." (citing *Wieman v. Updegraff, Shelton v. Tucker,* and *Keyishian v. Board of Regents*); Duke v. North Texas State Univ., 469 F.2d 829, 837 (5th Cir. 1972); Shanley v. Northeast Indep. School Dist., 462 F.2d 960, 970 n.10 (5th Cir. 1972); Scoville v. Board of Educ., 425 F.2d 10, 14 (7th Cir. 1970): The "editorial . . . reflects a disrespectful and tasteless attitude toward authority. Yet does that imputation . . . , without more, justify a 'forecast' of substantial disruption or material interference with the school policies or invade the rights of others? We think not. The reference undoubtedly offended and displeased the dean. But mere 'expressions of [the students'] feelings with which [school officials] do not wish to contend' is not the showing required by the *Tinker* test to justify expulsion."; Bright v. Isenbarger, 314 F. Supp. 1382, 1391 (N.D. Ind. 1970); Aguirre v. Tahoka Indep. School Dist., 311 F. Supp. 664, 666 (N.D. Tex. 1970) (wearing brown armbands in support of those who advocate certain changes in educational policies and practices held not "disruptive of normal educational functions"); Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969): "This lawsuit arises at a time when many in the educational community oppose the tactics of the young in securing a political voice. It would be both incongruous and dangerous for this court to hold that students who wish to express their views on matters intimately related to them . . . may be precluded from doing so by that same adult community."; Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967) (expulsion of student editor for criticizing state officials overturned) (cited with approval in *Tinker*); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967) (cited with approval in *Tinker*); Nahmod, *supra* note 50, at 287: A "disrespect" test might chill legitimate expression. "An accusation that a principal has 'racist views and attitudes' . . . might also serve . . . a useful, though controversial, function in the high school. This suggests that a distinction in terms of educational function between personal attacks against school personnel and other protest against personnel [*e.g.*, against state officials, as in *Dickey, supra*] is not tenable for first amendment purposes."; Wright, *supra* note 40, at 1057: "[S]peech cannot be punishable on campus simply because it is vigorous or uncomplimentary. . . . [T]he first amendment did not enact Mrs. Emily Post's book of etiquette."; *Developments in the Law—Academic Freedom, supra* note 5, at 1130: "[R]esponsible student criticism of university officials is socially valuable, since in many instances the students are peculiarly expert in campus issues and possess a unique perspective on matters of school policy."

Consider also Evans v. State Bd. of Agric., 325 F. Supp. 1353 (D. Colo. 1971), which likewise involved a proposed protest (following a previous violent protest) by black students at Colorado State University during an athletic contest with Brigham Young. In upholding a prohibition on all demonstrations at scheduled athletic events, the court relied on the "rights of others" exception, not in the *Williams* sense of religious disparage-

Tinker itself stands for the freedom "to expose others to one's opinion."[58] In *Williams*, the opinion expressed was essentially ideological and secular in both origin and purpose, and touched on religion only incidentally.[59] As such, it constituted a manifestly political statement aimed at the implications and social consequences of Mormon racial policy. Consequently, it did not interfere with the "rights" of anyone, since there *is* no right of immunity from the political views of a minority, even though peripherally related to religious belief.[60] As noted above, when

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ment, but to emphasize the potential for physical disruption of school activities and the need for protecting the safety of others. *Id.* at 1360. *See* Barker v. Hardway, 283 F. Supp. 228 (S.D. W. Va. 1968) (student protest at football game for correction of grievances "far exceeded the bounds of a peaceful demonstration" and could therefore be restricted, but "sing-in" on college president's lawn, though conducted after midnight and intended to harass and annoy, held not punishable because it remained peaceful).

The net effect of this review is that there is scant authority, if any, for the unusual interpretation in *Williams* of the "rights of others" exception. As expressed in *Burnside*, "the presence of . . . [political symbols] did not hamper the school in carrying on its regular schedule of activities; nor would it seem likely that the simple wearing of buttons [or armbands] unaccompanied by improper conduct would ever do so." 363 F.2d at 748. To repeat the warning in *Blackwell*, there is a "fundamental requirement that school officials should be careful in their monitoring of student expression in circumstances in which such expression does not substantially interfere with the operation of the school." 363 F.2d at 754. (See the textual discussion of *Panarella v. Birenbaum* accompanying notes 99-117 *infra*, and refer again to the distinction between regulating content and conduct, note 48 *supra*.)

[58]Nahmod, *supra* note 50, at 292 n.58. As observed by another authority: "The *Tinker* Court thought that the first amendment protects a learning process in state schools which is open, vigorous, disputatious, disturbing—a robust dialetic in which error is combatted with reason, not fiat." *The Supreme Court, 1968 Term, supra* note 35, at 159.

[59]In other words, the purpose of the demonstration was to protest racial discrimination, rather than to engage in religious bigotry. (Refer to textual discussion accompanying notes 87-93 *infra*.) *See* Todd v. Rochester, 41 Mich. App. 320, 200 N.W.2d 90 (1972), where a novel (Kurt Vonnegut's *Slaughterhouse Five*) used in a public school curriculum made only *incidental* or ancillary reference to religious matters for essentially literary reasons, and therefore did not constitute establishment of religion.

Consider also the comment of Mr. Justice Goldberg in *School District of Abington Township v. Schempp* to the effect that "many of our legal, political and personal values derive historically from religious teachings." 374 U.S. 203, 306 (1963) (concurring opinion). If one accepts the practical truth of this statement, the general relegation of blacks to second-class status in American society can be viewed as deriving in some small measure from the racial policy of the Mormon Church, at least in areas like Wyoming where Mormon influence is strongly felt. When viewed from this perspective, it is easier to comprehend both the origin and intensity of the black athletes' feelings on this issue and the reason why a religous group was chosen as the object of the protest.

[60]See the textual discussion of religious criticism by private individuals accompanying notes 81-95 *infra*. *Cf.* Tinker v. Des Moines, 393 U.S. 503, 508 (1969); *The Supreme Court, 1968 Term, supra* note 35, at 156: "Because the student's message was political, their conduct was peculiarly deserving of protection against the unwarranted interference of public officials."

school authorities are dealing with noneducational interests, only those which could also be legally protected off-campus should be held to have that substantial and material gravity needed to invoke the protection of the "rights of others" exception.

This is especially true where, as in *Williams*, there was a valid and logically connected reason for protesting (at the B.Y.U. game) and the vehicle (armband) of communication chosen was relatively unobtrusive and unprovocative.[61] From the viewpoint of those who proposed to conduct the protest, it was adequately provoked, calculated to draw mass attention to a legitimately felt grievance, and served a "useful, though controversial, function."[62] In short, it was an attempt "to express their views on matters intimately related to them, through traditionally accepted nondisruptive modes of communication . . . ."[63]

B. *"Others"*

In *Tinker* and its foundational predecessors, *Burnside* and *Blackwell*, the audience affected consisted almost exclusively of *school children*, and the concern of the courts in each case was directed toward their educational and physical well-being. In effect, *Tinker* can be viewed as having established a "variable free speech" standard for expression on campus.[64] For that reason the proper application of the *Tinker* rule in any given situation is necessarily related to the age level of the particular audience exposed to the expression.

Professor Charles Alan Wright addressed this point in a recent article, where he noted:

> I find no . . . reason to believe that the rules applicable to high

[61]Tinker v. Des Moines, 393 U.S. 503, 508 (1969): The *Tinker* armband protest involved "a silent, passive expression of opinion, unaccompanied by any disorder or disturbance on the part of petitioners."; Melton v. Young, 465 F.2d 1332, 1337 (6th Cir. 1972) (Miller, J., dissenting): "The nature of the 'symbolism' . . . is of significance. . . ."; Butts v. Dallas Indep. School Dist., 436 F.2d 728, 731 (5th Cir. 1971): "The boy who came to school flaunting his Nazi symbols was also, of course, communicating his ideas in his own fashion. However, the black armbands were more adult, more rational adornments."; Watson v. Thompson, 321 F. Supp. 394, 397 (E.D. Tex. 1971): "[T]he wearing of 'freedom buttons' is not significantly different from the wearing of a black armband. Hence, it is also closely akin to pure speech; and thus neither is, in and of itself, conceivably classifiable as conduct."; Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969).

[62]Nahmod, *supra* note 50, at 287.

[63]Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969). The essence of freedom of speech is the right to express views on issues which directly affect oneself.

[64]*Cf.* Ginsberg v. New York, 390 U.S. 629, 635 & n.4, 638-40 (1968), where the concept of "variable obscenity" was adopted by the Supreme Court.

> schools can be indiscriminately transferred to institutions of higher learning . . . . The average university student is more than 21 years old and is surely an adult. The average high school student is in his mid-teens, and we have been authoritatively taught that even in the area of free expression important consequences can be made to "depend upon whether the citizen is an adult or a minor."[65]

Another authority has emphasized that the permissible scope of student first amendment activity is dependent not upon the age of the person claiming the right to free speech, but upon the age of those being *protected* from the expression.[66] Thus, the older the students in the audience, the weaker the state interest in protecting them from questionable speech.[67]

In summary, there is compelling authority for the proposition that, as in *Ginsberg v. New York*,[68] the more mature the audience, the greater should be the tolerance for controversial expression. The audience being protected in *Williams* (presumably the football crowd) consisted of a general cross section of the public rather than school children alone, and taken as a whole its collective sensibility must be held more resilient than those of the

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[65]Wright, *supra* note 40, at 1052-53 (footnotes omitted), *quoting* Ginsberg v. New York, 390 U.S. 629, 636 (1968). For the statistical information on student age, Wright relied on Soglin v. Kauffman, 295 F. Supp. 978, 988 (W.D. Wis. 1968), *citing* U.S. BUREAU OF THE CENSUS, DEPARTMENT OF COMMERCE, CURRENT POPULATION REPORTS, SERIES P-20, No. 110, POPULATION CHARACTERISTICS 12 (1961). *See* James v. Board of Educ., 461 F.2d 566, 574 (2d Cir. 1972): An important basis of distinction here was that the students were "more mature than those junior high school students in *Tinker*."; Scoville v. Board of Educ., 425 F.2d 10, 13 n.5 (7th Cir. 1970); Schwartz v. Schuker, 298 F. Supp. 238, 242 (E.D.N.Y. 1969): The rights of high school students are more restricted than those of college students because "the former [are] in a much more adolescent and immature stage of life and less able to screen fact from propaganda."; Abbott, *supra* note 53, at 993; Nahmod, *supra* note 5, at 147-48: "[E]lementary school students are much more easily distracted and less able to fend for themselves intellectually than high school students."; *The Supreme Court, 1968 Term, supra* note 35, at 160 n.34: "The state's special interest in the education of children justifies stricter regulation of conduct in public schools than in an adult education class . . . [since] children are more easily distracted."

[66]*The Supreme Court, 1968 Term, supra* note 35, at 157. *See also* Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973) (court may consider "the age or maturity of those to whom [expression] is addressed").

[67]*See* Keefe v. Geanakos, 418 F.2d 359, 361 (1st Cir. 1969): "Hence the question in this case is whether a teacher may, for demonstrated educational purposes, quote a 'dirty' word currently used in order to give special offense, or whether the shock is too great for high school seniors to stand. If the answer were that the students must be protected from such exposure, we would fear for their future."; Webb v. Lake Mills Community School Dist., 344 F. Supp. 791, 799 (N.D. Iowa 1972): "The state interest in limiting the discretion of teachers grows stronger . . . as the age of the students decreases . . . ."; *The Supreme Court, 1968 Term, supra* note 35, at 157: "[T]he Court has recognized a greater state interest in protecting the young from harm than in protecting adults . . . ."

[68]390 U.S. 629 (1968).

children affected in *Tinker*.[69] To overlook this distinction is to misinterpret the precedential value of the "rights of others" exception.

C. Tinker *Variables*

Enough has been said to suggest the potential for abuse inherent to the uncritical application of the *Tinker* rule, without regard to the circumstances or the age of those affected. What is needed, then, is an evenhanded analytical approach to *Tinker*, one which isolates the underlying reasons for establishing a flexible standard for campus expression, and then determines their applicability in each individual case.

The *Tinker* situation involved a number of *variables* which might be viewed as the circumstantial background for the rule enunciated there. For example, the protest occurred (1) on school grounds, (2) during normal school hours, and (3) carried over into the classroom itself where it exposed (4) an audience of high school students to whatever (5) distractive or disruptive force it possessed. In effect, these variables encompass those things which lend themselves to disruption of the normal work of the school. For this reason, they serve as guidelines for the proper application of the *Tinker* standard.

An analysis of *Williams* with these factors in mind reveals that the protest there was scheduled to occur during the weekend when intereference with normal academic activities would be impossible. In addition, it was to take place in a nonacademic setting, outside the classroom and open to the general public, where there was less reason to fear any potential disruptive effect.[70] Finally, it was to be entirely passive, and those who were

[69]As for the potential argument that the protest was forced upon a "captive audience," see Cohen v. California, 403 U.S. 15, 21 (1971): "[M]uch has been made of the claim that Cohen's distasteful mode of expression was thrust upon unwilling or unsuspecting viewers, and that the State might therefore legitimately act as it did in order to protect the sensitive from otherwise unavoidable exposure to appellant's crude form of protest . . . . Yet this Court has consistently stressed that 'we are often "captives" outside the sanctuary of the home and subject to objectionable speech.' "; Street v. New York, 394 U.S. 576, 592 (1969): "Again, such a conviction could not be sustained on the ground that appellant's words were likely to shock passers-by. . . . [A]ny shock effect of appellant's speech must be attributed to the content of the ideas expressed. It is firmly settled that under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers." *Cf.* Keefe v. Geanakos, 418 F.2d 359, 361-62 (1st Cir. 1969); Kalemba v. Turk, 353 F. Supp. 1101, 1104 (N.D. Ohio 1973).

[70]*Cf.* Nahmod, *supra* note 5, at 147: "It may be argued . . . that standards for free

to be exposed to it were primarily adults. It would seem, then, that the *Williams* protest would have involved none of the factors critical to restriction of speech under the *Tinker* standard, other than the fact that it was to have taken place on school property.[71] Since the primary reasons for regulating expression on school property do not obtain during after-class hours,[72] it is difficult to understand why the *Williams* court chose to accept such a restrictive application of the *Tinker* rule.[73]

In effect, *Williams* may have interposed the rationale of *Tinker* without carefully examining the limitations and complexities that determine its applicability. Clearly, *Tinker* represents a step beyond in loco parentis,[74] but it nevertheless stands for the authority of school officials to restrict expression by students in given situations. In order to guard against abuse of this restrictive authority, it is essential that the criteria for its exercise be precisely defined. *Tinker* sets up a standard that allows for these procedural safeguards. Under this standard "the first amendment applies with full vigor on the campus,"[75] but it cannot be "indiscriminately transferred"[76] to campus situations. Instead it must be "applied in light of the special characteristics of the school environment."[77] These special characteristics (or variables) demand what amounts to a "sliding-scale approach" to administrative restriction of campus speech, where more latitude is allowed with (1) peaceful, unobstructive protests, (2) in nona-

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speech . . . should be less rigorous outside of the classroom, because there is no direct interference with the close-knit and disciplined teacher-student relationship which is required in the classroom."

[71]And even here it was on a college rather than a high school campus.

[72]*See The Supreme Court, 1968 Term, supra* note 35, at 160 n.34. *See generally* Annot., 79 A.L.R.2d 1148 (1961).

[73]As in Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970), "there has been no showing that the harm from . . . [controversial speech] in a college setting is so much greater than in the public forum that it outweighs the danger to free expression inherent in" adopting a more restrictive rule for campus expression.

[74]*See* Beaney, *Students, Higher Education, and the Law*, 45 DENVER L.J. 511, 513-17 (1968); Van Alstyne, *supra* note 5, at 590, 591 n.22, *citing* Buttny v. Smiley, 281 F. Supp. 280, 286 (D. Colo. 1968): "We agree with the students that the doctrine of 'In Loco Parentis' is no longer tenable in a university community."; Note, *The Emerging Law of Student Rights*, 23 ARK. L. REV. 619, 632 (1970).

[75]Wright, *supra* note 40, at 1042. *See* Healy v. James, 408 U.S. 169, 180 (1972): "Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large."

[76]Wright, *supra* note 40, at 1038.

[77]Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

cademic settings, (3) during nonschool hours, (4) at the college level, and so forth.[78] This approach allows the specific circumstances of each case to determine the degree of restriction called for, rather than leaving it to the debilitating uncertainty of arbitrary discretion.[79] It likewise avoids an unduly expansive and obscurative construction of the "rights of others" exception in situations where reflexive, uncritical adherence to it would operate only to circumvent the spirit and logic of *Tinker*.[80] Otherwise the *Tinker* standard for campus expression may serve all too readily as a tool for the dilution of the first amendment rights of students.

D. *Religious Criticism by Private Individuals*

While the planned protest in *Williams* would not have interfered with the educational "rights of others" (or with normal school activities), it might still be argued that Mormon fans at the game had a right "to be secure and to be let alone"[81] in their religious beliefs. It is clear, however, that there is no such right:

> [T]he state has no legitimate interest in protecting any or all religions from views distasteful to them which is sufficient to justify prior restraints upon the expression of those views. It is not the business of government in our nation to suppress real or imagined attacks upon a particular religious doctrine, whether they appear in publications, speeches, or motion pictures.[82]

This opinion (along with those cited in the note) stands for a first amendment "right to speak" on religious matters, even though the protected expression may not always be supportive of religious doctrine.[83]

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[78]And as observed above, the "special characteristics" which permit restriction of speech in some campus situations are simply not present in *Williams*.

[79]*Cf.* Board of Regents v. Roth, 408 U.S. 564, 582 (1972) (Douglas, J., dissenting): "When a violation of First Amendment rights is alleged, the reasons for [restriction] must be examined to see if the reasons given are only a cloak for activity or attitudes protected by the Constitution."

[80]The inherent ambiguity in the term "rights of others" brings to mind the "familiar dangers to first amendment freedoms often associated with vague statutes." Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 808 (2d Cir. 1971).

[81]Tinker v. Des Moines, 393 U.S. 503, 508 (1969). The district court in *Williams* stated it this way: "Such protest would have been further violative of . . . Article 21, Section 25 of the Wyoming Constitution which guarantees perfect toleration of religious sentiment, and provides that no inhabitant of the State of Wyoming shall ever be molested in person or property on account of his or her mode of worship . . . ." 333 F. Supp. 107, 113-14 (D. Wyo. 1971).

[82]Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 505 (1951). *See* Kunz v. New York, 340 U.S. 290 (1951); Cantwell v. Connecticut, 310 U.S. 296, 308 (1940): "Equally obvious is it that a State may not unduly suppress free communication of views, religious or other, under the guise of conserving desirable conditions."

[83]Indeed, many modern denominations are themselves the end result of religious protest.

Under *Beauharnais v. Illinois*,[84] however, where the publication of one's private views involves expression in the nature of "group libel," the result might be different, for libel is one of several classes of speech which are of "slight social value as a step to truth."[85] So libelous utterances are not a protected form of free speech, and therefore may be restricted upon a showing of something less than a clear and present danger.[86]

In determining whether the *Williams* protest would have involved "group libel," one need only again refer to the circumstances under which it would have been conducted and the character of its expression. *Beauharnais* involved speech which was unprovoked, served no useful function, and was calculated to offend. The *Williams* protest, on the other hand, was provoked by relegation to inferior status, had social value for political purposes, and was designed to symbolize opposition to racial discrimination rather than simply to disseminate malicious and gratuitous invective in the form of religious profanation.[87]

In short, it was to be a "silent, passive expression of opinion"[88] on a policy which classifies people on racial grounds, and

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[84]343 U.S. 250 (1952).

[85]Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942).

[86]Beauharnais v. Illinois, 343 U.S. 250, 266 (1952). But note the dissent of Mr. Justice Black: "Every expansion of the law of criminal libel so as to punish discussions of matters of public concern means a corresponding invasion of the area dedicated to free expression by the First Amendment." *Id.* at 272.

[87]It was intended merely as a passive and rational means of dramatizing the agreement of the athletes with other black students on campus, all of whom were protesting what they perceived as *their* disparagement by Mormons. Moreover, *Beauharnais* is limited to libel itself, not mere hostile protest. *See* Kalemba v. Turk, 353 F. Supp. 1101 (N.D. Ohio 1973): "Defendants urge the Court to carve out a new exception under the First Amendment for expressions which are derogatory to a particular race [or religion] on the grounds that this country has adopted a policy of racial equality. . . . However, the Court rejects the proposition of limiting free speech to those who will support the national policy, however important. Indeed, the result of such a limitation would be the curtailment of all speech related to black power and superiority as well as, in this case, the advocates of white superiority." *Id.* at 1103-04. "While defendants cite Beauharnais v. Illinois . . . in support of their contention that racially degrading speech is not protected, the Court disagrees and considers that case as one limited to libelous statements, a situation not presented by this case" which involved the wearing of swastika armbands. *Id.* at 1104 n.1.

[88]Tinker v. Des Moines, 393 U.S. 503, 508 (1969). Contrast this with the vitriolic attacks protected in Cantwell v. Connecticut, 310 U.S. 296 (1940); Terminiello v. Chicago, 337 U.S. 1 (1949); and Kunz v. New York, 340 U.S. 290, 296 (1951): "Kunz preached . . . that 'The Catholic Church makes merchandise out of souls,' that Catholicism is 'a religion of the devil,' and that the Pope is 'the anti-Christ.' The Jews he denounced as 'Christ-killers,' and he said of them, 'All the garbage that didn't believe in Christ should have been burnt in the incinerators. It's a shame they all weren't.'"

therefore could most accurately be viewed as a traditional civil rights protest.[89] It would have taken on *religious* implications, but only because the discrimination being protested was religiously sanctioned. It might also have proved unsettling to many in the crowd, but the "essential feature" of any civil rights demonstration is an "appeal to public opinion."[90] Whatever offensive or controversial effect it may have had on Mormons in the stands would have been incidental to a constitutionally protected privilege to speak on the issue involved.[91] While there is a collateral right to prevent *coercion*[92] with regard to the conduct of a church's religious activities (or the religious beliefs of individuals), there is no right to forestall private criticism in a secular forum.[93]

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[89]Indeed, it was not unlike the protests in *Burnside* and *Blackwell*, which occurred near Philadelphia, Mississippi, where three civil rights workers—Andrew Goodman, Michael Schwerner, and James Chaney—had previously been killed.

[90]Kalven, *The Concept of the Public Forum: Cox v. Louisiana*, 1965 SUP. CT. REV. 1, 11, *citing* Garner v. Louisiana, 368 U.S. 157, 201 (1961) (Harlan, J., concurring):

> There was more to the conduct of those petitioners than a bare desire to remain at the "white" lunch counter . . . . We would surely have to be blind not to recognize that petitioners were sitting at these counters . . . to demonstrate that their race was being segregated in dining facilities in this part of the country.
>
> Such a demonstration . . . is as much a part of the "free trade of ideas" . . . as is verbal expression, more commonly thought of as "speech." It, like speech, appeals to good sense and to "the power of reason as applied through public discussion" . . . just as much as, if not more than, a public oration delivered from a soapbox at a street corner.

[91]Although some Mormon football fans might have been offended by a protest of this kind, that could well be viewed as the price of free speech in a free society (or the price of racial discrimination). Indeed, those who supported racial discrimination must have been equally offended by the civil rights protests of the Sixties.

[92]Coercion in the sense of compelling others to violate their religious scruples. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); United States v. Seeger, 380 U.S. 163 (1965); West Virginia Bd. of Educ. v. Barnette, 319 U.S. 624 (1943); Cantwell v. Connecticut, 310 U.S. 296 (1940). *But see* Reynolds v. United States, 98 U.S. 145 (1878), where the practice of polygamy by Mormons was held violative of an overriding public interest.

[93]This might be analogized to Organization for a Better Austin v. Keefe, 402 U.S. 415, 419-20 (1971), where it was held that even though a person's right of privacy may sometimes enable him "to stop the flow of information into his own household," there is no comparable right to halt the communication of information about him to the general public. *Cf.* Rowan v. United States Post Office Dept., 397 U.S. 728 (1970).

Note also the decision in Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 7, 434 P.2d 982, 64 Cal. Rptr. 430 (1967), which denied the contention of a public transit authority that political advertisements on its buses would make a "captive audience" of its passengers. The court went on to comment that "a passenger on a public conveyance does not possess the same rights of privacy as he does in his home; his rights are subject to reasonable limitations in relation to the *rights of others*" to express their views. 434 P.2d at 988-89 n.3, 64 Cal. Rptr. at 436-37 n.3 (emphasis added). *Cf.* Public Utilities Comm'n v. Pollak, 343 U.S. 451, 464 (1952).

It seems clear, then, that the *Williams* protest could not have been prohibited merely because the university hoped to protect Mormon spectators from "hostile expression." As explained in *Tinker* itself:

> In order for the State in the person of school officials to justify prohibition of a particular expression of opinion, it must be able to show that its action was caused by something more than a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint . . . .
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> . . . .
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> . . . [In the present case] the action of the school authorities appears to have been based upon an urgent wish to avoid the controversy which might result from [disputatious] expression . . . .
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> . . . [There was no] specific showing of constitutionally valid reasons to regulate [student] speech . . . . [S]chool officials cannot suppress "expressions of feelings with which they do not wish to contend."[94]

In effect, this serves to restate the requirement that school officials must be able to forecast invasion of a *legally protected* right before exercising their authority under the "rights of others" exception. To allow the mere elicitation of "discomfort and unpleasantness" from a civil rights protest to serve as a "constitutionally valid reason" for suppressing freedom of speech is to overlook the constitutional history of the first amendment[95] and seriously mis-

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[94]393 U.S. at 509, 510, 511, *quoting* Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

[95]*See, e.g.*, Terminiello v. Chicago, 337 U.S. 1 (1949) (cited with approval in *Tinker*). Note also the warning of Mr. Justice Douglas in Adderley v. Florida, 385 U.S. 39, 56 (1966) (dissenting opinion) (footnotes omitted):

> Today a trespass law is used to penalize people for exercising a constitutional right. Tomorrow a disorderly conduct statute, a breach of the peace statute, a vagrancy statute will be put to the same end. It is said that the sheriff did not make the arrests because of the views which petitioners espoused. That excuse is usually given, as we know from the many cases involving arrests of minority groups for breaches of the peace, unlawful assemblies, and parading without a permit. . . . [S]uch arrests are usually sought to be justified by some legitimate function of government. Yet by allowing these orderly and civilized protests against injustice to be suppressed, we only increase the forces of frustration which the conditions of second-class citizenship are generating amongst us.

See also Scoville v. Board of Educ., 425 F.2d 10, 14 n.7 (7th Cir. 1970): "Ill-considered suppression carries its own dangers. For example, in *Blackwell* . . . three students wore the challenged freedom buttons on Friday. They were taken to the principal who ordered the buttons removed. The three refused to do so and were suspended. On Monday 150 students wore the buttons."

construe the import of *Tinker*.

E. *"Representatives" of the State*

The heart of the *Williams* decision, however, seemed to be that the expression involved possessed "a greater capacity for evil"[96] in that the protesting athletes were "representatives" of a state university. And under the "rights of others" exception, the court suggested, views expressed in this representative capacity *may* be restricted, since there is a legal right to demand that school officials restrict "hostile expressions against religious beliefs of others by representatives of a state or its agencies."[97] Or, viewed from a different perspective, if a state university failed to prevent members of its football team from using a state-owned stadium as a forum in which to protest Mormon racial policy, it would be "facilitating" religious criticism through "state inaction," thereby involving the state impermissibly in what would otherwise be protected private expression.[98]

1. Freedom of the Press Analogy

It will be helpful in testing the merits of this argument to analogize it to student use of another state-owned forum—the university newspaper. In all probability the University of Wyoming newspaper *could* have criticized Mormon racial policy editorially or could have allowed an article or letter to be published which did so. A recent New York decision, *Panarella v. Birenbaum*,[99] provides a case in point. There a student newspaper at a state-operated college[100] published an article attacking the

[96]Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 502 (1952).

[97]468 F.2d at 1083.

[98]As previously noted (see textual discussion accompanying note 13 *supra*), the *Williams* court stated that it would be unnecessary to consider "state action" in deciding the case. However, some variation of that concept was clearly essential to the result reached, since expression which would have been permissible if purely private was restricted because those involved were held "representatives" of the state. *Cf.* Reitman v. Mulkey, 387 U.S. 369 (1967); Burton v. Wilmington Pkg. Auth., 365 U.S. 715 (1961).

[99]32 N.Y.2d 108, 296 N.E.2d 238, 343 N.Y.S.2d 333 (1973), 37 App. Div. 2d 987, 327 N.Y.S.2d 755 (1971), *rev'g* 60 Misc. 2d 95, 302 N.Y.S.2d 427 (Sup. Ct. 1969).

[100]As stated at the trial court level:

> The basic facts are not in dispute. Both schools are tax-supported institutions. Both publications display the *official seal* of the City University of New York; both have faculty members as advisors; both are funded in part by a mandatory fee collected from the students; both have office space and telephones on the campus; the official student handbook at both institutions promotes the publications.

302 N.Y.S.2d at 429 (emphasis added).

Catholic Church.[101] An action was then brought by a student and his father to compel school officials "to adopt and enforce regulations prohibiting derogatory and blasphemous attacks on religion in student publications."[102] The trial court sustained this petition, basing its decision on the admitted use of State property, facilities, and employees for what the court saw as an attack on religion: "A government that finances religion is no longer neutral. Similarly, a government that underwrites attacks on religion is no longer neutral."[103] The court then reconciled its finding with the *Tinker* standard:

> The recent case of Tinker v. Des Moines School District . . . is not at variance with these principles.
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> . . . .
>
> The petitioners herein have made a "showing of constitutionally valid reasons to regulate" the contents of these publications—they have shown that the strict neutrality required of government vis a vis religion has not been preserved. The published articles also "collid[ed] with the rights of others," that is, the petitioners' right to have the state refrain from attacking religion.[104]

The Appellate Division of the New York Supreme Court, however, subsequently overruled this interpretation, despite the involvement of government facilities:

> It has repeatedly been held that, once having established . . . a forum, the authorities may not then place limitations upon its use which infringe upon the [first amendment] rights of the students
> . . . .
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> . . . .
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> There is no showing herein . . . that publication of the matter sought to be suppressed constitutes a threat to the orderly functioning of these institutions.[105]

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[101]The case actually involved two student-written articles at separate schools. The one referred to in the text was entitled "The Catholic Church—Cancer of Society." 302 N.Y.S.2d at 428.

[102]*Id.*

[103]*Id.* at 431.

[104]*Id.* at 431-32. Note that this is almost precisely the ruling in *Williams*.

[105]37 App. Div. 2d 987, 988, 999, 327 N.Y.S.2d 755, 757, 758 (1971) (4-1 decision), *citing* Tinker v. Des Moines, 393 U.S. 503 (1969); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966); Trujillo v. Love, 322 F. Supp. 1266 (D. Colo. 1971); Korn v. Elkins, 317 F. Supp. 138 (D. Md. 1970); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970); Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097 (W.D. Wis. 1969); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967).

Upon further appeal, the New York Court of Appeals affirmed the order of the Appellate Division:

> Tax-supported colleges may provide financial assistance for a student newspaper publishing an occasional article attacking religious beliefs, so long as the nature of the attack is arguably within constitutionally protected publication. The colleges merely provided a neutral forum for debate, and did not evidence an intent to advance or destroy religious beliefs. Only if the colleges continued financial support to a newspaper systematically attacking religion over a period of time, without balance, might there be an attempt to "establish" a "secular religion."[106]

Panarella is apparently the only other reported post-*Tinker* decision to consider the precise issue of the use of state-owned facilities for student criticism of religious doctrine. Its implicit rejection of the lower court's application of the "rights of others" exception is therefore especially significant. Moreover, it indirectly emphasizes the logical contradiction of holding the passive, symbolic views represented by the *Williams* armband less worthy of constitutional protection than the rather vitriolic opinions expressed in the *Panarella* article, although each involved "student extracurricular expression"[107] through state-owned facilities. Surely student expression critical of religious policy is no more pervasive or affronting if communicated through an armband rather than a school newspaper. If this expression by one kind of school "representative" is protected, the state must provide a "constitutionally valid reason" for denying the same freedom to others.[108] Yet the reasons advanced in *Williams*, even viewed in

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[106]32 N.Y.2d 108, 112, 296 N.E.2d 238, 239, 343 N.Y.S.2d 333, 335 (1973) (6-1 decision).

[107]*Developments in the Law—Academic Freedom, supra* note 5, at 1129.

[108]And clearly the mere use of "state facilities" as a forum for expression cannot serve as a valid reason. *See, e.g.*, Korn v. Elkins, 317 F. Supp. 138, 143 (D. Md. 1970): "The fact that the University is involved in the financing of . . . [the school paper] does not permit its officials to apply a statute unconstitutionally."; Channing Club v. Board of Regents, 317 F. Supp. 688, 692 (N.D. Tex. 1970); Antonelli v. Hammond, 308 F. Supp. 1329, 1337 (D. Mass. 1970): "We are well beyond the belief that any manner of state regulation is permissible simply because it involves an activity which is a part of the university structure and is financed with funds controlled by the administration. The state is not necessarily the unrestrained master of what it creates and fosters." Thus, "the creation of the form does not give birth also to the power to mold its substance." For this reason, "there is no right to editorial control by administration officials flowing from the fact that . . . [the school paper] is college sponsored and state supported . . . ."; Dickey v. Alabama State Bd. of Educ., 273 F. Supp. 613 (M.D. Ala. 1967); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962); *Developments in the Law—Academic Freedom, supra* note 5, at 1129-30. *Cf.* Palacios v. Foltz, 441 F.2d 1196, 1198 (10th Cir. 1971): "The State of New Mexico's regulatory powers over Las Cruces Public School do not necessarily implicate the state with the student council's by-laws nor with the action by the 'principal's office' pursuant thereto."

light of the difference in circumstances, were nearly identical to those relied upon by the lower court in *Panarella*—and rejected by the appellate courts.[109]

In effect, then, there is no apparent constitutional basis for distinguishing between the student expression in *Williams* and *Panarella*.[110] Indeed, to allow students to communicate views critical of Mormon racial policy while "representing" a state school through their editorial positions on a school newspaper, yet deny this right to other students while similarly engaged in extracurricular activity, would suggest the kind of selective enforcement often held to constitute due process inconsistency.[111] For this reason, all forms of extracurricular speech must be analyzed under a single standard.

The applicable standard is apparent from the case law on student expression. The clear import of the decisions dealing with the use of school facilities for expressive purposes is that their utilization may not be restricted except in accord with "the guidelines of traditional first amendment theory":[112]

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[109]For example, the Appellate Division of the New York Supreme Court, in a 4-1 decision, declined to follow the argument of the one dissenting judge that freedom of speech "must give way to the right of other students to be free from ridicule about their religious beliefs." 37 App. Div. 2d 987, 989-90, 327 N.Y.2d 755, 759 (1971).

[110]As for the potential argument that the function of a student newspaper is to accommodate student expression, while that is not the function of a school stadium, see text accompanying notes 131-41 *infra*.

[111]*Cf.* Keefe v. Geanakos, 418 F.2d 359, 362-63 (1st Cir. 1969): "It is hard to think that any student could walk into the library and receive a book, but that his teacher could not subject the content to serious discussion in class. . . . Such inconsistency on the part of the school has been regarded as fatal."; Channing Club v. Board of Regents, 317 F. Supp. 688, 692 (N.D. Tex. 1970): "[N]umerous other publications, not banned, and sold from the same location as The Catalyst, contained language identical to that objected to here which does sustain the allegation of discrimination and denial of equal protection. There thus being no legal distinction between the types of publications, the State does not become privileged to ban a publication merely because it is edited and published by students."; American Civil Liberties Union v. Radford College, 315 F. Supp. 893, 896-97 (W.D. Va. 1970); Vought v. Van Buren Pub. Schools, 306 F. Supp. 1388, 1393-96 (E.D. Mich. 1969) (student's expulsion for possession of allegedly obscene literature on campus was held "rank inconsistency" and a denial of due process, since identical expletives were contained in other literature in the school library); Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962) (school regulation calling for substitution of personal discretion by administration officials held too indefinite).

[112]Abbott, *supra* note 53, at 993. As expressed in American Civil Liberties Union v. Radford College, 315 F. Supp. 893, 896 (W.D. Va. 1970):

> A perusal of these cases makes clear a recurring theme that once a public school makes an activity available to its students, faculty, or even the general public, it must operate the activity in accord with first amendment principles.

> The notion that the state can condition the grant of a privilege on the surrender of a constitutional right without compelling justification has been discredited by the Supreme Court in other areas, and by several lower federal courts in the context of student rights [and subsequently by *Tinker*]. With the removal of this obstacle to judicial relief, school regulations restricting student extracurricular speech and association will be subjected to the requirements of the first amendment.[113]

So a student does not retain his first amendment rights in some extracurricular activities, yet automatically forfeit them in others.[114] This is really the only defensible reading of *Tinker*, which specifically noted that a student's constitutional rights apply uniformly to *all* phases of school life:

> A student's rights . . . do not embrace merely the classroom hours. When he is in the cafeteria, or on the playing field, or on the campus during the authorized hours, he may express his opinions, even on controversial subjects . . . , if he does so without . . . colliding with the rights of others.[115]

It logically follows, then, that the state interest needed to restrict a student's constitutional rights (*i.e.*, protection of the rights of others) must *also* be applied uniformly. A comparison of *Williams* and *Panarella*, however, suggests only the lack of uniformity in this regard. If the state's interest in protecting the rights of others is somehow distinguishable in these two instances, school authorities must bear the burden of proving the "*material and substantial*"[116] nature of this distinction. And if they cannot sustain this burden, there is no "valid university interest"[117] by which they can legitimately restrict student expression.

2. Disavowal

A related argument for showing this "valid university interest" is that the *Williams* protest would necessarily have cast a negative "reflection" on the University of Wyoming, and through it perhaps even the State itself. More specifically stated, this

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[113]*Developments in the Law—Academic Freedom, supra* note 5, at 1129. *See* Jones v. State Bd. of Educ., 397 U.S. 31, 34 (1970) (Douglas, J., dissenting) (numerous authorities cited).

[114]*Cf.* Note, *Student Academic Freedom—"State Action" and Private Universities*, 44 TUL. L. REV. 184 (1969): "The decision of this case, resulting in a 'schizophrenic' student body, some of whom appear to have constitutionally protected rights while the others do not, seems peculiar in itself."

[115]393 U.S. 503, 512-13 (1969).

[116]*Id.*; Vail v. Board of Educ., 354 F. Supp. 592, 598 (D.N.H. 1973) (emphasis added).

[117]Channing Club v. Board of Regents, 315 F. Supp. 688, 691 (N.D. Tex. 1970).

contention arises from the fact that the athletes would have been wearing school uniforms while protesting, and thereby would have been "representing" the State in a unique and more apparent way.[118] It seems well established, however, that schools and other government agencies do not somehow become "advocates" of private opinions expressed on public property.[119] To hold other-

[118]*Cf.* Schacht v. United States, 398 U.S. 58, 62-63 (1970), where a statute which permitted the wearing of a military uniform in a theatrical production only "if the portrayal does not tend to discredit" the armed forces was held unconstitutional as a violation of free speech.

[119]In Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 7, 434 P.2d 982, 64 Cal. Rptr. 430 (1967), for example, this issue was discussed as follows:

> Defendants assert that the overriding consideration impelling them to adopt the present [restrictive] policy is the necessity to keep the Government outside the arena of partisan affairs and the acceptance of [antiwar] advertising . . . might give the impression that the district *endorses* the views of the advertiser . . . .
>
> These pragmatic hurdles are no more relevant to a public forum when it is a motor coach than they are to a public park or a school auditorium. The endorsement of an opinion expressed in an advertisement on a motor coach is no more attributable to the transit district than the view of a speaker in a public park is to the city administration or the tenets of an organization using school property for meetings is to the local school board . . . .
>
> Likewise, the defendants' apprehensions relating to the *content* of the messages they would be required to accept are no more significant than those involved in . . . the making of speeches in the parks and schools. In any event, the right to utilize a public forum for the expression of opinions and beliefs cannot be made to depend upon such ephemeral concerns.
>
> It will undoubtedly be true . . . that an occasional advertiser may post controversial messages which will offend some, perhaps a majority, in the community. . . . Annoyance and inconvenience, however, are a small price to pay for preservation of our most cherished right.
>
> Defendants' potential problem of "equal time" for conflicting views is a straw man. . . . [C]onstitutional standards are satisfied if all those who wish to exercise their right to state beliefs and opinions protected by the First Amendment are permitted to do so on an equal basis.

434 P.2d at 989-90, 64 Cal. Rptr. 437-38. (emphasis added).

Consider also Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962), where a regulation governing use of school facilities at a public college provided that programs there must be "determined to be compatible with the aims" of the school. In applying these regulations, the Dean of Administration stated that the *National Review* was "a political group presenting a distinct point of view of its own" and therefore the college could not allow its facilities "to serve as a forum for such political groups," since their viewpoint was "opposed by substantial parts of the public." The rationale offered in support of the regulation was that "academic institutions of a public character must avoid giving the appearance or creating the suspicion that they favor particular movements or groups over other groups opposed to their positions or their points of view." *Id.* at 468-69, 471, 230 N.Y.S.2d at 927, 930. In deciding the case, the court noted that the school's "motives are . . . to avoid identification with any minority position," but "as well-intentioned as these aims are, they evidence a temper of mind . . . incompatible with

wise would be to stifle minority opinion indirectly through a convenient rationalization of government restriction as being necessary to the public interest.

And even aside from the university's legal connection with the protest, it could also have neutralized any consequent "impression" of school-sanctioned hostility to Mormons through a timely public disavowal of any position on the views expressed.[120] In this way the university officials could have convincingly disas-

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the philosophy of the First Amendment." *Id.* at 473, 230 N.Y.S.2d at 932.

This same issue was raised in *National Socialist White People's Party v. Ringers*, where it was observed:

> The state action doctrine has never been thought to extend to cases where the streets, parks and public meeting places of a particular community are utilized for the exercise of first amendment rights . . . . No case suggests that in maintaining a street, park or public meeting place, a state espouses the views which may be there expressed. . . .
>
> The essential point here is not that there is insufficient state action, but simply that the state action doctrine is not applicable where a group seeks to exercise first amendment rights in a public forum [partially] dedicated to that purpose . . . .

473 F.2d 1010, 1016-17 (4th Cir. 1973) (footnote omitted).

> We are confident that if the high school auditorium is made available to all groups, the very diversity and complexity of the views expressed, taken in bulk, will cure any incidental official identification attendant upon the use of the building for the articulation of extreme or abusive speech. At least that is the principle on which we have staked our all.

Id. at 1018 (footnote omitted).

See Women Strike for Peace v. Morton, 472 F.2d 1273, 1280 (D.C. Cir. 1972): "If this right could be exercised only when government is willing to offer its co-sponsorship to the speaker, a system of free expression would be indistinguishable from a system of prior restraint."; Tate v. Board of Educ., 453 F.2d 975, 980, 982 (8th Cir. 1972): In protesting the playing of "Dixie" as the school song, plaintiffs urged that "the right to free speech does not give rise to the right to publicly insult or defame . . . ." Yet the court held "we cannot say that the . . . playing of the tune . . . officially sanctioned racial abuse."; Veed v. Schwartzkopf, 353 F. Supp. 149, 152 (D. Neb. 1973): The plaintiff argued "that in its program of supporting extracurricular speakers and a student newspaper the university assumes the role of advocate for the particular philosophy expressed . . . . The evidence is to the contrary," for no editorial control is exercised over these views. "Indeed, such control by the university would raise grave constitutional questions."; Panarella v. Birenbaum, 60 Misc. 2d 95, 302 N.Y.S. 2d 427 (Sup. Ct. 1969) (emphasis on display of the "school seal" and use of school facilities, allegedly resulting in placing "the imprimatur of the state" on the contested school expression, not followed by two appellate courts in considering same case); Stanton v. Board of Educ., 190 Misc. 1012, 76 N.Y.S.2d 559 (Sup. Ct. 1948) (board's refusal to adopt resolution denying use of school and grounds to Communists, Nazis, Fascists, or an organization that fosters racial or religious intolerance upheld).

[120] *See* Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 7: "Indeed, the [government transit] district is more insulated from implied endorsement since it can, and in the instant case does, require a *disclaimer* in the text of the advertisements submitted to it." 434 P.2d 982, 989, 64 Cal. Rptr. 430, 437. (emphasis added).

sociated the school from the content of the protest, while continuing to extend to the student athletes the full range of liberty traditionally associated with freedom of speech and the right to dissent.

With this alternative available, then, a game with Brigham Young University should have been viewed as a particularly logical and defensible occasion for publicizing dissenting views directly related to Mormon policy. And therefore the conflict in *Williams* between religious conviction and political conviction was an unavoidable aspect of the first amendment obligation of a university to serve as a public forum,[121] since that constitutional function entails an equal and impartial accommodation of expression by *all* students who choose to use school property in a peaceful, unobstructive manner to communicate legitimately felt dissent.[122]

Viewed in this light, the action of the school officials in *Williams* seems considerably less justified, since one indispensable prerequisite for government regulation of expression is that the restriction involved be "no greater than is *essential* to the furtherance" of the governmental interest.[123] Here a firm public

[121]Tinker v. Des Moines, 393 U.S. 503, 512-13 (1969); United States v. Gourley, 502 F.2d 785 (10th Cir. 1973) (right of civilians to enter "public areas" of Air Force Academy for purpose of exercising their first amendment rights outside football stadium upheld); Zucker v. Panitz, 299 F. Supp. 102, 104 (S.D.N.Y. 1969); Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967) (cited with approval in *Tinker*); Abbott, *supra* note 53, at 19: *Hammond* "indicated that a college campus is sufficiently analogous to the 'site of state government' which has been given constitutional protection for purposes of a demonstration by the Supreme Court, and is thus to be distinguished from *Adderley v. Florida*," which involved public property dedicated to a special use incompatible with the normal standard for free expression.; Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 953 (1963): "The most common form of governmental assistance to freedom of expression is the furnishing of facilities for communication. Traditionally streets, parks, commons and similar open public places have been used for meetings, parades and other forms of expression. Clearly there should be a right for any person or group to use such public property, subject only to restrictions of the traffic control type."; Kalven, *supra* note 90; Nahmod, *supra* note 50, at 293-300: "*Hammond v. South Carolina State College* indicates . . . that a college campus is to be treated as a first amendment forum for peaceful demonstrations." *Cf.* Amalgamated Food Employees Union v. Logan Valley Plaza, 391 U.S. 308 (1968); Wolin v. Port of N.Y. Auth., 392 F.2d 83 (2d Cir. 1968).

[122]Emerson, *supra* note 121, at 953: Once public property has been made available to the public, it "should be open to all on an equal basis; no differentiation based upon the *content* of the expression is permissible." (emphasis added).

[123]United States v. O'Brien, 391 U.S. 367, 377 (1968) (emphasis added). *See* Shelton v. Tucker, 364 U.S. 479, 488 (1960): "[E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle funda-

disavowal would have been a "less drastic alternative" by which the university could have remained neutral politically and religiously.[124] Since it is "incumbent upon . . . [the government] to demonstrate that *no* alternative forms of regulation would . . . [protect the government's position of neutrality] *without* infringing First Amendment rights,"[125] it would appear that the state interest advanced in *Williams* could have been more narrowly achieved.

3. University "Representation"

The University of Wyoming's argument might be analyzed further by applying its reasoning to a situation where one of its professors (as a contractual "representative" of the state) decides to wear an armband to his classroom (a publicly owned facility or forum) to protest Mormon racial policy. Under those circumstances it would seem considerably easier to establish a legal "connection" with the state. Yet even here the professor/representative in all likelihood would prevail on the basis of academic freedom.

This general issue was tested in the recent case of *James v. Board of Education of Central District No. 1*,[126] where it was recognized that "a high school teacher, despite the *influential position* he holds in the classroom, does not forefeit his right to

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mental personal liberties when the end can be more narrowly achieved. . . . [Restriction of speech] must be viewed in the light of less drastic means for achieving the same basic purpose."; Wallace v. Ford, 346 F. Supp. 156, 165 (E.D. Ark. 1972): "It should be emphasized . . . that any such restriction [of student expression] must not exceed that which is *absolutely necessary* to carry out [the school's] legitimate objectives." (emphasis added); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 7, 434 P.2d 982, 989, 64 Cal. Rptr. 430, 437 (1967): "In the realm of the First Amendment, no governmental agency is permitted to burn down the house to roast a pig."; Kalven, *"Uninhibited, Robust, and Wide-Open"—A Note on Free Speech and the Warren Court*, 67 MICH. L. REV. 289, 299 (1968): Where speech is regulated, "[i]t is not enough that the end be legitimate; the means must not be wasteful of first amendment values."

[124]Refer again to the quotation from *Panarella* accompanying note 106 *supra*, where it was observed: "The colleges merely provided a neutral forum for debate, and did not evidence an intent to advance or destroy religious beliefs." 32 N.Y.2d 108, 112, 296 N.E.2d 238, 239, 343 N.Y.S.2d 333, 335 (1973).

[125]Sherbert v. Verner, 374 U.S. 398, 407 (1963) (emphasis added) (footnote omitted). *See* NAACP v. Button, 371 U.S. 415, 438 (1963): "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms."; Russo v. Central School Dist., 469 F.2d 623, 632-33 (2d Cir. 1973); Butts v. Dallas Indep. School Dist., 436 F.2d 728, 732 (5th Cir. 1971): In *Tinker*, "the Supreme Court has declared a constitutional right which school authorities must nurture and protect, not extinguish, unless they find the circumstances allow them no practical alternative."

[126]461 F.2d 566 (2d Cir. 1972), *cert. denied*, 409 U.S. 1042 (1972).

exercise his freedom of speech there because of that position."[127] So long as the expression "is not coercive and does not arbitrarily inculcate doctrinaire views in the minds of the students,"[128] it cannot be restricted without a substantial showing of interference with the educational process or the teacher's obligation to educate.

Therefore, as in *Tinker*, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the school house gate."[129] In short, expression on campus by either students or teachers is protected by "correlative first amendment rights," in that "the considerations called into play are the same whether the right asserted is freedom of speech or academic freedom."[130]

The question, then, is why a salaried employee of a state university can criticize Mormon racial policy, even when acting under a legally binding relationship with the state in a publicly owned classroom, while student athletes with a much more remote and conjectural connection with the state cannot. In response, the proposition could be advanced that discussion of this type is the primary function of a classroom (or of the newspaper in *Panarella*), while it is not the function of a stadium (or of a student athlete). Yet this would merely be an indirect way of saying that students forfeit their right of free expression when not in the classroom. And, to quote *Tinker* once again, a school cannot "confine the permissible exercise of First Amendment rights to . . . supervised and ordained discussion in a school classroom."[131] The student does not "shed" these rights either "at the schoolhouse gate," during classroom hours, "in the cafeteria, . . . on the playing field, or on the campus . . . ."[132] Nor, by analogy, should student athletes shed their constitutional

[127]Comment, *Discharging Teacher for Wearing Armband Violates First Amendment Right of Free Speech*, 7 SUFF. L. REV. 197, 210 (1971) (emphasis added). *Cf.* Pickering v. Board of Educ., 391 U.S. 563, 568 (1968); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967); Russo v. Central School Dist., 469 F.2d 623 (2d Cir. 1972).

[128]James v. Board of Educ., 461 F.2d 566, 573 (2d Cir. 1972).

[129]Tinker v. Des Moines, 393 U.S. 503, 506 (1969).

[130]Comment, *supra* note 127, at 205 & n.39, *citing* Parducci v. Rutland, 316 F. Supp. 352, 355 (M.D. Ala. 1970). *See* Russo v. Central School Dist., 469 F.2d 623, 631 (2d Cir. 1972): "[T]he school board, as it did in *James v. Board of Education*, would have us decide that the rights enjoyed by school children are broader than the First Amendment rights of their teachers. [As in] *James*, we decline[d] that invitation."

[131]393 U.S. at 513.

[132]*Id.* at 506, 512-13.

rights at the fieldhouse gate. By necessary implication, the right of free expression is retained throughout all of a student's endeavors, including participation in an extracurricular activity such as football.[133]

Though the *Williams* protest might well have been planned for a location other than the stadium, that is essentially insignificant so long as it promised to be peaceful and unobstructive. Thus, as explained by one authority:

> [T]hough students arguably have other means of protesting educational policies—for example, through their parents or, as could have been done . . . in *Tinker*, by wearing bands off school premises—the availability of other alternatives is constitutionally less relevant in "pure speech" cases [like *Williams*] than where conduct is involved. Furthermore, the relevant audience is not the same when these alternatives are pursued.[134]

Some public property, due to the particular nature of the use to which it is dedicated, can be reserved for "*non*expressive purposes."[135] *Tinker*, however, viewed school property as a "public place."[136] So the public forum right clearly extends to a school stadium.[137] Indeed, the "mass communication potential"[138] of the

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[133]The opportunity to participate in intercollegiate athletic competition must be considered, even in this day of relevancy and change on college campuses as an important aspect of the overall educational program offered by the University of California at Berkeley.

Curtis v. NCAA, No. C-71-2088-ACW (N.D. Cal., filed Oct. 29, 1971), *quoted in* Reply Brief for Plaintiffs-Appellants at 2, Williams v. Eaton, 468 F.2d 1070 (10th Cir. 1972).

[134]Nahmod, *supra* note 50, at 281 (citing *Tinker*). *See* Schneider v. State, 308 U.S. 147, 163 (1939): "[O]ne is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place."; Lee v. Board of Regents of State Colleges, 306 F. Supp. 1097, 1101 (W.D. Wis. 1969): Since "a paid advertisement can be cast in such a form as to command much greater attention than a letter to the editor," the fact that plaintiffs could have published their political views in the letters column was held insignificant; Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969); Danskin v. San Diego Unified School Dist., 28 Cal. 2d 536, 546-47, 171 P.2d 885, 892 (1946): "Once [a school] opens its doors [as a forum] . . . it cannot demand tickets of admission in the form of convictions and affiliations that it deems acceptable. Censorship of those who would use the school building as a forum cannot be rationalized by reference to its setting. School desks and blackboards, like trees or street lights, are but the trappings of the forum; what imports is the meeting of minds and not the meeting place."

[135]*See* Adderley v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965).

[136]393 U.S. at 512 n.6, *citing* Hammond v. South Carolina State College, 272 F. Supp. 947 (D.S.C. 1967).

[137]In *National Socialist White People's Party v. Ringers*, which involved a controversial political party's request to use a public school auditorium, the Fourth Circuit observed:

> [The first] amendment's protections cannot be made to turn on structural distinctions between, for example, an open public park, a public amphi-

occasion and the relatively undisruptable nature of the school activity being conducted make it an unusually effective and desirable setting in which to publicize symbolic dissent.[139] And as another federal court has observed:

> It is patently unfair in light of the free speech doctrine to close to the students the forum which they deem effective to present their ideas. The rationale of *Tinker* carries beyond the facts in that case.[140]

Wyoming officials may have wanted only to funnel the protest into what they deemed "less offensive channels" of commu-

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theatre, a public *stadium*, or an enclosed public auditorium. While limitations on its use as a forum to permit it to serve its prime function (school purposes) . . . may be sustained, regulation which limits the exercise of first amendment guarantees should be stricken down.

. . . Specifically, the expression of racist and anti-semitic views in a public place . . . [is] protected activit[y] and may not be circumscribed by the state, except where "advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

473 F.2d 1010, 1015 (4th Cir. 1973) (emphasis added) (footnote omitted), *quoting* Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). *Cf.* Pollitt, *Free Speech for Mustangs and Mavericks*, 46 N.C.L. REV. 39, 43-46 (1967).

See United States v. Gourley, 502 F.2d 785 (10th Cir., 1973) (right of civilians to enter "public areas" of Air Force Academy for purposes of exercising their first amendment rights outside school football stadium upheld); Barker v. Hardway, 283 F. Supp. 228 (S.D. W.Va. 1968) (peaceful demonstration at halftime of football game protected, but right exceeded where protest became violent); Wirta v. Alameda-Contra Costa Transit Dist., 68 Cal. 2d 7, 434 P.2d 982, 64 Cal. Rptr. 430 (1967); Denno, *supra* note 36, at 59: "Virtually all the public facilities and institutions in the country have been opened to the presence of the first amendment . . . ."; Horning, *The First Amendment Right to a Public Forum*, 1969 DUKE L.J. 931, 946: "It would seem clear that the public forum right extends to streets and parks, subways, mass transportation terminals, mass entertainment areas, school buildings and grounds, and grounds of general governmental buildings." *But cf.* A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 46-47 (1968): School buildings may not be used "in a way which subverts their purpose and prevents their intended use by others."

[138]Horning, *supra* note 137, at 948 (describes the public forum right as "a 'constitutional obligation' flowing out of the first amendment").

[139]*See* Wolin v. Port of N.Y. Auth., 392 F.2d 83, 90 (2d Cir. 1968): "The [Bus] Terminal building is an appropriate place for expressing one's views precisely because the primary activity for which it is designed is attended with noisy crowds and vehicles, some unrest and less than perfect order." *Cf.* Grayned v. City of Rockford, 408 U.S. 104 (1972); Hicks v. State, 294 N.E.2d 613, 616 (Ind. 1973).

[140]Zucker v. Panitz, 299 F. Supp. 102, 105 (S.D.N.Y. 1969). *See* Tinker v. Des Moines, 393 U.S. 503, 513 (1969): "Under our Constitution, free speech is not a right that is given only to be so circumscribed that it exists in principle but not in fact. . . . [W]e do not confine the permissible exercise of First Amendment rights to a telephone booth or the four corners of a pamphlet, or to supervised and ordained discussion in a school classroom."; Los Angeles Teachers Union v. Los Angeles City Bd. of Educ., 71 Cal. 2d 551, 559, 455 P.2d 827, 832-33, 78 Cal. Rptr. 723, 728-29 (1969) (the first amendment contemplates *effective* communication).

A. FORTAS, CONCERNING DISSENT AND CIVIL DISOBEDIENCE 46-47 (1968): School buildings may 073

nication,[141] but the black athletes in *Williams* viewed the Brigham Young game as their single most promising opportunity to dramatize their feelings about Mormon racial policy to Mormons themselves. Students normally do not have ready access to the more traditional, and expensive, means of communication by which public opinion is influenced. As Wyoming football players, however, these particular students did command considerable public attention. As in *James*, their "influential position" should not serve of itself to deprive them of their right to communicate their views, particularly when both the content and mode of their expression were responsible, nondisruptive, and logically related to the occasion.

Social problems often can best be solved by *allowing* a healthy conflict of first amendment rights:

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.[142]

In other words, the open expression of opinion, even on religious matters, is basic both to freedom of speech and the shaping of

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[141]That is, they may have been willing to allow the wearing of armbands during times when the athletes were not "representing" the school.

[142]Cantwell v. Connecticut, 310 U.S. 296, 310 (1940). *See* Street v. New York, 394 U.S. 576, 593 (1969): "We have no doubt that the constitutionally guaranteed 'freedom to be intellectually . . . diverse or even contrary' . . . encompass[es] the freedom to express publicly . . . those opinions which are defiant or contemptuous."; Cox v. Louisiana, 379 U.S. 536, 551-52 (1965), *quoting* Terminiello v. Chicago, 337 U.S. 1, 4-5 (1949): "[P]ersons [may not] be punished merely for peacefully expressing unpopular views . . . . [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 . . . is . . . protected against censorship or punishment . . . . There is no room under our Constitution for a more restrictive view. For the alternative would lead to standardization of ideas either by legislatures, courts, or dominant political or community groups.' "; New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964): There is "a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks . . . ."

public opinion. Surely responsible free expression is equally in keeping with the traditional role and function of a university:

> "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools." The classroom ["with its surrounding environs"][143] is peculiarly the "marketplace 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."[144]

4. Private Capacity of Students

Clearly neither the State nor the University of Wyoming were purposely utilizing publicly owned property to facilitate religious criticism. The protest was neither prescribed nor mandated by the State, nor was it conducted at the request of or under any form of encouragement from the state. Instead it was *privately* initiated and merely used State property as a forum for its expression. As emphasized previously, it was merely a peaceful, silent protest, individually felt and individually expressed.[145] The participating students did "represent" both the State and the school in an *athletic* capacity, but not in an individual capacity and certainly not in the expression of their *private beliefs*.[146] Students

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[143]This phrase was added by Healy v. James, 408 U.S. 169, 180 (1972).

[144]Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (citations omitted). *See* Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D. Mass. 1970): "The university setting of college-age students being exposed to a wide range of intellectual experiences creates a relatively mature market-place for the interchange of ideas so that the free speech clause . . . with its underlying assumption that there is positive social value in an open forum seems particularly appropriate."; Buckley v. Meng, 35 Misc. 2d 467, 230 N.Y.S.2d 924 (Sup. Ct. 1962): "I would have thought . . . that one of the aims of a college worthy of the name was to stimulate thought and to provoke intellectual controversy. The action of the Dean . . . and the President . . . in this case bespeaks a contrary belief—they seem to regard intellectual quiescence and freedom from any conceivable identification with strongly expressed views as being necessary to their educational goals." 230 N.Y.S.2d at 934. "To be sure, the . . . College authorities are motivated by the desire to preserve the good name of their college, rather than by a desire to stifle minority opinion. But even if I were to suppose that they were correct in believing that to allow dissenting opinion to be expressed from their platforms has a tendency to besmirch the institution—and I, in fact, think they are wrong in this—this would not provide a sufficient reason to deny the expression of the opinion. . . . 'Only an emergency can justify repression.' " *Id.* (citation omitted).

[145]*See* Business Executives' Move for Vietnam Peace v. FCC, 450 F.2d 642, 656 (D.C. Cir. 1971): "[A]s the Supreme Court has said in the context of classroom debate 'supervised and ordained discussion' is not enough. . . . In other words, there is always a strong First Amendment interest in opening up channels for more spontaneous, self-initiated, self-controlled expression." (footnote omitted).

[146]Assuming public disavowal by university officials, this would certainly have been clear to nearly everyone in the stands.

"may not be confined to the expression of those sentiments that are officially approved,"[147] and, conversely, a school need not be held to *have* officially approved every expression of student opinion. To invoke the relationship of a student with his school in order to restrict extracurricular speech which is "private" in all other respects is to misconceive and thereby dilute the meaning of *Tinker*.

This is not to say, of course, that students are entitled to be entirely free of regulation in their extracurricular activities. Clearly they can be more strictly disciplined in matters where "basic constitutional values" are not affected.[148] If only student appearance is involved, for example, courts may tend to grant more room to administrative regulation than if the right asserted were freedom of speech.[149] The measure of permissible school regulation, then, depends primarily on the nature of the *right* alleged to have been infringed. Where that right can be shown to bear a

[147]Tinker v. Des Moines, 393 U.S. 503, 511 (1969).

[148]Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

[149]By way of illustration, grooming regulations concerning student dress and hair length have on occasion been held of insufficient importance to warrant judicial review. *Compare* Dunham v. Pulsifer, 312 F. Supp. 411 (D. Vt. 1970) (hair code for student athletes held unconstitutional), *with* Neuhaus v. Torrey, 310 F. Supp. 192 (N.D. Cal. 1970) (hair code for student athletes held constitutional). See cases cited in Murphy v. Pocatello School Dist., 94 Idaho 32, 480 P.2d 878, 881-82 (1971); Annot., 14 A.L.R.3d 1201 (1967).

But even student speech may be subject to regulation in accordance with its inherent "communicative value"—that is, whether frivolous and facetious (as in the case of a pointlessly crude halftime show or school play) or serious and responsible. *See* Close v. Lederle, 303 F. Supp. 1109 (D. Mass. 1969), *rev'd*, 424 F.2d 988 (1st Cir. 1970); Note, *Symbolic Conduct*, 68 COLUM. L. REV. 1091 (1968) (discusses problems which result when symbolic conduct is less clearly communicative).

The armband protest considered in *Tinker* was held to involve responsible first amendment activity:

> These petitioners merely went about their ordained rounds in school. Their deviation consisted only in wearing on their sleeve a band of black cloth, not more than two inches wide. They wore it to exhibit their disapproval of the Vietnam hostilities and their advocacy of a truce, to make their views known, and, by their example, to influence others to adopt them.

393 U.S. at 514. The *Williams* athletes, therefore, should have been well within their rights in wearing armbands for an equally responsible purpose.

They might *not* have been entitled, however, to wear a black jersey (interference with the game), shout obscenities at Mormon fans ("fighting words"; little communicative value), engage in unruly conduct, and so forth. And it could be argued that even the wearing of an armband might justify regulatory action by the coach if the athletes were participating in a different kind of athletic event, such as a swim meet, where its presence would substantially impair their performance. In determining which athletes would compete, a coach might then be entitled to reassess their potential contribution to the team's showing in light of this predictable impairment of their individual performances.

high order of importance, the authority of the school to regulate its exercise will be more carefully limited.

By participating in extracurricular activities, then, a student may arguably limit his latitude in expressing his *personality*, but not in the sincere, nondisruptive expression of his individual *beliefs*. Basic first amendment rights are consistently worthy of protection, whether implicated in extracurricular or classroom activities. Consequently, they can only be regulated under a single standard addressed to the value of the right itself and the means of its expression (*i.e.*, the *Tinker* rule). And in applying this standard, the relationship of the student with his school is constitutionally irrelevant, so long as his expression is privately initiated.

A related quotation from *Bond v. Floyd*, where members of the Georgia House of Representatives challenged Julian Bond's right to be seated because of his antiwar statements, is especially applicable to this point:

> "I stand before you today charged with entering into public discussion on matters of National interest. I hesitate to offer explanations for my actions or deeds where no charge has been levied against me other than the charge that I have chosen to speak my mind . . . . The posture of my life for the past five years has been calculated to give Negroes the ability to participate in formulation of public policies. The fact of my election to public office does not lessen my duty or desire to express my opinions even when they differ from those held by others . . . ."[150]

In endorsing Bond's position, the Supreme Court observed:

> The State attempts to circumvent the protection the First Amendment would afford to these statements if made by a *private* citizen by arguing that a State is constitutionally justified in exacting a higher standard . . . from its [*representatives*] than from its citizens.[151]

State officials, therefore, have no authority to exact a more restrictive standard for speech on the basis of some alleged "representative" relationship with the state. And so when dealing with the *Tinker* standard for campus expression, school authorities are legally bound to apply it *uniformly* to all students, without distinctions based on the particular activity in which they are engaged. To restrict otherwise protected private expression by artificially categorizing certain students as "representatives" of the

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[150]385 U.S. 116, 124-25 (1966).

[151]*Id.* at 135 (emphasis added).

state is, as in *Bond*, tantamount to circumvention of first amendment guarantees.[152]

III. State Neutrality Toward Religious Protest

We have seen that the private expression of peaceful dissent is permissible, even though it may be directed at a religious group or belief. Where the state may be unduly involved in that expression, however, the question is more difficult, for "when government activities touch on the religious sphere, they must be secular in purpose, evenhanded in operation, and neutral in primary impact."[153]

A. *Neutrality*

Williams placed a great deal of emphasis on the need for religious neutrality by the state, quoting *School District of Abington Township, Pennsylvania v. Schempp* to this effect: "The government is neutral, and, while protecting all [religious opinions and sects], it prefers none, and it *disparages* none."[154]

Admittedly, separation of church and state demands that government remain neutral in all its dealings with religion. Under the "secular purpose" doctrine,[155] however, many instances of

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[152]Consider, for example, the fact that other black students at Wyoming were allowed to wear armbands as an expression of their private opinions on Mormon racial policy. Brief for Defendants-Appellees at 7-8, Williams v. Eaton, 468 F.2d 1079 (10th Cir. 1972). And remember that *Williams* cited no other case which stands for the proposition that some students can be classified as school "representatives" so as to restrict their first amendment rights.

[153]Gillette v. United States, 401 U.S. 437, 450 (1971).

[154]374 U.S. 203, 215 (1963) (emphasis in the original), *quoting* Minor v. Board of Educ., (Cincinnati Super. Ct., Feb. 1870) (unpublished opinion of Judge Alphonso Taft). Note that in relying on *Schempp* the *Williams* court placed itself in the ironic position of restricting the rights of nonbelievers by citing a case which upheld the rights of other nonbelievers.

In evaluating phrases like "it *disparages* none" and "rights of others," the researcher would be well-advised to recall the warning expressed in *Anderson v. Laird*:

> "The hazards of placing too much weight on a few words or phrases of the Court is abundantly illustrated within the pages of the Court's opinion in *Everson [v. Board of Education]*." The Chief Justice noted that the Court had stated in *Everson* that the government cannot "pass laws which aid one religion, aid all religions, or prefer one religion over another" but had no difficulty in upholding a taxing statute which undoubtedly helped children get to church schools.

466 F.2d 283, 289 n.33 (D.C. Cir. 1972) (citation omitted), *cert. denied*, 409 U.S. 1076 (1972), *quoting* Walz v. Commissioner, 397 U.S. 664, 670 (1970).

[155]The "secular purpose" doctrine constitutes an exception to the traditional principle of separation of church and state. Periodic elaborations have determined that a "secular purpose," with "a principal or primary effect that neither advances nor inhibits religion"

government activity apparently *supportive* of religion have been held not to offend the constitutional requirement of neutrality.[156] The reasoning in these cases has generally been that the government involvement consisted only of neutral, nonpreferential provision of government services, facilities, or materials to *all* on an equal basis.[157] And if government action only *indirectly* inures to the benefit of religion, the establishment clause is not violated.

So the "secular purpose" doctrine means that government actions "directed toward secular ends are valid even though they result in incidental benefits for religious purposes."[158] The logical extension of this doctrine, therefore, should protect action by the state directed toward secular ends which results in incidental disparagement of religion.[159] As applied to the *Williams* facts, a state school's acceptance of its constitutional obligation to accommodate nondisruptive student expression should not be held to violate the neutrality requirement, even though private criticism of religious policy would be an incidental side effect of meeting this obligation.[160] Clearly the "*primary* effect" of this kind of

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and which avoids "an excessive government entanglement with religion," will legitimate government action which would otherwise appear to violate the neutrality requirement. *See* Lemon v. Kurtzman, 403 U.S. 602, 612-13 (1971).

[156]*See* Board of Educ. v. Allen, 392 U.S. 236 (1968) (free loan of secular textbooks to all students); McGowan v. Maryland, 366 U.S. 420 (1961) (uniform day of rest); Everson v. Board of Educ., 330 U.S. 1 (1947) (reimbursement of all parents who sent their children to school on public buses). In *Everson*, by way of example, it was held that New Jersey had not violated the establishment clause since the purpose of its bus fare reimbursement program "was not to aid religious education but to promote the valid public welfare purpose of providing safe transportation for children attending parochial schools." Kauper, *The Warren Court: Religious Liberty and Church-State Relations*, 67 MICH. L. REV. 269, 270 (1968).

[157]Lemon v. Kurtzman, 403 U.S. 602, 616-17 (1971): "Our decisions from *Everson* to *Allen* have permitted the State to provide church-related schools with secular, neutral, or nonideological services, facilities, or materials. Bus transportation, school lunches, public health services, and secular textbooks supplied in common to all students were not thought to offend the Establishment Clause."

[158]Kauper, *supra* note 156, at 280, *citing* Everson v. Board of Educ., 330 U.S. 1 (1947). *See* Sutherland, *Historians, Lawyers, and "Establishment of Religion,"* in RELIGION AND THE PUBLIC ORDER 27, 49-50 (D. Giannella ed. 1969): "I suggest that in no case has the Supreme Court decided that a nonpreferential governmental activity, with a secular objective, and with no element of religious compulsion on the individual, is nevertheless unconstitutional because some incidental advantage may accrue to some religious group."

[159]Compare the "incidental burden" on religion held justified by a substantial governmental interest in Gillette v. United States, 401 U.S. 437 (1971). Note also the similarity with the "free exercise" cases where substantial governmental interests have been held to outweigh freedom of religion. *See, e.g.*, Reynolds v. United States, 98 U.S. 145 (1878).

[160]*See Cohen v. California*, where the neutral role of government in regulating speech was described as follows:

school policy would be to further a "*secular* purpose"[161]—the evenhanded provision of access to school property for use as a first amendment forum.[162]

Thus the mere "involvement" of religion in government activity does not, of itself, presuppose a violation of the establishment clause:[163]

> [T]he usual rule [is] that governmental bodies may not prescribe the form or content of individual expression . . . . The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours. It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, . . . in the belief that no other approach would comport with the premise of individual dignity and choice upon which our political system rests.
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> To many, the immediate consequence of this freedom may often appear to be only verbal tumult, discord, and even offensive utterance. These are, however, within established limits, in truth *necessary side effects* of the broader enduring values which the process of open debate permits us to achieve. That the air may at times seem filled with verbal cacophony is, in this sense not a sign of weakness but of strength. We cannot lose sight of the fact that, in what otherwise might seem a trifling and annoying instance of individual distasteful abuse of a privilege, these fundamental societal values are truly implicated. That is why . . . "so long as the means are peaceful, the communication need not meet standards of acceptability [to others]."

403 U.S. 15, 24-25 (1971) (emphasis added) (citation omitted), *quoting* Organization for a Better Austin v. Keefe, 402 U.S. 415 (1971).

[161]*See* Walz v. Commissioner, 397 U.S. 664, 692 (Brennan, J., concurring): The "principal effect" of tax exemptions for church property "is to carry out secular purposes—the encouragement of public service activities and of a pluralistic society."

[162]Interestingly enough, religious groups have also been extended the right to use public school property, even for purely religious purposes such as the erection of nativity scenes. *See, e.g.*, Annot., 36 A.L.R.3d 1256, 1268-70 (1971). In such cases it has generally been held significant that religious symbolism is inescapable during certain holidays, that schools are out of session during that time, and that the symbols do not occasion greater influence simply because they are located on school property. In short, the school's action is merely a "passive accommodation of religion." *Id.* at 1269-70.

[163]*See* National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973) (emphasis added), where a controversial political party was granted the right to use public school property for the purpose of expressing racist and anti-semitic views:

> This case is not unlike *Everson v. Board of Education* . . . . Just as New Jersey in *Everson* did not transgress the establishment clause or unconstitutionally support parochial schools by providing transportation facilities and "such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks," so too, Virginia would not transgress the equal protection clause or unconstitutionally support the Party['s racist and antisemitic views] by providing a public forum. Although the establishment clause prohibited New Jersey from enacting laws favoring one religion over another, . . . New Jersey was [also] prohibited from hampering its citizens in the exercise of their own religion by denying generally provided government services to certain

> What the Framers meant to foreclose, and what our decisions under the Establishment Clause have forbidden, are those involvements of religious with secular institutions which (a) serve the essentially religious activities of religious institutions; (b) employ the organs of government for essentially religious purposes; or (c) use essentially religious means to serve governmental ends, where secular means would suffice.[164]

In short, "what the first amendment forbids is a classification [or state action] which results in either preference or discrimination based on the *religious factor*."[165] Furthermore, the state must have played on *active, instigatory role*[166] in the sense that the action must have originated with the state and must have consisted of something beyond "generally provided government serv-

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groups. Similarly, although the fourteenth amendment in the instant case prohibits Virginia from practicing the discrimination which the Party practices, the first amendment also prohibits Virginia from hampering its citizens in the exercise of their right to speak and assemble freely by denying a *generally provided public forum*.

. . . .

[T]he use of facilities partially dedicated as a public forum for the expression of diverse views does not amount to state espousal of racist views . . . .

In short, the first amendment "requires the state to be a neutral in its relations with groups of [both] religious believers and non-believers; it does not require the state to be [the] adversary [of either]." Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[164]School Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 294-95 (1963) (Brennan, J., concurring). *Cf.* Sherbert v. Verner, 374 U.S. 398, 422 (1963) (Harlan, J., dissenting): "The constitutional obligation of 'neutrality' . . . is not so narrow a channel that the slightest deviation from an absolutely straight course leads to condemnation. There are too many instances in which no such course can be charted. . . ."

[165]Kauper, *supra* note 156, at 282 (emphasis added), *citing* P. KURLAND, RELIGION AND THE LAW (1962).

[166]*See* Walz v. Commissioner, 397 U.S. 664, 668 (1970): "It is sufficient to note that for the men who wrote the Religion Clauses of the First Amendment the 'establishment' of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity."; Panarella v. Birenbaum, 32 N.Y.2d 108, 112, 296 N.E.2d 238, 239, 343 N.Y.S.2d 333, 335 (1973): "Only if the colleges continued financial support to a newspaper systematically attacking religion over a period of time, without balance, might there be an attempt to 'establish' a 'secular religion'."; Todd v. Rochester Community Schools, 41 Mich. App. 320, 200 N.W.2d 90, 93 (1972): "Plaintiff's complaint specifically pleads only that *Slaughterhouse Five* is used in a public school and 'contains and makes reference to religious matters.' We have been cited to no authority, nor has our own research uncovered any, which holds that *any* portion of *any* constitution is violated simply because a novel, utilized in a public school 'contains and makes reference to religious matters.' . . . By couching a personal grievance in First Amendment language, one may not stifle freedom of expression."; Williams, *The Twilight of State Action*, 41 TEX. L. REV. 347, 367 (1963): The role of state law is so pervasive "that it is difficult to conceive of situations where state action is not present." So a mere finding of state action does not establish, of itself, a violation of constitutional rights. "Under the terms of the Constitution, it must be the state which engages in the violation, not the private individual."

ices."[167] In *Williams*, however, privately initiated political belief came into conflict with private religious belief, and in that situation government intervention on behalf of *either* conviction would have been to employ the forces of the state to stifle the free expression of the other. The only constitutionally defensible alternative for the state, then, was to assume the "politically neutral" role of holding its public facilities open to all accepted forms of nondisruptive expression. Surely a passive acknowledgment of its legal obligation in this respect is hardly synonymous with "instigation."[168]

B. *Blasphemy Analogy*

Both the establishment clause and the concept of neutrality have assumed new dimensions as courts provide further substance to the constitutional mandate that states neither aid nor hinder religion. In *State v. West*,[169] for example, the Maryland Court of Special Appeals considered the constitutionality of a state blasphemy statute,[170] and found that it constituted an abandonment by the state of its required position of neutrality on religious matters. The petitioner there had argued that enforcement of the statute "may coerce into holding his tongue anyone who in the course of promoting his own religious [or antireligious] belief would want to criticize Christianity."[171] As in *Williams*, the state countered by attempting to portray the statute "as an effort by the State to enable 'those citizens who desire

[167]National Socialist White People's Party v. Ringers, 473 F.2d 1010, 1017 (4th Cir. 1973).

[168]*See id.*:

> The essential point here is not that there is insufficient state action, but simply that the state action doctrine is not applicable where a group seeks to exercise first amendment rights in a public forum [partially] dedicated to that purpose. . . . We have a . . . [forum] where the position of the state is required to be neutral and where denial of the use of the place will substantially impair the exercise of first amendment rights.
>
> In short, the state's "interest on this record is too remote and conjectural to override the guarantee of the First Amendment that a person can speak or not, as he chooses, free of all governmental compulsion." DeGregory v. N.H. Atty. Gen., 383 U.S. 825, 830 (1966).

[169]9 Md. App. 270, 263 A.2d 602 (1970).

[170]Blasphemy has been defined as "maliciously reviling God or religion." Annot., 41 A.L.R.3d 519, 520 n.2 (1972). Its doctrinal foundation has been held to rest on the principle that "it is not necessary to maintain that any man should have the right publicly to vilify the religion of his neighbors . . . ." *Id.* at 523. *See generally* T.A. SCHROEDER, CONSTITUTIONAL FREE SPEECH DEFINED AND DEFENDED IN AN UNFINISHED ARGUMENT IN A CASE OF BLASPHEMY (1919).

[171]Annot., *supra* note 170, at 514 (brief of petitioner).

to worship to carry on *unmolested*' . . . ."[172] In its decision, the court adopted the *Schempp* interpretation of neutrality:

> The wholesome "neutrality" of which this Court's cases speak thus stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert of dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies.[173]

With this potential "dependency" in mind, it then proceeded to apply the neutrality test to the Maryland blasphemy statute:

> It obviously was intended to serve . . . as a mantle of protection by the State to believers in Christian orthodoxy and extend to those individuals the aid, comfort and support of the State. This effort by the State of Maryland to extend its protective cloak to the Christian religion or to any other religion is forbidden by the Establishment and Free Exercise Clauses of the First Amendment. As stated by former Associate Justice Fortas in Epperson v. Arkansas, ". . . The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion."[174]

Under this line of reasoning, then, the University of Wyoming could be held to have done administratively (as an agency of the State) what the State of Maryland was prevented from doing statutorily in *West*. In both cases the government action could be viewed as favoring a particular religion (or religion in general) through restricting criticism by those not likewise persuaded. Admittedly, the action taken by the respective States arose out of a legitimate concern for the role religion plays in our national life. This should not, however, allow the state to adopt an overprotective position in tacit support of the immunity of religion from public criticism. To accept this kind of reasoning is to lose sight of the real meaning of neutrality as applied to the separation of church and state. And in *Williams* it lent support to action by the State which amounted to deviation from its position of neutrality in a well-intentioned, though misguided, effort to preserve its neutrality.

C. *Accommodation of Religious Protest*

The lesson to be learned from this discussion of the relationship between church and state is that a government can best be neutral by not interfering in *any* way with the dissent of those

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[172]State v. West, 9 Md. App. 270, 263 A.2d 602, 604 (1970).

[173]*Id.*, *citing* School Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 222 (1963).

[174]State v. West, 9 Md. App. 270, 263 A.2d 602, 605 (1970).

peacefully protesting religious doctrine.[175] The establishment clause forbids not only "government preference of one religion over another . . . [but also] an impartial governmental assistance of all religions."[176] In other words, the government is also prevented from "establishing" religion in general[177] by prohibiting religious criticism. Instead the traditional state role of "passive accommodation" of dissenting views is a more acceptable form of neutrality here. A neutral government policy of this kind "leaves religion on the solid foundation of its own inherent validity, without any connection with temporal authority . . . ."[178]

As Mr. Justice Jackson observed in *West Virginia State Board of Education v. Barnette*:

> [The] freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order.[179]

Once this is understood, it is clear that religious criticism is an accepted subcategory of the freedom to dissent. To restrict constitutionally protected expression of this kind by undue expansion of the "rights of others" exception to *Tinker* is to perpetuate the outmoded view that the state can place a ban on religious criticism.[180]

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[175]This is especially true where, as in *Williams*, the object of the protest is a racially discriminatory policy directly affecting those protesting.

[176]Illinois *ex rel.* McCollum v. Board of Educ., 333 U.S. 203, 211 (1948). *See* School Dist. of Abington Tp. v. Schempp, 374 U.S. 203, 216 (1963); McGowan v. Maryland, 366 U.S. 420, 443 (1961).

[177]*Cf.* Anderson v. Laird, 466 F.2d 283, 287 (D.C. Cir. 1972), *cert. denied*, 409 U.S. 1076 (1972).

[178]4 DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 200 (J. Elliott ed. 1907). In this connection consider the facts in Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495 (1951), which involved a controversial and allegedly "sacrilegious" film ("The Miracle"). The movie was produced in Italy where "[b]y the Lateran agreements and the Italian Constitution the Italian Government is bound to bar whatever may offend the Catholic religion." Although no action was taken to ban the film in Italy, an unsuccessful effort to that end was made in New York City. *The Commonweal*, a respected Catholic periodical, editorially "questioned the wisdom of transforming Church dogma . . . into state-enforced censorship for all." In addition, a *Commonweal* contributor noted that all the effort at censorship "will have succeeded in doing is insulting the intelligence and faith of American Catholics with the assumption that a second-rate motion picture could in any way undermine their morals or shake their faith." M. KONVITZ, BILL OF RIGHTS READER 576-78 (2d ed. 1960).

[179]West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

[180]This point might be analogized to the controversy in the Sixties over university speaker ban laws. At that time many citizens, legislators, and school officials also felt that state colleges should not "facilitate" the expression of certain views. *See* Pickings v.

CONCLUSION

As has been observed of another case involving symbolic expression, the *Williams* court "chose not to deal with the complexities" of the problem it faced, "made no attempt to discuss, let alone to answer, the difficult and disturbing constitutional questions presented," but instead "trivialized the issues and handed down an opinion that has all the deceptive simplicity and superficial force that can usually be achieved by begging the question."[181] As a result, the *Williams* demonstrators were disciplined because their *message* was unpopular, rather than because they interfered in a material and substantial way with normal school activities or with the rights of others. In effect, the "rights of others" exception was used as an excuse to avoid the merits, and such an expansive interpretation of *Tinker* can only serve "to undermine the rule [enunciated] there by the 'disintegrating erosion' of particular exceptions."[182]

The proper legal approach for school administrators to follow in dealing with a situation such as that in *Williams* is to look to traditional first amendment theory as a guideline. In other words, the days of arbitrary administrative restriction of a student's constitutional rights have passed. The *Tinker* rule affords a student the same right any other citizen has to make his views known. As with any other citizen, moreover, the exercise of this right on school property may not be restricted without a "constitutionally valid reason."[183]

Bruce, 430 F.2d 595, 598-99 (8th Cir. 1970): "Recent case law indicates that student organizations have a broad right to sponsor controversial speakers on campus. We have been unable to find a single case decided in the 1960's in which a speaker ban has been upheld by a federal court."; American Civil Liberties Union v. Radford College, 315 F. Supp. 893, 896-97 (W.D. Va. 1970) (numerous cases cited); Wright, *supra* note 40, at 1051-52; "I am strongly tempted to believe that the only good speaker ban is one that has not yet been tested in court . . . . It will not do to limit speakers to those who 'clearly serve the advantage of education' or to lease the auditorium only for programs 'determined to be compatible with the aims of [the college] as an institution of higher learning.' "

[181]Alfange, *Free Speech and Symbolic Conduct: The Draft-Card Burning Case*, 1968 SUP. CT. REV. 1, 3, describing the decision in United States v.O'Brien, 391 U.S. 367 (1968).

[182]Meinhard v. Salmon, 249 N.Y. 458, 464, 164 N.E. 545, 546 (1928), *quoting* Wendt v. Fischer, 243 N.Y. 439, 444, 154 N.E. 303, 304 (1926).

[183]As observed by Professor Wright:

> [I]t is a false dichotomy to suggest, as some have, that there are circumstances in which a *university* can limit or forbid "the exercise of a right guaranteed by the Constitution . . . to persons generally." I do not think such a conflict ever can arise . . . . [For example, a university] rule barring loud discussions in the reading room of the library does not limit "the exercise of

In determining the constitutional validity of the reason offered for restricting expression on public property, whether on or off campus, courts must look first to the particular use to which the property has been dedicated.[184] This entails "taking into account its character, its pattern of usual activity, its essential purpose and the people who use[d] it."[185] With these factors in mind, a court is then in a better position to evaluate the extent to which those engaged in the expression may have interfered with the normal function of the property, and with the rights of others to use that property in the intended manner.[186] And if substantial interference with the normal use is found, *reasonable* regulation of the traffic control type (*i.e.*, time, place, and manner) will be upheld, so that the degree of interference may be minimized.

When regulation is based on the *content* of the expression, however, a standard of mere reasonableness is clearly too restrictive, especially where the audience affected by the expression consists primarily of adults. It would appear, moreover, that those exposed to controversial or unpopular views have no legal right to expect the state to stifle the expression of those views in a public forum. Conversely, the state has no legal authority to artificially construct a right of immunity from criticism on behalf of those in a public audience. For these reasons, the expression of symbolic "hostility" to others, where there is no showing of violence or disruptive potential, cannot amount to interference with the rights of others. The restriction of expression requires "something more than a mere desire to avoid the discomfort and

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> a right guaranteed . . . to persons generally," for *no one* [on or off campus] has a constitutional right to speak in a place so clearly inappropriate.

Wright, *supra* note 40, at 1042 (emphasis added). Compare the facts in Brown v. Louisiana, 383 U.S. 131, 139 (1966), where a group of demonstrators stood peaceably in a public library as "monuments of protest" against racial discrimination there, with those in *Williams*.

> [184]"The principal use to which the schools are dedicated is to accommodate students during prescribed hours for the purpose of certain types of activities. Among these activities is personal inter-communication among the students. This is not only an inevitable part of the process of attending school; it is also an important part of the educational process.

Tinker v. Des Moines, 393 U.S. 503, 512 (1969).

[185]Nahmod, *supra* note 50, at 296.

[186]As noted above, the nature of some public property (*e.g.*, a public library) is such that even a minimal amount of vocal expression might prove substantially disruptive. This is not true, however, of school grounds during afterclass hours, especially where the expression occurs in a school stadium and is symbolically communicated.

unpleasantness that always accompany an unpopular viewpoint."[187]

Nor is this altered significantly when those participating in the protest are engaged in an extracurricular school activity. The constitutional standard for student expression must be applied uniformly to all students and all school activities. Distinctions based on categorizing some students as "representatives" of the state, so as to dilute their first amendment rights, are constitutionally indefensible under *Tinker*.

Likewise, the fact that the expression has religious implications is legally irrelevant, so long as it is *privately* initiated. The state may not itself show hostility to religious policy, but it has a constitutional duty to accommodate the peaceful expression of others, even when antireligious in character. This may have an *incidental* impact on religion, but so long as the state is motivated by a "secular purpose" there is no violation of the neutrality requirement.

Finally, school officials may not restrict student expression because of some vague apprehension as to the "reflection" it may cast on the school. This approach is totally inconsistent with the function of the first amendment in a free society, and amounts only to a rationalization for censorship:

> The danger of our times is not that we as a people have become aroused to fever pitch by the excitement of ideas. It is rather the opposite, that we as a people have become inert and conformist, that we do not often enough hear the vital issues of our day mooted from public platforms . . . .
>
> These being the dangers of our day a college should, to my mind, pursue a policy of fostering discussion and the exchange of opinion by providing an open forum for it to all who want to be heard. A college should generate intellectual excitement, it should attempt to awaken the public mind from the torpor and quiescence of accepted and conventional opinion.[188]

That is the value of freedom of expression on a college campus. From this perspective, then, the *Williams* protest could hardly be held to have constituted interference with the educational process. Rather, it was an inherent part of that process.

Richard G. Seymour

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[187]Tinker v. Des Moines, 393 U.S. 503, 509 (1969).

[188]Buckley v. Meng, 35 Misc. 2d 467, 476, 230 N.Y.S.2d 924, 934-35 (Sup. Ct. 1962).