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Constitutional Law: Freedom of Expression in Student Demonstrations

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the condemnation was to destroy such a substantial portion of the business building as to require the discontinuation of further business activity at that location, the business was deemed to be *completely* located on that portion of the petitioner's land that was condemned. The supreme court's reversal holds that for purposes of a statutory award the business was deemed *completely* located on petitioner's adjoining uncondemned land, although a substantial portion of the business was taken with the land actually condemned.

The Supreme Court of Florida has characterized the power of eminent domain as "one of the most harsh proceedings known to the law."[39] The court has further pointed out that one of the distinguishing characteristics of American democracy is the emphasis placed on the individual and the protection of his personal property rights against the state and all other assailants.[40] "The State may condemn . . . property for public use and pay a just compensation for it, but it will not be permitted to grab or take it by force."[41] The obvious purpose of the Florida statute allowing an award for business damage resulting from a partial taking of the land upon which the business was located is to protect the owner from what amounts to an appropriation of his property without any compensation whatever. If all of a business is taken when land is condemned, the fact that a business was located on the land is taken into account when fixing the value of the land.[42] Under the Florida statute, business damage suffered by a business standing on the condemnee's adjoining land is obviously compensable as well. To refuse an owner such a recovery because only a part of his business was located on the remaining property would be to place that business in a limbo between compensability and noncompensability and to defeat the ends of justice to be promoted by the statute.

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CONSTITUTIONAL LAW: FREEDOM OF EXPRESSION IN STUDENT DEMONSTRATIONS

Tinker v. Des Moines Independent Community School District, 89 S. Ct. 733 (1969)

Petitioners, public school students in Des Moines, Iowa, wore black armbands to school to protest the war in Viet Nam. The principals of their respective schools had previously adopted and published a policy that specifically prohibited the wearing of armbands to class. In accordance with this regulation the students were suspended until they returned without armbands. Petitioners, claiming a violation of first amendment rights, sought

39. Peavy-Wilson Lumber Co. v. Brevard County, 159 Fla. 311, 314, 31 So. 2d 483, 485 (1947).

40. State Rd. Dep't v. Tharp, 146 Fla. 745, 749, 1 So. 2d 868, 870 (1941).

41. *Id.* at 749, 1 So. 2d at 870.

42. State Rd. Dep't v. Bramlett, 179 So. 2d 137, 141 (1st D.C.A. Fla. 1965).

relief under the 1964 Civil Rights Act.[1] They sought to enjoin school officials from disciplining them and also requested nominal damages. The district court dismissed the complaint on the grounds that the school authorities acted reasonably to prevent unnecessary disturbance of school activities and discipline.[2] The Court of Appeals for the Eighth Circuit was equally divided, thereby affirming the decision of the district court.[3] The Supreme Court granted certiorari and HELD, students participating in a nondisruptive expression of opinion are protected by the first and fourteenth amendments and cannot constitutionally be punished by school authorities in the absence of a clear showing of material interference with, or substantial disruption of, school activities. Judgment reversed, Justices White and Stewart concurring separately, Justices Harlan and Black dissenting.[4]

Although the issue has been much litigated in the state and lower federal courts, this case marks the first time that the Supreme Court has enumerated the first amendment feedoms of speech and expression as applied to students in their relations with public school administrators. The opinion by Mr. Justice Fortas follows closely the trend in those courts to extend due process principles to students.

For a long time the courts refrained from interfering in the academic community and allowed wide disciplinary discretion on the part of school administrators.[5] Only in cases of flagrant abuse of this discretion or of unlawful action did the courts intervene on behalf of students.[6] Recently, however, students' rights as secured by the federal and state constitutions, have begun to receive judicial protection in disciplinary matters.[7] A major factor leading to this reversal of attitude by the courts is the recognition that in student suspensions or dismissals:[8]

> [T]he harm to the student may be far greater than that resulting from the prison sentence given to a professional criminal. . . . A law school student dismissed for cheating will not be admitted to practice even if he is able to complete his legal education.

Admitting the seriousness of disciplinary action against students[9] where

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1. 42 U.S.C. §1983 (1964).
2. 258 F. Supp. 971 (S.D. Iowa 1966).
3. 383 F.2d 988 (8th Cir. 1967).
4. 89 S. Ct. 733 (1969).
5. *E.g.*, Stetson Univ. v. Hunt, 88 Fla. 510, 102 So. 637 (1925); Gott v. Berea College, 156 Ky. 376, 161 S.W. 204 (1913).
6. *See* Tanton v. McKenney, 226 Mich. 245, 197 N.W. 510 (1924); Gott v. Berea College, 156 Ky. 376, 379, 161 S.W. 204, 206 (1913).
7. Van Alstyne, *The Judicial Trend Toward Student Academic Freedom*, 20 U. FLA. L. REV. 290 (1968). The courts still decline to intervene in strictly scholastic affairs where the only issue is the student's failure to meet required academic standards. *See, e.g.*, Mustell v. Rose, 211 So. 2d 489 (Ala. 1968).
8. Seavey, *Dismissal of Students: "Due Process,"* 70 HARV. L. REV. 1406, 1407 (1957).
9. *See* Woods v. Wright, 334 F.2d 369, 375 (5th Cir. 1964).

they have a legally protected interest in remaining in school,[10] the courts have overcome their historic unwillingness to impose constitutional standards in areas where the competence of the judiciary admittedly may not be great.[11]

There are two considerations for the courts in their protection of students' rights. First: Was the student's conduct in fact punishable? Second: Was the punishment given in a proper manner? With respect to the latter question, the high point in the development of student procedural due process came in *Dixon v. Alabama State Board of Education*.[12] There the Court of Appeals for the Fifth Circuit laid down minimum guidelines to be followed in public college disciplinary actions of a serious nature. Each student must be given adequate notice of the specific charges against him, an explanation of the grounds for the charges, the names of witnesses against him, and an opportunity to present a defense at a fair hearing. These "rudimentary elements of fair play"[13] have since been expanded to include: the student's right to examine, in advance of the hearing, that evidence on which the school bases its charges;[14] the right to question witnesses against him at the hearing;[15] the right to have his own counsel to advise him at the proceedings;[16] and the right to have those administrators at the hearing act as jurors, weighing and deciding upon only such evidence as is presented at the hearing.[17] Yet, the courts have not admitted that the student is entitled to the formality of a trial, in the usual sense of that term.[18] These procedural standards are, for the most part, accepted by public college administrations today.[19]

The emphasis has been placed on the procedural aspects of due process, and few strides had been made prior to the instant case toward the protection of students' substantive rights. The courts have concentrated on *how,* rather than when or for what activities, students may be punished. With respect to the latter, first amendment guarantees of free speech and expression become important. In this substantive due process area the question now becomes: Did the student have a right to do what he did, and was the subsequent punishment by the school officials an abridgement of his rights? In dealing with this question the courts — and school administrators generally — are faced with the intricate problems of balancing the individual's right of self-expression with the state's interest in maintaining order in the daily life of the institution. Admitting the necessity of deciding the relative weights of

10. *See* United States v. Atkinson, 323 F.2d 733, 763 (5th Cir. 1963).

11. West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 634, 640 (1943) (compulsory flag salute unconstitutional).

12. 294 F.2d 150 (5th Cir. 1961), *cert. denied*, 368 U.S. 930 (1961).

13. *Id.* at 159.

14. Esteban v. Central Mo. State College, 277 F. Supp. 649, 651 (W.D. Mo. 1967).

15. *Id.* at 652.

16. Goldwin v. Allen, 54 Misc. 2d 94, 281 N.Y.S.2d 899 (Sup. Ct. 1967). *But see* Madera v. Board of Educ., 386 F.2d 778 (2d Cir. 1967), *cert. denied*, 390 U.S. 1028 (1968).

17. Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747, 759 (W.D. La. 1968).

18. Jones v. State Bd. of Educ., 279 F. Supp. 190, 202 (M.D. Tenn. 1968).

19. *E.g.*, University of Florida Handbook, University Regulations on Student Conduct 91 (1968) (enumerating the student rights that are essential for "basic procedural fairness" in disciplinary hearings).

competing interests on the specific circumstances of each case,[20] the courts have provided a few very general limitations on the regulatory power of administrators. The regulations must be aimed at curtailing only such activity as would present a clear and present danger to the operation of the school;[21] they must not be vague and therefore susceptible to uncertain interpretation;[22] and they must be free from discretionary application by the administrators to the extent that such discretion would act as a prior restraint on individual freedoms.[23] With such activity by the lower courts it was inevitable that the Supreme Court also would need to consider students' rights of free speech.

The instant case is not the first time the Supreme Court has considered the first amendment rights of students. As early as 1923[24] the Court referred to the rights of teachers and students to teach and learn a foreign language in public school. In that case a prohibition against teaching German was found as applied to be "arbitrary and without reasonable relation to any end within the competency of the state."[25]

Twenty years later in *West Virginia v. Barnette*[26] the Court held that a regulation requiring a compulsory flag salute in the schools violated the freedom of religion guarantee of the first amendment. Mr. Justice Jackson, speaking for the Court, said: "The Fourteenth Amendment, as now applied to the States protects the citizen against the State itself and all of its creatures — Boards of Education not excepted."[27] The highly discretionary functions of boards of education must be performed within the limits of the Bill of Rights.[28] Using this same rationale, the Court has on several occasions intervened to protect students' freedom of, or from, religion.[29] Most recently, in striking down the Arkansas "anti-evolution" law Mr. Justice Fortas summed up the issue facing the Court:[30]

> Judicial interposition in the operation of the public school system of the Nation raises problems requiring care and restraint. Our courts, however, have not failed to apply the First Amendment's mandate in our educational system where essential to safeguard the fundamental values of freedom of speech and inquiry and of belief.

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20. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 508-09 (1951); *accord*, Schneider v. New Jersey, 308 U.S. 147, 161 (1939).

21. Hammond v. South Carolina State College, 272 F. Supp. 947, 950 (D.S.C. 1967); *see* Burnside v. Byars, 363 F.2d 744, 748 (5th Cir. 1966); Dickey v. Alabama State Bd. of Educ., 272 F. Supp. 613, 618 (M.D. Ala. 1967), *vacated as moot*, 412 F.2d 515 (5th Cir. 1968).

22. Dickson v. Sitterson, 280 F. Supp. 486, 498 (M.D.N.C. 1968).

23. Hammond v. South Carolina State College, 272 F. Supp. 947, 950 (D.S.C. 1967).

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

25. *Id.* at 402; *see* Pierce v. Society of Sisters, 268 U.S. 510 (1925).

26. 319 U.S. 624 (1943).

27. *Id.* at 637.

28. *Id.*

29. Engle v. Vitale, 370 U.S. 421 (1962) (invalidated statute providing for prayer reading in school); McCollum v. Board of Educ., 333 U.S. 203 (1948) (religious teaching in public school unconstitutional).

30. Epperson v. Arkansas, 393 U.S. 97, 104 (1968).

With this characterization of the academic community as one where freedom of expression in the open exchange of ideas is to be carefully preserved, the Court has dealt with the related problem of teachers' academic freedom.[31] The Court recognized the need for constitutional protection when it stated that academic freedom is "a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom."[32]

The rationale in these first amendment cases, in conjunction with the recent case of *In re Gault*[33] in which the Court declared that in delinquency hearings a juvenile is entitled to procedural rights of due process similar to those afforded to adults in criminal trials, led the Court to its decision in the instant case. The Court had to answer several questions: (1) What rights of free speech and expression does a student have at a state school? (2) Can the action of wearing armbands be classified as "speech" within the protection of the first amendment? (3) At what point does this speech cease to be protected, thereby subjected to state police power regulation?

Guided by *Barnette, Gault,* and similar cases the Court concluded that students as well as adults are fully protected by the first amendment guarantees of free speech and expression. Attending public school is now recognized as a right, rather than a privilege, in return for which the student may not be required to surrender his constitutional liberties "at the schoolhouse gate."[34]

Recognizing the protection of students by the first amendment, the Court defined the scope of this protection. The wearing of armbands, unaccompanied by any other actions, disruptive or otherwise, on the part of the demonstrators was classified as "closely akin to pure speech,"[35] rather than to the more tenuous "symbolic speech"[36] and thereby is afforded full first amendment security. This would apply, however, only where the purpose of the armband is the expression of ideas or opinions, and in the absence of any showing that the student had a legitimate purpose of expression is carefully distinguished from clothing or haircut regulations.[37]

The third question presented to the Court encompasses the real substance of the issue. The right of free speech is not absolute, and abuse of this freedom may be punished by the state in the exercise of its police

31. Keyishian v. Board of Regents, 385 U.S. 589 (1967). There the Court invalidated a New York statute that deprived a teacher of his job for mere knowing membership in the Communist Party without the specific intent to further its unlawful ends. Such a deprivation of freedom of expression and association is not justified by any sufficient state interest.

32. *Id.* at 603; Barenblatt v. United States, 360 U.S. 109, 112 (1959).

33. 387 U.S. 1 (1967).

34. 89 S. Ct. 733, 736 (1969).

35. *Id.* at 736.

36. Brown v. Louisiana, 383 U.S. 131 (1966); Griswold v. Connecticut, 381 U.S. 479, 482 (1965); Edwards v. South Carolina, 372 U.S. 229 (1963).

37. 89 S. Ct. at 737; *see, e.g.,* Ferrell v. Dallas Independent School Dist., 392 F.2d 697 (5th Cir. 1968), *cert. denied,* 393 U.S. 856 (see dissenting opinion by Justice Douglas to denial of certiorari); Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1966).

powers.[38] As Justice Black reiterated in his dissent, the rights of free speech "do not mean that anyone with opinions or beliefs to express may address a group at any public place and at any time."[39] Some expression in some contexts exceeds the bounds of first amendment protection. In the instant case the students had a legitimate right to express their opposition to the Viet Nam war, and the administration had a legitimate fear of disruption, which it had the authority and duty to control. This authority, however, did not extend to the supression of controversial ideas or to the stifling of opinions in the name of preventing disorder, in the absence of a clear showing that it is necessary to avoid "material and substantial interference with school work or discipline."[40] Here again is the familiar "clear and present danger" test emerging in its purest form to protect free thought in the "marketplace of ideas" — the classroom. The danger to the school must be immediate, rather than possible, probable, or future. Moreover, the danger must be of disruptions amounting to "a serious substantive evil that rises far above public inconvenience, annoyance, or unrest."[41] This serious limitation on the school's powers to regulate discipline makes it a practical requirement for the school to justify such regulation by showing that it was absolutely necessary.

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.[42] Justice Fortas emphasized the importance of this distinction in his reference to two lower court cases. In *Burnside v. Byars*[43] students wore "freedom buttons" to school in violation of a school regulation, but otherwise conducted themselves properly. What little disruption did occur was made by others reacting to the demonstrators rather than by the demonstrators themselves. The Court of Appeals for the Fifth Circuit properly enjoined the enforcement of the prohibitive regulation, thereby protecting this form of free speech. In *Blackwell v. Issaquena County Board of Education*,[44] handed down by the same court on the same day, an opposite holding was reached. In this case, however, the demonstrators had harrassed others and created a disruptive disturbance that was inseparable from the wearing of the "freedom buttons." Under these circumstances the wearing of the buttons could be legitimately restricted. In both cases the same test was used. The Court also used this test in the instant case: The exercise of protected first amendment freedoms can only be restricted by the state under circumstances where the restriction is reasonable and necessary to prevent a material and substantial disruption by those who would exercise their fundamental rights.

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38. Stromberg v. California, 283 U.S. 359 (1931).

39. 89 S. Ct. at 742; Cox v. Louisiana, 379 U.S. 536, 554 (1965). *See also* Adderley v. Florida, 385 U.S. 39 (1966).

40. 89 S. Ct. 733, 739; *see* Schneider v. New Jersey, 308 U.S. 147 (1939).

41. Terminiello v. Chicago, 337 U.S. 1, 4 (1959).

42. 89 S. Ct. at 740. *Compare* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966), *with* Blackwell v. Issaquena County Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).

43. 363 F.2d 744 (5th Cir. 1966).

44. 363 F.2d 749 (5th Cir. 1966).

This test leaves several problems unsolved. First: What guidelines are to be followed to determine the reasonableness of, and the necessity for, the regulation of student conduct. Second: Since every demonstration is at least minimally disruptive, with some disturbance inevitable by definition, how much is the school required to tolerate before the administration may constitutionally step in? Third: Since this case deals with secondary school children supported by their parents, would the results be the same where the students are opposed by administration and parents alike? This parent-child relationship could pose radically different problems with respect to the students' rights. Fourth: May these rights of free expression be exercised anywhere within the school grounds at the discretion of the demonstrators, or may they be limited by the administration to areas prescribed for such activity?

One indication of a line of reasoning to be followed in answering the last question, and possibly relating to the first three, may be found in the 1966 case of *Adderley v. Florida*.[45] The Court there upheld trespass convictions of students who demonstrated on the grounds of a jail. Justice Black concluded for the Court that a jail is not a place normally open to the public or dedicated to public discussion and education as are libraries or parks. A jailyard is not a *proper forum* for the exchange of ideas. This concept of proper forum may be one limiting factor to freedom of expression to the extent that it is applied to put certain parts of the school "off limits" to students and especially to demonstrators. Just as the presence of demonstrators at the jail posed a serious potential threat to the security and operation of that institution, so might it be said that the presence of demonstrators in a closed faculty meeting or in the president's office presents a similarly unnecessary danger. If such places are not normally open to the public, demonstrators may likewise be excluded, if the courts choose to apply *Adderley* in this manner.

Within the restrictions of the "proper forum" doctrine and the other lurking problems suggested above, the Court has in the instant case delineated and clarified the first amendment rights of students in the school context to be coextensive with those of the general public. The principal effect of this decision is to allow students an opportunity to make their opinions known while keeping them within the existing social and political structure. In granting students this outlet for their expression, the Court has clarified the crucial distinction between disruptive behavior and legitimate expression.

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45. 385 U.S. 39 (1966).