Buffalo Law Review

Volume 22 | Number 2 Article 16

1-1-1973

# Constitutional Law: Board of Education Rule Requiring Prior Review of All Student Literature Distributed in High Schools Declared Unconstitutional.

Michele O. Heffernan

Follow this and additional works at: https://digitalcommons.law.buffalo.edu/buffalolawreview

Part of the Constitutional Law Commons, and the Education Law Commons

Recommended Citation

Michele O. Heffernan, *Constitutional Law: Board of Education Rule Requiring Prior Review of All Student Literature Distributed in High Schools Declared Unconstitutional.*, 22 Buff. L. Rev. 611 (1973).
Available at: https://digitalcommons.law.buffalo.edu/buffalolawreview/vol22/iss2/16

This Recent Case is brought to you for free and open access by the Law Journals at Digital Commons @ University at Buffalo School of Law. It has been accepted for inclusion in Buffalo Law Review by an authorized editor of Digital Commons @ University at Buffalo School of Law. For more information, please contact lawscholar@buffalo.edu.

# RECENT CASES

CONSTITUTIONAL LAW: BOARD OF EDUCATION RULE REQUIRING PRIOR REVIEW OF ALL STUDENT LITERATURE DISTRIBUTED IN HIGH SCHOOLS DECLARED UNCONSTITUTIONAL.

In 1970, three Chicago public high school students were suspended for distributing written material at school without first having obtained approval from administrative officials. Two of the students had published and distributed copies of an "underground" newspaper, *The Cosmic Frog*. The third student had been suspended twice: once for handing a petition calling for an anti-war teach-in to another student in the school corridor; and a second time for distributing anti-war leaflets to other students while assembled outdoors during a fire drill. Each suspension charged "gross disobedience" or misconduct as defined by section 6-19 of the rules of the Chicago Board of Education which stated:

> No person shall be permitted . . . to distribute on the school premises any books, tracts, or other publications, . . . unless the same shall have been approved by the General Superintendent of Schools.

The three students brought a class action in federal district court on behalf of themselves and all students in Chicago high schools. The plaintiffs sought an injunction against the inclusion of the suspensions on their school records and a judgment declaring section 6-19 of the board of education rules unconstitutional. At a hearing on the defendants' motion to dismiss, the district court granted the injunction to the extent of expunging the students' records of all suspensions except that one arising from the fire drill incident. Nevertheless, the remainder of the suit was dismissed, the court failing to hand down any definite declaration concerning the constitutionality or enforceability of section 6-19. The plaintiffs were also denied permission to maintain a class action.

On appeal, the plaintiff-appellants argued that the board rule operated as an unconstitutional prior restraint of their freedom of expression. The defendants contended that the rule was constitutionally permissible since it did not require approval of the *content* of the literature distributed but, presumably, only approval of the distribution itself. Finding that section 6-19 would require prior approval of the content of publications, the Seventh Circuit Court of

Appeals reversed the district court and remanded the case with instructions to enjoin enforcement of the rule. All suspensions, including that of the third student for distribution of literature during a fire drill, were ordered expunged from the students' records. *Held*: The rule of the Chicago Board of Education prohibiting distribution of all publications on school premises without approval by the superintendent of schools is unconstitutional as a prior restraint in violation of the first amendment. *Fujishima v. Board of Education*, 460 F.2d 1355 (7th Cir. 1972).

Recognition of the first amendment rights of high school students as it has developed over the past 50 years has effected a reorientation, at least in the legal sense, of the roles of school and student. Justification for the school's regulation of student activity had formerly been based on the theories that the school stood *in loco parentis*, that education was a privilege accorded the student at the institution's discretion, or that the student impliedly waived his rights by contracting with the school. These theories have been generally disavowed. Courts recognize that the public school functions as an agency of the state, serving in the interest of the state, and that its authority is derived from the state.[1] In 1923, the Supreme Court maintained that the right to teach and to acquire knowledge may not be abridged by arbitrary and capricious legislative action,[2] setting a standard of reasonableness for state action through the school system. Later, the rights of students were further delineated by the Supreme Court in the following language:

> 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. These [Boards] have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights.[3]

1. *See Developments in the Law—Academic Freedom*, 81 HARV. L. REV. 1045, 1144-48 (1968). An example of such statutory authorization is N.Y. EDUC. LAW § 1709(2) (McKinney 1969), where the board of education of every union free school district is given authority:

> To establish such rules and regulations concerning the order and discipline of the schools, in the several departments thereof, as they may deem necessary to secure the best educational results.

2. Bartels v. Iowa, 262 U.S. 404 (1923); Meyer v. Nebraska, 262 U.S. 390 (1923). (These cases concern state statutes prohibiting the teaching of foreign languages in parochial schools.)

3. West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 637 (1943) (freedom of religion held to be abridged by statute mandating daily recitation of the Pledge of Allegiance).

The Court proposed that the school, in its task of educating the young for citizenship, should serve as an exemplar of civil liberties protection. The Fifth Circuit, in *Burnside v. Byars*,[4] held that while the state and the school have a duty to maintain the educational system, regulation of student freedoms must be reasonable and imposed only when *essential* to order and discipline within the institution.[5] School boards cannot

> ignore expression of feelings with which they do not wish to contend. They cannot infringe on their students' right to free and unrestricted expression . . . where the exercise of such rights in the school . . . [does] not *materially and substantially* interfere with the requirements of appropriate discipline in the operation of the school.[6]

Implementing the foregoing reasoning, the court in *Burnside* held that students in Philadelphia, Mississippi, were justified in wearing "freedom buttons" to school in violation of the principal's order where it was evident that the students had not been disruptive.[7] Conversely, in a companion case, the court upheld the suspension of students where it found that the violated regulation had been reasonable in light of disturbances at the school, and that the violation had caused substantial disruption.[8]

It was the *Burnside* standard of material and substantial disruption which the Supreme Court adopted in *Tinker v. Des Moines Independent School District*[9] to test administrative regulation of student freedom of expression. In *Tinker*, students were suspended for wearing black armbands in protest of the Vietnam war after having been forbidden to do so by school officials. The Court held that the students' manner of expression was protected by the first amendment. "It can hardly be argued," stated the Court, "that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."[10] One of the functions of the school is to accommodate students for the purpose of certain activities, one of those being communication among the students[11] and such com-

4. 363 F.2d 744 (5th Cir. 1966).
5. *Id.* at 749.
6. *Id.* (emphasis added).
7. *Id.* at 748.
8. Blackwell v. Issaquenna Co. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966).
9. 393 U.S. 503 (1969).
10. *Id.* at 506.
11. *Id.* at 512.

munication may not be confined to officially approved opinions or topics.[12] Examining the record, the Court concluded that although the students' armbands had generated a certain amount of controversy, school authorities could not reasonably "forecast substantial disruption of or material interference with school activities . . . ."[13] The opinion noted that "undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression."[14]

The principles promulgated in *Tinker* have since been applied in cases involving various forms of student expression including newspapers and other student publications. For example, in *Zucker v. Panitz,*[15] school authorities objected to the introduction of politics into the school-funded newspaper through a student-placed advertisement protesting the Vietnam war. The court, nevertheless, found it to be a protected, traditional, and non-disruptive manner of exercising freedom of expression. Concededly, school authorities may enforce regulations which are reasonable and necessary to the maintenance of school order and discipline. Officials may, for example, regulate the time, place, and manner of the distribution of literature.[16] However, where the enforcement of rules infringes upon a student's freedom of expression, the burden is upon the school to justify the infringement.[17] This definition of the school's position was drawn by the Seventh Circuit Court of Appeals in *Scoville v. Board of Education.*[18] There, the unapproved distribution of an underground newspaper violated school rules, and the newspaper itself was found to be in contempt of authority and to encourage disobedience. Relying

---

12. *Id.* at 511.
13. *Id.* at 514.
14. *Id.* at 508.
15. 299 F. Supp. 102 (S.D.N.Y. 1969).
16. Riseman v. School Comm., 439 F.2d 148, 150 (1st Cir. 1971).
17. Scoville v. Board of Educ., 425 F.2d 10 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970). *But see* Tinker v. Des Moines Ind. School Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting):

> I certainly agree that state public school authorities in the discharge of their responsibilities are not wholly exempt from the requirements of the Fourteenth Amendment respecting the freedoms of expression and association. . . . I would . . . cast upon those complaining the burden of showing that a particular school measure was motivated by other than legitimate school concerns—for example, a desire to prohibit the expression of an unpopular point of view, while permitting expression of the dominant opinion.

18. 425 F.2d 10 (7th Cir.), *cert. denied,* 400 U.S. 826 (1970).

on *Tinker,* the court maintained that when first amendment rights are involved, a school may be required to bear the risk of potential disruption arising from the free expression of student opinions. Unless the school can demonstrate that the expression "could reasonable have led [the board] to *forecast* substantial disruption . . ."[19] the right to freedom of expression must prevail.

Various jurisdictions have inconsistently judged the implementation of school policies with respect to student literature which might substantially interfere with the operation of the school. Interpreting *Tinker* broadly, one court found that disruption resulting from distribution of a student-published underground newspaper was not substantial enough to warrant any infringement upon first amendment rights.[20] However, another court—acting in a university setting —accepted the school officials' appraisal of imminent disorder, and held that the officials were justified in imposing an immediate ban on certain literature rather than waiting for harm to ensue.[21] Determination of the point at which school officials may assert their authority over student publications has provoked considerable judicial controversy. May censorship precede the distribution of literature and the perceived disorder or must there be an actual demonstration of disruption? In other words, is a school obliged to rely upon subsequent punishment as a deterrent to disruptive literature, or may it invoke prior restraint? The conflict merits an examination of the prior restraint doctrine.

Prior restraint of expression, either by an absolute prohibition of certain forms of communication or by censorship of material prior to distribution, is often justified by the value of preventing abuses of uninhibited speech in certain circumstances. However, such restraint may also inhibit activities actually protected by the first amendment without a showing of a real threat to the state's interest. The doctrine against prior restraint was incorporated into the Constitution by the first amendment as a reaction to the censorship and licensing

19. *Id.* at 13, *quoting Tinker,* 393 U.S. at 514.

20. Sullivan v. Houston Ind. School Dist., 307 F. Supp. 1328, 1339 (S.D. Tex. 1969).

21. Norton v. Discipline Comm., 419 F.2d 195 (6th Cir. 1969), *cert. denied,* 399 U.S. 906 (1970), *discussed in* Haskell, *Student Expression in the Public Schools: Tinker Distinguished,* 59 GEO. L.J., 37, 43-44 (1970) (Haskell maintains that *Norton,* as a case involving university students, should set the outer limits of high school students' rights).

laws which had once dominated the English press.[22] The Supreme Court stated in *Near v. Minnesota ex rel. Olson*:

> In determining the extent of the constitutional protection, it has been generally, if not universally, considered that it is the chief purpose of the [first amendment] guaranty to prevent previous restraints upon publication.[23]

Nevertheless, the Court went on to enumerate certain unprotected areas of speech which operate as exceptions to the doctrine against against prior restraint: speech which would hinder the nation in wartime; speech which would incite violence or forceful overthrow of the government; or speech which is obscene.[24] In support of these exceptions the Court relied upon two of its previous decisions which had excluded words with "the effect of force"[25] from first amendment protection. The determinant in evaluating the protection available for the expression had been held to be 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."[26]

Objections to implementation of prior restraints have primarily focused upon the lack of procedural safeguards and the greater frequency and arbitrariness of application likely to result from the use of this sanction as opposed to that of subsequent punishment.[27] Due to these remonstrations, acceptance of prior restrictions has been confined mainly (although not exclusively) to two areas: the regulation of the time, manner, and place of various forms of public expression;

22. *See* Emerson, *The Doctrine of Prior Restraint,* 20 LAW & CONTEMP. PROB. 648, 651-52 (1955).

23. 283 U.S. 697, 713 (1931).

24. *Id.* at 716.

25. In Gompers v. Bucks Stove & Range Co., 221 U.S. 418, 439 (1911), the Court had held that literature supporting a boycott could be enjoined along with the boycott itself, since the literature becomes "verbal action" effectively damaging property. *See also* Emerson, *Toward a General Theory of the First Amendment,* 72 YALE L.J. 877, 932 (1963).

26. Schenck v. United States, 249 U.S. 47, 52 (1919).

27. *See* Emerson, *supra* note 22, at 656-59. Discussing the injunction placed against a publisher which had been challenged in *Near v. Minnesota,* this article comments:

> On paper, it was a system for subsequent punishment by contempt procedure.
> But in practice, the system was bound to operate as a serious prior restraint. Punishment could be summarily dispensed by a single official, without jury trial or the other protections of criminal procedure, for infraction of a loose and illusive mandate.

*Id.* at 654.

and the regulation of obscenity in motion pictures. In order to withstand constitutional scrutiny regulation of these areas must be limited and specific.

In the area of public exercise of first amendment rights, for example, an ordinance requiring a permit for the distribution of pamphlets was held invalid where the standards for issuance were not

> limited to ways which might be regarded as inconsistent with the maintenance of public order or as involving disorderly conduct, the molestation of the inhabitants or the misuse or littering of the streets.[28]

A Minnesota statute which prohibited public assembly without a permit was also invalidated as an unconstitutional means of suppression of the right of assembly. The permit was to be granted upon consideration of the possibility of riot, disturbance, or disorderly conduct; facts showed that the standards were applied discriminatorily and arbitrarily.[29] In *Cantwell v. Connecticut*[30] the Jehovah's Witnesses asserted the unconstitutionality of a Connecticut statute which granted solicitation licenses only to those organizations defined as "religious" by the state public welfare council. The Supreme Court concurred with the petitioners' claim, finding that the discretion given the welfare council to determine "religiousness" exceeded the permissible limitations of restraint. This discretion transcended regulation of solicitation and infringed upon petitioners' freedom of religion. Similarly, the Court condemned a statute requiring permits for public assembly "in the absence of narrowly drawn, reasonable, and definite standards for the officials to follow [in the issuance of the permits] . . . ."[31]

Significantly, however, where a statute properly confined the exercise of discretion in the issuance of parade licenses to considerations of safety and convenience, the Court upheld the power of a locality to devise such a licensing system.[32] Thus, it appears that statutory regulation of the various forms of public exercise of first amendment rights may be permitted if it consists of impartially-administered, well-defined standards aimed at safeguarding public order.[33]

---

28. Lovell v. Griffin, 303 U.S. 444, 451 (1938).
29. Hague v. CIO, 307 U.S. 496 (1939).
30. 310 U.S. 296, 305-06 (1940).
31. Niemotko v. Maryland, 340 U.S. 268, 271 (1951).
32. Cox v. New Hampshire, 312 U.S. 569 (1941).
33. *See* Emerson, *supra* note 22, at 667.

The second field in which the Supreme Court has accepted a system of prior restraint involves motion picture censorship. The Court has authorized state-instituted systems of film censorship only when incorporation of procedural safeguards will minimize the dangers of erroneous judgment. Under the standards established by the Court in *Freedman v. Maryland*[34] the censor has the burden of proving that the film is unprotected expression and that his determination is not final, but subject to judicial review which must be expeditious.

While the Court has struck down statutes regulating the content of expression in public assembly cases, it has allowed censorship of movies, but even then only in the presence of elaborate procedural safeguards. It should be noted that obscenity is not protected by the first amendment,[35] and that the Supreme Court tends to distinguish films as a form of expression from literature.[36]

To insure the right of freedom of expression in literature, the Court has placed a heavy burden on persons seeking to impose restraints.[37] In *New York Times v. United States*[38] (the "Pentagon Papers" case), Justice Brennan argued that

> the First Amendment tolerates absolutely no prior judicial restraints of the press predicated upon *surmise* or *conjecture* that untoward consequences may result . . . . Thus, only governmental allegation and proof that publication must inevitably . . . cause the occurrence of an event kindred to imperiling the safety of a transport already at sea [an example given in *Near v. Minnesota*] can support even the issuance of an interim restraining order. In no event may mere conclusions be sufficient . . . .[39]

This passage cautions that implementation of prior restraint must be limited to situations where there may be a definite forecast of a violation of protected interests which are superior to first amendment rights. In what manner is this policy applied when the publication

---

34. 380 U.S. 51, 60-61 (1965).

35. Roth v. United States, 354 U.S. 476, 481 (1957).

36. Joseph Burstyn, Inc. v. Wilson, 343 U.S. 495, 503 (1952).

37. *See* Organization for a Better Austin v. Keefe, 402 U.S. 415, 418-19 (1971); Bantam Books, Inc. v. Sullivan, 372 U.S. 58 (1963).

38. 403 U.S. 713 (1971).

39. *Id.* at 725-27 (Brennan, J., concurring) (emphasis added). The concurring opinions of Justices White and Stewart suggest more strongly the availability of prior restraint had the government made a stronger case showing a clear and present danger. Justices Black and Douglas, in two separate concurring opinions, negated the availability of any such restraint.

sought to be restrained is student-authored and distributed within a school?

*Eisner v. Stamford Board of Education*[40] presented this issue to the Second Circuit Court of Appeals. In this case, the policy of the board of education required prior approval by the school administration of all literature to be distributed on the school grounds. A board rule established guidelines for the granting of such approval:

> No material shall be distributed which, either by its content or by the manner of distribution itself, will interfere with the proper and orderly operation and discipline of the school, will cause violence or disorder, or will constitute an invasion of the rights of others.[41]

This policy was challenged by students who distributed their own newsletter in school without seeking advance permission. The court struck down the policy, finding it to be procedurally deficient according to standards set out in *Freedman v. Maryland.*[42] Notably, the policy lacked both a time limit on review and a method to appeal decisions.[43] The *Eisner* opinion emphasized, however, that the board policy was not unconstitutional as an authorization of prior restraint.[44] The court found that the standard set forth by the board conformed generally with the *Tinker* requirement that a foreseeable disruption must be substantial and material in order to form the basis of a restrictive action. Thus, the court concluded that the board's policy was not overbroad.[45] Nevertheless, the opinion did recommend the formulation of more precise guidelines in order to avoid constitutional issues which might arise in particular applications of the rule.[46]

---

40. 440 F.2d 803 (2d Cir. 1971).

41. *Id.* at 805.

42. *See* text at *supra* note 34.

43. *Id.* at 810; *see* Antonelli v. Hammond, 308 F. Supp. 1329, 1335 n.5 (D. Mass. 1970):

> If anything, safeguards are more essential to protect publishers of a student newspaper than distributors of a motion picture. . . . [T]he effective finality of a censor's decision regarding the content of a student newspaper is all the more probable and consequently so is the danger that protected expression will be suppressed.

44. 440 F.2d at 810; *accord,* Baughman v. Freienmuth, 343 F. Supp. 487 (D. Md. 1972); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).

45. 440 F.2d at 809.

46. *Id.*

> [G]reater specificity . . . would be highly desirable. . . . The Board [should] resolve . . . some of the difficult constitutional issues . . . . For example, to what extent . . . [may] school authorities . . . suppress criticism of their own actions and policies? . . . [Will school officials] take reasonable measures to minimize or forestall potential disorder . . . that might otherwise be generated

Writing for the court in *Eisner,* Judge Kaufman cited *Near v. Minnesota*[47] and *Chaplinsky v. New Hampshire*[48] in support of the premise that the state may suppress speech which has the effect of force.[49] In the school environment, this definition would be satisfied by speech substantially disruptive of the educational process. The crucial factor to be noted is that if the existing rule had incorporated the necessary procedural safeguards, the *Eisner* court would have permitted the requirement of prior submission of the student publications.

Confronting the issue of prior restraint under circumstances similar to those in *Eisner,* the court in *Fujishima* reached a contrary conclusion. The Chicago Board of Education regulation challenged in *Fujishima* provided no criteria for the approval or disapproval of literature to be distributed within the school. This factor, however, was not determinative of the court's decision to declare the regulation unconstitutional. The court flatly observed that "[b]ecause section 6-19 requires prior approval of publications, it is unconstitutional as a prior restraint in violation of the First Amendment."[50] This conclusion derives from two premises. First, under the *Tinker* doctrine, unless there is a showing of material and substantial interference with school discipline, the school may not restrain the first amendment rights of its students.[51] Secondly, according to *Near v. Minnesota,* these rights include the freedom to distribute publications without prior censorship.[52] If all prior restraints are invalid under the first amendment, and if students possess full first amendment rights, then a prior restraint is not valid when applied to the student's exercise of those rights. Thus, the position taken by the court on prior restraint eliminates any need to balance the school's interest in avoiding disruption against the students' rights. Any restraint of the rights of the student must be in the form of *subsequent punishment.*

In reaching its decision, the court was compelled to consider *Eisner,* which would have allowed prior restraint if accompanied by proper procedural safeguards. Unimpressed by the Second Circuit's

in reaction to the distribution of controversial or unpopular opinions, before they resort to banishing the ideas from school grounds? . . . The Board might also undertake to describe the kinds of disruption . . . that it contemplates would typically justify censorship . . . .

47. 283 U.S. 697 (1931).
48. 315 U.S. 568 (1942).
49. 440 F.2d at 807.
50. 460 F.2d at 1357.
51. *Id.*
52. *Id.*

conclusion in *Eisner,* the *Fujishima* court announced its belief that "*Eisner* is unsound constitutional law."[53] Judge Sprecher suggested that the *Eisner* court had erred in interpreting *Tinker* to allow prior censorship of student publications as a "tool of school officials in 'forecasting' substantial disruption of school activities."[54] Rather, the *Fujishima* opinion observed that the *Tinker* forecast principle permits restraint of freedom of expression only when school officials can predict the likelihood of disruption in school discipline from existing or ongoing conduct. By this interpretation, *Tinker* cannot stand for the proposition that student conduct must be submitted to administrative examination prior to its exercise so that potentially disruptive activities may be prohibited.

> The *Tinker* forecast rule is properly a formula for determining when the requirements of school discipline justify *punishment* of students for exercise of their First-Amendment rights. It is not a basis for establishing a system of censorship and licensing designed to *prevent* the exercise of First-Amendment rights.[55]

The *Fujishima* court has maintained that *Eisner* erred in interpreting *Tinker* to allow prior restraint of publications. However, the Second Circuit read *Tinker* to affirm school authority as well as student freedom of expression, and to allow the prohibition of certain expression. For authority to allow prior review, the *Eisner* opinion sought support from cases which provide exceptions to the general rule against prior restraints.[56] *Eisner* then invoked *Tinker's* formulation of students' first amendment rights in order to judge the criteria by which school authorities had censored student-published literature.[57]

It is submitted that the disputed "*Tinker* forecast rule" itself should not be determinative of the authority of a school to use a system of prior review of student-published literature. In evaluating the extent of the school's right to impose prior restraint, two other points made in *Tinker* become relevant. First, the Court observed that "in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expres-

53. *Id.* at 1359.
54. *Id.* at 1358.
55. *Id.*
56. *See* 440 F.2d at 806-07. The court found support in *Near v. Minnesota, Freedman v. Maryland,* and related cases.
57. *See id.* at 807-08.

sion."[58] This indicates the heavy burden of justification borne by school officials whenever any restraint of expression is undertaken. Secondly, in its discussion of constitutional protections, the opinion declared that "[f]irst amendment rights, *applied in the light of the special characteristics of the school environment,* are available to teachers and students."[59] This statement suggests that special considerations are necessitated by the confined and sometimes volatile conditions in certain schools, and perhaps by the young age of the students as well.[60]

In positive terms, therefore, students are assured of their right to express opinions, political views, or criticism of school policy in their publications. At the same time the school, charged with providing for the effectiveness of the educational process, has an interest in maintaining order. Acting in this interest, the school may regulate the time, manner and place of distribution to assure that it will not interfere with the operation of the school activities. Such regulation, which would not go to the content of the literature, was recognized to be valid in *Fujishima.*[61]

A system of prior review such as that contemplated in *Eisner,* which would prevent distribution only of literature that would be a material and substantial interference, theoretically might serve simply as a precaution and not an abridgment upon the students' freedom of expression. Reading the publication would undoubtedly keep the administration abreast of student concerns, but this does not justify prior review. Such a system presents a potential for abuse, and, given the narrow scope of restrainable material, additionally appears to be a generally futile exercise of authority. Furthermore, the anticipation of review affords the possibility of chilling a free and uninhibited expression of opinions. Since a school may rely on the deterrent effect of subsequent punishment to prevent distribution of disruptive literature, as well as regulate the time, place, and manner of distribution, the school's interest, under ordinary circumstances, does

58. 393 U.S. at 508.

59. *Id.* at 506 (emphasis added).

60. *Cf.* concurring opinion of Mr. Justice Stewart in *Tinker,* 393 U.S. at 514; Ginsberg v. New York, 390 U.S. 629 (1968); Quarterman v. Byrd, 453 F.2d 54, 57-58 nn.6 & 7 (4th Cir. 1971).

61. 460 F.2d at 1359. "Such injunction [against the enforcement of the school's policy of predistribution review] will not prevent defendants from promulgating reasonable, specific regulations setting forth the time, manner and place in which distribution of written materials may occur."

not seem to overcome the "heavy presumption" against the validity of a prior restraint.[62]

Outside the educational environment, restraint of expression has been allowed where the expression is found to present "a clear and present danger."[63] The problems which exist in particular schools may create situations where the probability of disruption is demonstrably higher than that in other schools. The existence of such circumstances may justify a flexible system of prior review which would allow limited restraints upon distribution. A school with racial tensions might exemplify a situation where an inflammatory publication could directly increase hostility and endanger the school community. Comparable situations[64] necessitate the administration's ability to eliminate the focus of disruption before the school is affected.

The power to initiate such action may be regulated, as, for example, may the power of the police to conduct a search which is valid under the fourth amendment. In order to obtain a search warrant from a magistrate, an officer is required to show probable cause. The magistrate acts as an objective and neutral decision maker to determine whether or not the officer has cause to conduct a search. Similarly, in order to impose a system of prior review such as that anticipated in *Eisner,* the school should be able to show justification—for instance, the existence of turmoil within the school, or the frequent appearance of disruptive literature. Neither the *Eisner* nor *Fujishima* courts provide guidelines upon which to base a determination as to the existence of extraordinary circumstances. *Eisner* justifies prior review by the school's general regulatory power. *Fujishima* does not indicate recognition of any situation where the school's interest might be sufficiently threatened to validate prior restraint. The conflict between these opinions denies the existence of an accommodation between first amendment rights and the demands of maintaining an educational system. Even under *Fujishima* school authorities

62. Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963).

63. Schenck v. United States, 249 U.S. 47, 52 (1919).

64. *See* ACLU, *Academic Freedom in the Secondary Schools* 11-12 (September, 1968), *cited in* S. Nahmod, *Black Armbands and Underground Newspapers: Freedom of Speech in the Public Schools,* 51 Chi. B. Rec. 144, 153 (1969).

> Neither the faculty advisors nor the principal should prohibit the publication or distribution of material except when such publication or distribution would clearly endanger the health or safety of the students, or clearly and imminently threaten to disrupt the educational process, or might be of a libelous nature. Such judgment, however, should never be exercised because of disapproval or disagreement with the article in question.

conceivably might institute some type of review under a "clear and present danger" theory. Certainly, any school may take steps to deal with an emergency situation.[65] It would seem that even the student in *Fujishima* who distributed literature during a fire drill might have been punished on the grounds of improper conduct during the drill, unless it could be shown that other students distributing nonpolitical literature were not so reprimanded.

In order to preserve first amendment rights in such situations, and to clarify the parameters of school authority, definite standards are needed to avoid the implementation of ad hoc regulations which might develop. The court in *Fujishima* might have directed educational authorities to define the conditions which would give a school sufficient cause to implement a regulated system of prior review. The ideal standard would have both administrators and students aware of the extent of school authority and student responsibility.

Since controversial literature to which school officials may object is often more symptomatic than causative of discontent, stifling the outlets for such dissatisfaction can result in problems more serious than any controversy initiated by the expression of opinions. The school's policy should be to foster bilateral debate and responsible criticism. Only where the atmosphere warrants particular caution is a system of prior review a justifiable means of maintaining order.

MICHELE O. HEFFERNAN

## CONSTITUTIONAL LAW—NONTENURED STATE UNIVERSITY PROFESSOR NOT ENTITLED TO PROTECTION OF PROCEDURAL DUE PROCESS UPON NONRENEWAL OF CONTRACT.

In January 1969, David E. Roth, a nontenured assistant professor at a state university was notified that he would not be rehired after his one-year contract expired. No reasons were given, and no hearing was offered concerning his nonrenewal. He brought suit in a United States district court, alleging that the university's action deprived him of both substantive and procedural rights under the fourteenth amendment.[1] The plaintiff claimed that the decision was in retaliation for

65. *See* Sullivan v. Houston Ind. School Dist., 333 F. Supp. 1149, 1170 (S.D. Tex. 1971).

1. Roth v. Board of Regents of State Colleges, 310 F. Supp. 972 (W.D. Wis. 1970).