Supreme Court of the United States

In the Matter of:

John F. Tinker and Mary Beth Tinker, Minors, etc., Petitioners.	Docket No. 21
v.	
The Des Moines Independent Community School District, et al. Respondents	

Place Washington, D. C.

Date November 12, 1968

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1968

John F. Tinker and Mary Beth Tinker, Minors, etc., Petitioners.	:	
v.	:	No. 21
The Des Moines Independent Community School District, et al., Respondents.	:	

Washington, D. C.
Tuesday, November 12, 1968

The above-entitled matter came on for argument

BEFORE:

EARL WARREN, Chief Justice
HUGO L. BLACK, Associate Justice
WILLIAM O. DOUGLAS, Associate Justice
JOHN M. HARLAN, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
ABE FORTAS, Associate Justice
THURGOOD MARSHALL, Associate Justice

APPEARANCES:

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P R O C E E D I N G S

MR. CHIEF JUSTICE WARREN: Number 21, John F. Tinker and Mary Beth Tinker, minors, etc., petitioners, versus The Des Moines Independent Community School District.

THE CLERK: Counsel are present.

MR. CHIEF JUSTICE WARREN: Mr. Johnston, you may proceed with your argument.

ORAL ARGUMENT OF DAN JOHNSTON, ESQ.,

ON BEHALF OF PETITIONERS

MR. JOHNSTON: May it please the Court, this case is similar in some respects to the decision in the case that resulted in the decision of Epson v. Arkansas which this Court decided just this morning.

The case is here on Certiorari to the United States Court of Appeals for the Eighth Circuit.

One major distinction between Epson and this case is that this case involves the right of public school students rather than public school faculty members to exercise expressions of their opinions in a non-disruptive way in the school.

Q This is not a religious establishment case?

A No, it is not, your Honor. It is a First Amendment free speech case in the sense of expression of views rather than a worship.

The case began as a petition for injunction and nominal damages under 42 United States Code 1983 in the United

States District Court for the Southern District of Iowa. That Court dismissed the Petition and on appeal to the Circuit the decision was split four to four.

The conduct of the students was essentially this. That at Christmas in 1965, they decided that they would wear small black armbands to express certain views which they had in regard to the war in Vietnam. Specifically, the views were that they mourn the dead on both sides, both civillian and military in that war and they supported the proposal that had been made by United States Senator Robert Kennedy that the truce which had been proposed for that war over the Christmas period be made an open ended or indefinite truce. This was the purpose that the students gave for wearing the armband during this period.

During this period of time, of course, there were school days and they wore the arm bands to school.

Prior to the time when any of these petitioners wore the arm bands to school, it came to the attention of the school authorities that perhaps there would be some students who would express views relating to the war in Vietnam in this manner during school time.

The principals of the secondary schools, the high schools and perhaps the junior high schools in the City of Des Moines public school system met prior to the time any of the arm bands had been worn and enacted a policy which was not

written but which was agreed upon among themselves that no public student could wear an arm band in the Des Moines/School system for this purpose; that if the student came into school wearing the arm band he would be asked to remove it; failing that, the student's parents would be contacted and their assistance would be solicited in getting the students to remove the arm bank; failing that, the students would be sent home -- would be in effect suspended from school until such time as they were willing to return to school without the arm bands.

The three students who are petitioners in this case, Christopher Eckhardt, who is 16 and in the 10th grade at Roosevelt High School; John Tinker, 15, in the 11th grade; Mary Beth Tinker, 13, and in the 8th grade, determined that in spite of the policy that had been announced through the schools they would wear the arm bands as a matter of conscience to express the views that they had.

Christopher Eckhardt and Mary Beth Tinker wore theirs on the first day. Mr. Eckhardt went to school having the arm band on knowing of the policy against wearing the arm bands.

He went immediately to the office of the Principal and said "I am wearing the arm band. I know that it is in violation of the school policy."

The Principal carried out the dictates of the policy, which were to tell the students to remove it. The student said he could not in good conscience remove it, that he thought he

had a right to wear it.

The student's mother was called and she supported her son in the activity and then young Mr. Eckhardt was suspended from school. He was out of school approximately six days. Five days prior to the Christmas vacation and then one day after the Christmas vacation.

Mary Beth Tinker also wore her arm band on that first day. However, she wore it throughout the entire morning without any incident related to it in any way that disrupted the school or distracted. She wore it to lunch and she wore it where there was by the way some conversation between herself and other students in the lunch room as to why she was wearing the arm band, and she wore it into the first class in the afternoon.

It was in the first class in the afternoon when she was called to the office and the procedure was followed for contacting her parents, apparently asking her to remove it, and she did remove the arm band and then returned to class.

However, in spite of the fact that she did remove the arm band she was later called into the office and suspended, nevertheless.

John Tinker determined that it was his belief that the arm band should not be worn in open violation of the policy that the schools had adopted until some attempt had been made to try to reach and accommodation with the School Board.

On the first day John Tinker did not wear the arm

band to school. On the evening of the day when Mr. Eckhardt and John's sister, Mary Beth, were suspended from school, he with some other students who had worn the arm bands attempted to contact the Chairman of the Board of Directors of the Des Moines Public Schools and they requested that he call a special meeting of the Board of Directors of the School Board, as we call it, for the purpose of trying to reach an accommodation between the students and the policy enacted by the Principals of the Schools.

They were refused this special meeting of the School Board and then on the next day, Friday, John Tinker wore his arm band to school and wore it throughout the morning hours without any toward incident, without any substantial and material disruption to the school. He wore it at lunch where there was again some discussion about it in the period that is generally free for an open discussion among students, and then wore it into the first class in the afternoon where he was suspended.

Q What if the student had gotten up from the class and delivered a message orally what his arm band was intended to convey and insisted on doing it all during the hour?

A In that case we would not be here. Even if he insisted on doing it only for a second, although he would be expressing his views, he would be doing something else.

Q Why did they wear the arm band in the class, to

express the message?

A Yes, sir.

Q To everybody in the class?

A Yes, sir.

Q Everybody while they were listening to some other subject matter were supposed to be looking at the arm band and taking in the message?

A To the extent they would see it. But I don't believe that--

Q They were intended to see it, weren't they?

A They were intended to see it.

Q And to understand it?

A Yes.

Q And so absorb the message?

A Yes, sir.

Q While they were studying arithmetic or--

A Well, except that, your Honor, I believe that the method that the students chose in this particular instance was specifically designed in such a way that it would not cause that kind of disruption. None of the teachers who have testified at the hearing in the District Court--

Q Just wearing a meaningless arm band?

A No.

Q Carrying an ineffective message?

A No, they intended to be effective.

Q Why didn't they take it off when they went to class?

A There would be no reason to take it off.

Q Because it was ineffective, no one would notice it?

A It was not disrupting the class.

Q How about the attention of the students?

A Well, there is no testimony by any of the teachers that it was in any way--

Q Why did they wear it again? Why did they wear the arm band? To convey a message?

A That is right.

Q They anticipated students would see it and understand and think about it?

A Yes, sir.

Q When they did it in class they intended the students to think about--

A I think it is a fair inference that the method of--

Q They intended the students to think about it outside of the class but not inside the class?

A I think they chose a method of expression which would not be distracting.

Q Physically it wouldn't make a noise, wouldn't cause a commotion. But don't you think it would cause some people to direct their attention to the arm band and the Vietnam War and think about that rather than what they were thinking about?

A I think perhaps, your Honor, it might for a few

moments have done that, and I think it might have distracted some students, just as many other things do in the classroom.

Q But which the school has forbidden?

A But which the school also allows to continue. I don't think there is any suggestion that the school attempts to regulate all sorts of things that might be distracting, especially in a sense of this type of activity which probably contributes something to the total atmosphere.

Q It prohibited them from wearing the arm band where, in the building?

A That is right. In the cafeteria, halls, anywhere in the school.

Q Anyplace in the building?

A Yes, sir.

Q Your contention is they were entitled to wear it any where?

A Our contention is that the policy as it was adopted, it was a broad policy, it was not distinct, or not in any way directed toward disruption or distraction. It is a policy that will not stand the test of freedom of speech under the First Amendment.

As a matter of fact, a number of political buttons were worn to this school.

Q I am for Humphrey, I am for Wallace?

A We didn't have at that time I am for Nixon, I am for

Goldwater.

Q Deisgned to stop the bombing?

A That to me would not be the sort of thing designed to stop, disrupt the class.

Q Suppose it was a placard, a message?

A The situation and the problem that we have is the specific regulation was directed only toward one specific kind of conduct.

There is in the record a document which was defendants exhibit number 3 in the trial, which is a broad statement of policy by the School related to things that disrupt, related to disrupting conduct.

The difficulty we have with this particular policy as it was enacted is that there was no indication, no testimony by teachers, by the administration or anyone else, of any reason to believe that it would be disruptive. And when the students in fact did wear the arm bands, the record quite clearly shows it was not in fact disruptive.

Q Do you think a narrower regulation that says you may not wear bands or placards in the classroom would be sustainable under the First Amendment?

A I believe it would be more easily sustainable.

Q Or would it be sustainable?

A No, I don't believe so. It would not be.

Q You don't have to take that position.

A I don't in this case, but I do in answer to the Court's questions.

Q Why don't you have to sustain that position in this case?

A Because the arm band regulation in this case was directed toward wearing the arm band at any time in school.

Q But they wore it in class.

A They did. There is no indication they were suspended just for wearing it in class. I would suggest what is before is is the question of policy that was adopted. Whether or not the policy itself will stand the test of freedom of speech under the First Amendment.

Christopher Eckhardt never did wear the arm band in class and was suspended.

Q The action that was brought was what?

A The action that was brought was for injunction, for injunctive relief and nominal damages.

Q Against any enforcement of the regulation?

A Against any enforcement of the regulation which would infringe upon the students' freedom of expression.

Q Do you think your injunction should forbid the school from keeping arm bands out of class rooms?

A Unless they were kept out of there for the express purpose of preventing disruption, unless there were some showing--

Q You want the injunction and you are trying to sustain that injunction?

A Yes.

Q So you must be arguing that the school may not keep arm bands out of class rooms.

A On the state of this record.

Q I suppose you concede if they started fist fights, or something of that kind, and disrupted the school that the Principal could prevent the use of them?

A The suggestion, I believe, we are making there should not be any special rule for freedom of expression cases for schools.

Now, that would mean that under the general Terminiello type responsibilities that the state has an obligation to try to move directly against those causing the disruption rather than take away the first Amendment right of expression. But again we don't reach that in this case because there is simply not that kind of evidence in the record.

Q No clear and present danger principle?

A No. As the Fifth Circuit in two cases, Burnside vs. Byars, seems to indicate, and Blackwell -- the Byars case is cited in our Brief -- a material and substantial disruption to the schools would justify perhaps the subornation of freedom of expression.

Q Why shouldn't the Terminiello type case be applicable

in the class room?

A Well, the facts of the Terminiello case are not necessarily applicable to class rooms. But the kind of test and the thing, your Honor, that we have been trying to deal with in this case since the trial is the concept that whole special rules, whole special doctrines, for some reason should be applied to First AMendment law in schools.

What we suggest and we admit, we have admitted from the beginning that the amount of disruption that is permissible in a public hall in Chicago or--

Q Disruption?

A Anything that--

Q You are not talking about violence. At least you are talking about that?

A I think that is correct.

Q And so that there could certainly be some whispering going on, undertone in the class room?

A There is no doubt about that.

Q Even though it wouldn't be disruptive or bother anybody else at all, it didn't make anybody mad or anything?

A Impair the ability of the school to carry out the purposes that it was there for.

Q Is there any evidence that they have done that in this record?

A There is not. As I say, there was discussion from

time to time at the cafeteria at lunch. There was some discussion in the halls. There is, and I am frank to say, when John Tinker wore the arm band, in the first hour they were engaged in a class which was a free discussion type of class. The instructor of the class was outside the room and he was asked during that period about the arm band and he did explain to the students why he wore it. And we are urging upon the court the concept that especially in the public schools, which this Court recognized this morning in the Arkansas case and which it has recognized many times before, that it is important that the idea of freedom of dissent and inquiry in expression be maintained in the schools, and there is certainly nothing in this record which indicates that sufficient quantum of evidence to overcome that presumption.

Q As I understand it, and I want to be very clear about this. In response to my brother White's question, if the record shows that wearing of the arm band significantly or substantially or materially, or whatever is the right word, interferred with the business of the class room, that is, communication between teachers and students, then you would say that disciplinary action would be justified?

A I think we could take that position. I want to make a distinction, if I may, between an expression of an opinion which might its disrupt the class, and the expression of opinion which might cause someone else to disrupt the class. And I

believe those are perhaps two separate cases.

I would also like to make a distinction between the expression of opinion which is coupled with something else, marching in the hallway or standing up in the class and making a speech about the war in Vietnam during mathematics class; that kind of thing I think the Court can prohibit.

We are in a situation here where the record simply doesn't support that kind of a situation. Rather it supports the idea that before anyone wore an arm band really on the basis of pure conjecture that the policy was adopted frankly for the purpose -- and the administrators and teachers say this over and over again -- it was the principle of the demonstration, the idea of expressing political beliefs that they were opposed to in this context, and the students were suspended for violating that policy and not suspended for causing any disruption in the class room

Q Suppose the state passed a law applying a ban on black arm bands for protest purposes, across the board, so that it be applied in private schools as well, would that be constitutional?

A I think that would probably, your Honor, interfere with some earlier decision of this Court probably in regard to the right of individuals, of citizens, to establish private schools, and so long as they met accreditation standards to educate their children as they see fit, I think that is probably

a different kind of situation from what we have here.

The situation here is not based on the conduct of the students, whether or not it was permissible, but the conduct of the state,whether or not the conduct of the state was permissible, whether or not we have a situation of pure expression, with no evidence of substantial disruption of any public interest whether or not that in that situation the state can move to subornate and to punish freedom of expression.

Q Why isn't this case moot?

A The case is not.

Q No one has been punished, have they? I am reading from your Brief at the bottom of page 8 and the top of page 9 showing that the petitioners returned to school at the end of the Christmas vacation, January 4 or 5, 1966, two and a half years ago. Two and three quarter years ago -- without their arm bands.

A The students each testified in the District Court -- and this will appear in the record -- that although they did return to school because of the obvious dire consequences to themselves if they did not return to school, that they still have these views on the war in Vietnam, they still have a desire to wear arm bands to express their opposition to the war in Vietnam, and were the policy taken away they would wear their arm bands to school.

Q That is in the Complaint?

A It is in the appendix. That testimony is in the record.

Q In the Complaint?

A Yes, alleged in the Complaint. And any cause which anticipated the possibility that by the time the case might be finally decided the students might not no longer be in school and might not no longer have that interest.

Q You sued for a dollar?

A That is right.

Q Doesn't the statute require that $10,000 be in controversy?

A Not, your Honor, in a case that goes up under 42 U.S. Code 1983.

Q Your hope is that these children correctly understood some of our opinions on mootness?

A Yes, sir, your Honor.

Q What happens if the Vietnam war ends before we decide the case?

A Well, your Honor, we all hope for that, of course. I would say that the prayer for damages is still there. The students were still out of school for six days in the instance of two and five days in the instance of one.

I would also say to the Court, speaking frankly from my own experience and I am sure from the Court's experience this is not an isolated problem. That the correct balance between the interest of the scale in maintaining discipline

and the right of students, because I believe of the improvements in American education have increasingly moved to have opinions and want to express opinions, but this kind of situation arises and will continue to arise, and we suggest this case provides a good context for the Court to provide guidance.

Q This gets the Supreme Court of the United States pretty deep in the trenches of ordinary day to day discipline.

A I would not think it would get you any further in that sort of thing than in Barnett vs. Board of Education of West Virginia, than did the case that the Court announced this morning, and a number of other cases where the Court has held that whatever are the delicate functions of School Boards, and they are certainly delicate especially these days, that they still have no function which cannot be exercised within the purview and within the dictates of this Court's decisions under the First Amendment.

Q We didn't say any such things of that kind -- the majority of us. It is purely an establishment case and nothing more.

Let me ask you this: does it matter what the expression is about? Suppose some child shows up in school wearing an outlandish costume -- I don't want to particularize it -- and that is in violation of a regulation of the school saying children must come to school clothed, and this child says I am wearing this outlandish costume because I want to

express the very strong belief that I have in the utmost freedom for the individual. This child says that is what I want to do.

Does that make any difference? Does he have a constitutional protective right with respect to that kind of special or would you limit it to political matters, social political importance, as the older generation conceives it?

A Justice Fortas, I believe that the real question in that regard hinges upon whether or not the utterance is the expression as contemplated by the First Amendment, which was the finding that the District Court made, as a matter of fact, that the students were engaged in expression of views privileged by the First Amendment, unless subornated by some other State interest.

Q What is your opinion, if you care to express one?

A My opinion would be in that instance that probably again it would depend a lot upon what the students said and the demeanor of the student when he expressed it, and things of that sort, that probably would not be within the purview of the First Amendment.

But again it is just conjecture on my part and to wear one's hair cuts the way hewants to may present Fourteenth Amendment, but it does not present per se First Amendment problems such as we have here.

Q During the negotiations was the suggestion ever made

to limit the rules not to wear bands in the class room?

A Not to my knowledge.

Q It never was?

A No.

Q The Board never offered that as a solution, did they?

A No, they did not. By the time they had gotten finally to the Board, they felt the necessity, I believe, to sustain the action of the Principals.

Q Which school was it?

A This was generally the public schools in Des Moines. Three schools involved.

Q What grades?

A Mr. Eckhardt was in the 10th grade, your Honor, at Roosevelt High School. Mr. Tinker was in the 11th grade at North High School. And Mary Beth Tinker was in the 8th grade.

I would not think there would have to be a special rule for schools or any other part of our society for the First Amendment. But as far as the principles applied, we would like to have the same principles applied in the school or perhaps especially in the school that are applied elsewhere.

If I may, I would like to reserve the remainder for my rebuttal.

MR. CHIEF JUSTICE WARREN: Mr. Herrick.

ORAL ARGUMENT OF ALLAN A. HERRICK, ESQ.,

ON BEHALF OF THE RESPONDENTS

MR. HERRICK: Mr. Chief Justice and Associate Justices. The Respondents believe there are two basic issues involved here.

The first is do the school administrators or school boards have to wait until violence, disorder and disruption break out in a scholarly discipline of the school is disrupted or may they act when in good faith in their reasonable discretion and judgment disorder and disruption of a scholarly atmosphere of the school room will result unless they act firmly and promptly?

The second issue, it seems to me, is that this Court must determine how far it wants to go under the constitutional amendments for free speech in reviewing every decision of every school district made in good faith in its reasonable discretion and judgment as necessary to maintain order in a scholarly discipline atmosphere within the class room.

A third issue might be added. Are disturbances or threatened disturbances in the schools to be measured by identical standards with disturbances or threatened disturbances on the streets?

It is the position of the Respondents that the decision of the school administration and of the School Board made in good faith under the circumstances existing when that decision was made, was the reasonable exercise of discretion

on the part of the school authorities and did not deprive the petitioners of their constitutional right of free speech.

Now, this Court has held that freedom of speech, including, of course, the right of demonstration, is not an absolute right to be exercised regardless of time or place.

I am sure it isn't necessary to quote to this Court its own decisions, but the case of Adderley vs. State of Florida seems particularly pertinent, where the students went from the University to the jail grounds to protest the arrest of students who had been arrested the day before that and--

Q How many students were involved in the Adderley case? Several hundred, weren't there?

A It was quite a large number.

Q How many were involved in this one?

A Well, it is a question of what do you mean by "involved."

Q How many were wearing arm bands?

A There were five suspended for wearing arm bands.

Q Any wearing arm bands that were not suspended?

A Yes, sir, I think there were two.

Q That makes seven.

A They weren't excepted, and I will refer to that a little later.

Q Seven out of 18,000? And the School Board was advised that seven students wearing arm bands were disrupting

18,000? Am I correct?

A I think, if the Court please, that doesn't give us the entire background that builds up to what was existing in the Des Moines Schools at the time the arm bands were worn.

As we view it, the right of freedom of speech or the right of demonstration in the school room and on the school premises must be weighed against the right of the school administration to make decisions which the administration believed in good faith, believed in its discretion, was reasonable to preserve order and to avoid this disturbance and disruption in the school.

Q And had there been any disruption?

A I will refer to that also, your Honor. There had been with John Tinker what I would call disruption. There were one or two boys struck.

Q How many boys were struck in the Des Moines system in a day?

A If the Court please, I think the question there is the fact that the first issue that I undertook to state, does the school system, if we have an aroused community, have to wait until disruption occurs, or may it act to--

Q The school system was aroused? Where is that in the record?

A I think I can point that out, if the Court please. In the background of this case, in November of 1965, the

petitioner, Christopher Eckhardt, with his mother, who was President of the Des Moines Chapter of the Womens' International League for Peace and Freedom, had come to Washington, D. C. to participate with the students for democratic society on the spot and others in the march which I am sure this Court is familiar with, from the White House to the Washington Monument.

That was in November, I think, about the Thanksgiving Holiday.

On Saturday, December 11, 1965, following this march, a group which included students related to Students for Democratic Society, and some adults, met at the Eckhardt home and one of the proposals that was developed at this meeting was the wearing of these black arm bands.

Now, none of these petitioners were present. Now, as the trial court said -- and this is on page 73 of the appendix, the last paragraph: "The Vietnam War and the involvment of the United States therein has been a subject of major controversy for sometime. When the arm band regulation involved herein was promulgated the debate over the Vietnam War had become vehement in many localities. A protest march against the war had recently been held in Washington, D. C. A wave of draft card burning instances protesting the war had swept the country. At that time two highly publicized draft card burning cases were pending in this Court. Both individuals supporting the war and those opposing it were quite vocal in expressing

their views. This was demonstrated during the School Board's hearing on the arm band regulation."

And that appears also in the record, I think, some 200, many of them outsiders, at the time of the School Board hearing.

At this hearing the School Board voted in favor of the rule prohibiting the wearing of arm bands on school premises. It is against this background the Court must review the reasonableness of the regulation. This is the background that faced the schools.

This had become a matter through the press and through the community and the Superintendent directed Doctor Petersen, who was the Director of Secondary Education, to call a meeting of the Principals on December 14, 1965, and with this background and at this meeting the Principals in good faith, using their discretion and best judgment, decided to maintain discipline and to avoid disruption the wearing of the arm bands in the school room should not be permitted.

Now, on page 46.

Q Suppose they decided to wear black neckties, four-in-hand ties?

A Oh, I would anticipate there probably wouldn't have been any question about it, unless they had built it up to a point--

Q Suppose instead of saying we will wear black arm

bands and in order to mourn the war in Vietnam we will wear mourning black ties?

A I think, your Honor, if we get all of this back to the same problem -- it is difficult to sit in this Court or to stand in this Court and say what faced the schools out in Des Moines in the enactment of this, making this decision against the wearing of arm bands. It was an inflammatory matter at that time.

Now, Doctor Petersen, the--

Q But before you get off that subject, is that any different from what was going on in practically every community in this country during the last two months, during the campaign for the Presidency? Weren't those things thoroughly debated, and argumentatively and vociferously in almost every community in the country?

A Oh, I think that is true, your Honor. But I think the place for that--

Q Do you think then that what you have read is sufficient backdrop for stopping First Amendment rights in all of these communities because of that?

A I think, your Honor, that the correct answer to that is free discussion in the class room is always permitted, always has been, if they want to come in and discuss these matters.

But the question of imposing a captive audience moving with an arm band, when it is known through the press

and through the community,through things that have happened here, that the community is inflamed and might disrupt the orderly conduct of the schools.

Q What did the Court have to say, the trial Court, as to whether this was an exercise of the First Amendment right?

A Well, the Court said this--

Q What page?

A It is on page 75. "After due consideration, it is the view of the Court that the actions of the school officials in this realm should not be limited to those instances where there has been a material or substantial interference with the school discipline."

Q Didn't they say something before that about whether this was a First Amendment right or not?

A Yes, I think just immediately--

Q That is what I was interested in.

A Here we are. It is on page 72. "The question which must now be determined is whether the action of the officials of the defendant school district forbidding the wearing of arm bands on school facilities deprived the plaintiffs of constitutional rights secured by the freedom of speech clause of the First Amendment. An individual's right of free speech is protected against infringement by the due process clause of the Fourteenth Amendment. Goodloe vs. New York, 268 U.S. 252.

"The wearing of arm bands for the purpose of express-

ing certain views is a symbolic act and falls within the protection of the First Amendment free speech clause. West Virginia State Board of Education vs. Barnett. However, the protections of that clause are not absent. The abridgment of speech by a state regulation must always be considered in terms of the object the regulation is attempting to accomplish and the abridgment of speech that actually occurs. In each case the Courts must ask whether the gravity of the evil discounted by its improbability justifies such invasion of free speech as is necessary to avoid danger.

"The officials of the School District have the responsibility for maintaining a scholarly disciplined atmosphere within the class room. These officials not only have a right, they have an obligation to prevent anything which might be disruptive of such an atmosphere. Unless the actions of the school officials in this connection are unreasonable, the Court should not interfere."

Does that answer what your Honor had in mind?

Q Yes, that is what I had in mind.

A Now, in this case counsel has already referred to the fact Christopher Eckhardt went to Roosevelt High School wearing the black arm band; with his mother he had been down here on the march and he came back and they had this meeting at which he didn't attend. Adults held the meeting. When Christopher came to school he was asked by a student if he knew there was a rule

against wearing the arm band and he said he did, and he went directly to the Principal's office in defiance of the rule, because, as he said, he thought they might suspend him.

Now, Mr. Blackman, who was the Vice-Principal, asked Christopher to remove the arm band and he refused. After considerable discussion, Mr. Blackman finally called Christopher's mother and told her that he would have to suspend Christopher for wearing the arm band and for refusing to abide by the school's regulations, and Mrs. Eckhardt's reply was that Christopher had a constitutional right to wear the arm band.

Now, the other two petitioners, John F. Tinker and Mary Beth Tinker, bring this action by their father, The Reverend Leonard Tinker, who is Secretary for Peace and Education of the American Friends Service Committee. And I think it is of some significance here, I don't in any sense feel that it is controlling of the constitutional right, but Paul Tinker, who is eight years old, went to school with a black arm band. Hope Tinker, who is eleven years old, went to school with a black arm band. And the petitioner Mary Beth Tinker, who is thirteen, went to school with a black arm band. John Tinker is fifteen. He went to school with a black arm band.

Now, Reverend Tinker testified that he had to support them in what he considered the exercise of their conscience and their own constitutional rights.

Now, Respondents do not question students for democratic society or that Reverend Tinker as the Secretary for Peace and Education of the American Friends Service Committee or Mrs. Eckhardt, as local President of the International League for Peace and Freedom are entitled to express their views under their constitutional right of free speech, but the point is not at every time, not at every place, and particularly not under the circumstances that existed in this case, not in the school room at a time when it might result in disruption and might even result in violence.

Now, in substance, if we understand the Petitioners' position in this case, it is that the school officials are powerless to act until the disruption occurs.

Respondents believe that should not be the rule. Sometimes an ounce of prevention is a lot better than a pound of cure, and I think the subsequent history of such activities bear out the judgment of the school officials in their discretion.

Q On that theory, could they proscribe all discussion or demonstrations of interest in political matters or political candidates or issues of government?

A Not at all. Not at all. They could proscribe, I think, the class room, the time and the place where the matters would be discussed, and that.

Q Suppose they wore a Humphrey or a Nixon or a Wallace

button in the school, which might be as it was in many communities, highly controversial, and some places inflammatory. Could that be done?

A I think, if the Court please, if it were done as I think the record in this case shows, where they came in with a whole row of buttons on, something of that sort, that it could prove disruptive as a matter of dress.

Q Did they come in with a whole row of arm bands?

A No.

Q Would there be any question if they walked in with a placard and said "we protest the Vietnam war"?

A I think there would.

Q Don't you think it would be different?

A Normally, yes. But I say this. This thing had been ostensibly exploited in the press. We had a situation here where it was explosive.

Q What evidence is there of explosiveness in the community? That is the thing that I haven't gotten out of this case yet.

A All right. If the Court please, I refer first I think here to John Tinker for just a moment.

Q What page?

A That would be on page 18 of the appendix.

Q He said he saw the arm band.

A Yes, sir. Then he went to gym class. And he said

that on the way to gym class there wasn't any discussion. There was hardly no one around. That is the way it is stated here. After gym class some of the students were making fun of me for wearing it. Others who were my friends made remarks in the locker room that were not very friendly. After, others who were my friends said they didn't want me to get into trouble. Two or three boys made remarks in the locker room, I beg your pardon. This lasted perhaps three or four minutes. They did not threaten me with any physical harm. After gym class I had half an hour for lunch. I ate lunch in the students center and several other students with whom I ate frequently, these people warned me in a friendly manner to take the arm band off; and one student with whom I had a fued in the 7th grade was making smart remarks for about ten minutes. There were four or five people with him standing milling around there and there were quite a few other students standing and milling around the lunch room.

To my knowledge, there were no threats to hit me or anything like that. But at no time was I in fear that they might attack me or hit me at the student center because there were too many people there.

Now, it was right at lunch, the exposure. We frankly concede on the matter of disruption was very brief, because Christopher Eckhardt went to the Principal's office, and I am going to give you what happened with John Tinker--

Q You are not saying anything that happened, that happened up to this time, as you have read it, would show any immediate danger of disruption in the school, would you?

A I don't know. I believe it is page 62.

Q How about that, the question I just asked you?

A Well, that is a pretty close question, your Honor. I don't think this. If the Court says there has to be disruption, I don't believe that is the test.

Q Does it show danger of disruption there?

A I feel that it does, your Honor. But I feel the test goes one step further than that. In the reasonable judgment of the school administrators and the School Board, if in their reasonable judgment disruption were threatened. At that point it is our idea that they are entitled to act.

Q I agree to that. But the reasonableness of it will have to depend on what is in this record to support it; isn't that true?

A Yes, of course.

Q That is what I was asking, where is this evidence that shows danger of disruption?

A Page 62. And this is from a deposition of John Tinker.

Q What page?

A Page 62, toward the bottom of the page. "I attended the meeting of some fifty people at the building where my father's office is and there were accounts of some students

there as to physical violence having been inflicted on them as to wearing the arm band--

Q Is that on page 62?

A Yes, sir.

Q What part?

A It says portion of the deposition of John Tinker, down below there. I attended the meeting of some fifty people at the building where my father's office is and there were some accounts of some students there as to physical violence that had been inflicted upon them for wearing these arm bands. Bruce Clark or Ross had said somebody had struck him. It could have been both of them. I was there and recall hearing somebody say that.

Q Would I be correct in assuming that if that violence had occurred at any of the three schools, the Des Moines school officials would have known about it?

A I wouldn't want to say that this is true because I wouldn't know.

Q Would it be normal? And my second question would be if the School Board knew about it, wouldn't they put in evidence about it?

What evidence did the School Board, the school officials there, when they adopted this resolution, is it on paper anyplace?

A No; I think, your Honor--

Q Do you have anything more than your oral assertion that they used due care?

A I think, as I have stated before, that it was a matter of the explosive situation that existed in the Des Moines Schools at the time the regulation was adopted.

Q And that explosive situation was that they had a meeting in Washington, D. C. What else besides that?

A A former student of one of our high schools was killed in Vietnam. Some of his friends are still in school. It was felt that if any kind of a demonstration existed it might evolve into something which would be difficult to control.

Q Do we have a city in this country that hasn't had someone killed in Vietnam?

A No, I think not. But I don't think it would be an explosive situation in most cases. But if someone is going to appear in court with an arm band here protesting the thing, it could be explosive. That is the situation we find.

Q It could be. Is that your position?

A Yes, sir.

Q And there was no evidence that it would be? Is that the rule you want us to adopt?

A No, not at all, your Honor. Maybe I can express it. I think there is an Arkansas case that I have referred to that expresses what we feel should be the rule, and this is in the Respondent's Brief on page 28. This again was a case where the

plaintiff was suspended from school for violating a school rule forbidding the use of face paint and cosmetics and she brought the mandamus to require her admission to school notwithstanding her refusal to obey the rule.

Q At least the trial court didn't find that it was an expression of First Amendment rights as did the court in this case.

A What was involved, I think, Your Honor, was that it was disruptive of the atmosphere of the school room.

Q I would like to ask you a question because you seemed to have admitted some things rather modestly.

Do I understand that you have admitted that the constitution of the United States forbids the people of a state from barring political discussion in their schools, if they want to do so?

A No, I don't believe I admitted that. I think if the situation broke down--

Q I didn't think you intended to. A person doesn't have any more right to make some symbolic speech than he does actually to talk and engage in speech that the First Amendment protects. If not, why wouldn't these boys have a right to demand that the school let them talk about Vietnam?

A Oh, they would, and it is in the record here free discussion of these matters is permitted.

Q You are saying you have a right to run your school

for the teaching of geography, history, mathematics, grammar, and the things that people want to teach; and if the federal constitution doesn't step in and tell you you have to let anybody discuss any subjects symbolic or otherwise that they see fit?

A I think so long as it doesn't interrupt or disrupt the atmosphere.

Q It would be disrupted if he broke a valid rule?

A Yes, sir.

Q Yuu are arguing whether or not this rule is valid of its constitutional protection?

A That is right.

Q And do you think the constitution prevents the school from barring the discussion particularly of acute emotional subjects such as this is, and allows them to say that we will have nothing in here except the teaching of the things that the school--

A I think within reason that is true.

Q You wouldn't say, would you, Mr. Herrick, that in doing that they could pick out one particular issue and say this you cannot do, but the rest you can do?

A I would go further than that, your Honor. I would say today if the same proposition comes up, if the atmosphere is different, it should be permitted. My only claim here is what existed here that the school administration and School Board acted reasonably and within their discretion at that time.

It could be very different today. A demonstration at another time might not be explosive.

Q Do I understand you to be saying now it is all right for them to interrupt grammar classes, history classes, and mathematics classes and any other classes that the school is suppose to teach, in order to talk about Vietnam?

A No, I think that that is not correct. If I have given that impression I am sorry. I don't believe that. I believe the schools are there to give these children an education, and I think Des Moines is one of the great spots in the nation where they have done it. And I feel that anything that threatens that type of scholarly atmosphere in the class room out to be prohibited.

Q There wasn't disruption here, was there?

A That is a question.

Q On page 29 it says the whole period of mathematics on Wednesday was taken up by this discussion of student demonstration.

A That is correct.

Q So they haven't forbade it in the schools, but mathematics, after all, is what ought to be taught in the mathematics class and I think they ar e entitled to regulate. That is what this is, a regulation.

I seem to remember in reading the Briefs in advance for this argument there was something here about other students

wearing other badges or symbols. But now glancing over I can't find it, except the footnote 2 of Petitioners' Brief with respect to some of the students have been seen wearing iron crosses.

Is there anything else?

A I think there was.

Q In the record?

A Iron crosses. And I think sometimes they had worn political buttons.

Q Does that show in the record, that you remember?

A It does, your Honor.

Q What do you do with Meyer and Henken and Casteel against Iowa?

A Meyer v. Nebraska is forbidding teaching the German language.

Q Yes. Those were decided in 1923.

A Surely. Again, your Honor, I would have to go back to the situation that the Court really doesn't sit down in a situation that the school administration or school board does. They have to say is this so unreasonable this is violating the constitutional right.

Q That is the test? That the Court make a judgment as to whether it is so unreasonable, and, if it is, if we think it is unreasonable -- which I suppose would be excessively unreasonable -- then we say it is a violation of the due process

clause of the Fourteenth Amendment and then we tell the School Board what it can or cannot do. Is that your argument? I am asking your opinion.

A My opinion is if the Court undertakes to go that far, you are getting into a very difficult field of trying to say in every instance--

Q I agree with you.

A Whether a regulation is or is not a violation of constitutional rights. I think some things have to be left to the judgment of the administration.

Q You would have to agree with me, wouldn't you, that Meyer and Bartell present very serious obstacles, because certainly those cases stand for the proposition that a state criminal law making it a criminal offense not to teach German is unreasonable, and that although that is the state law and state exercise of power of state schools, this court declared that law as unconstitutional in 1923?

A I say this, your Honor. I think every case must be reviewed on its own facts, and I think that is the difficulty in this court getting into the situation.

Q This was a public school?

A Yes, sir.

Q Didn't Meyer have some reservation about public schools or private schools in those cases--

A Yes, sir.

MR. CHIEF JUSTICE WARREN: Mr. Johnston, you have a few moments to rebut.

REBUTTAL ARGUMENT OF DAN L. JOHNSTON, ESQ.

MR. JOHNSTON: Thank you. I would like to point out one of the things which I believe has been mentioned and needs to be mentioned more firmly, that was there was no general prohibition against political emblems of this nature.

Q Under the law of Iowa, the school was acting within the authority of the state law?

A The school was acting, your Honor, under a very broad state statute.

Q Well, is there any question about that? Do we have to look into that?

A No.

Q We have to accept that they were engaged in doing what the law gives them the right to do?

A Gives them the power to do. But the point I would like to impress upon the Court at this time, that is on pages 44 and 50 and 51 of the record, it is very amply stated by Respondents that other kinds of political insignia, including the iron cross, were worn in these schools; that they were not covered by this policy; that it was simply this one policy against the wearing of the arm bands in this context.

Now, counsel indicates that there was some sort of explosive situation which made this a special circumstance.

I can't, of course, recite the record to prove the negative, I can simply say I don't believe that the record supports that kind of situation.

Q If that is a valid rule was it an explosive situation, an interruption, if it is a valid rule?

A Yes, your Honor, it is. But our point is that the rule is not valid because it is based solely upon a Fourteenth Amendment type standard of reasonableness.

Q I must say I agree with some of the implications of my Brother Fortas about the reasonableness rule. I think the Court was very careful to say this morning that it wasn't deciding that case.

A For instance, in the Barnett case, which we have cited in the Brief, which was a case of compulsory flag saluting, this Court specifically said that the mere Fourteenth Amendment tests of reasonableness are not sufficient in the schools when the students are engaged in something or where the conduct involves something that is privileged under the First Amendment. That is the suggestion we have here. The reasons for the School Board establishing the regulation are set out on page 70 of the record by a document promulgated by the School Board. Those reasons were reduced to paper after the suspensions and a week after the suspensions is simply to my reading of the decisions of this Court do not provide sufficient grounds for subornation of freedom of speech.

Q Is it your view that your State of Iowa is without power, if it sees fit, to bar political discussions in the school where children are being taught?

A I believe it has the power. But it is not necessary in this case because that is not what they have done, your Honor. They have banned only the discussion in one specific instance and that is all there is.

Q You are raising something similar to an equal protection argument?

A In addition to the other argument. And I believe the stronger argument is not the equal protection, not the censorship by discrimination, as Mr. Justice Black is calling it, but, as a matter of fact, the stronger argument is that the interest that the state sought to protect, whatever that may have been, is set out on page 70 of the record, whereas that is not sufficient, whereas it might have been sufficient to suppress something that is not privileged.

Q The real interest the State is trying to protect is the State authority of the teachers to run the school and establish the rules for teaching, rather than the pupils? Isn't that the interest it is trying to protect?

A I don't read that from the record. I believe from the record what the school wants--

Q Which do you think has the most control in the school, the pupil policy of teaching the pupils, or the authorities

that are running the schools?

A The authorities that are running the school under the authority given to them by the constitution of the United States and within the provisions of that constitution and the whole nub of our case is that they have exceeded their powers under that. Thank you.

(Whereupon, the above-entitled oral argument was concluded.)
