Tinker's Legacy: Freedom of the Press in Public High Schools

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TINKER'S LEGACY: FREEDOM OF THE PRESS IN PUBLIC HIGH SCHOOLS

Until recently, the infringement of children's rights seldom had been brought before the courts for redress. This was due to the concept of parens patriae, which grants the state power of guardianship over minors and almost unlimited discretion in the manner and focus of that power. In addition, on those rare occasions when children's rights issues were litigated, the courts focused on the nature and constitutionally permissible extent of the states' power over children. Quite simply, there existed no body of law governing the constitutional rights of minors. In the past ten years, however, there has been an increasing number of cases in this area, and the focus has shifted to the delineation of specific rights for children.

The major impetus for this change is found in a trilogy of decisions by the United States Supreme Court. In re Gault, Ginsberg v. New York, and Tinker v. Des Moines Independent Community School District were decided in the late 1960's. Although the holdings in earlier cases had the effect of protecting the rights of children, these three decisions initiated and furthered the development of the concept that children are persons under the Constitution and therefore should be protected by it. The Gault-Ginsberg-Tinker trilogy established a policy that the rights of minors are entitled to constitutional protection from infringement by the states. However, these cases did not detail guidelines for implementing that policy. Nor did they hold that children's rights are co-extensive with those of adults.

The true significance of the Gault-Ginsberg-Tinker trilogy, however, becomes apparent only when considered in the context of the Supreme Court's prior attitude toward children. Accordingly, Section I of this Comment will examine in detail the background and foundation for these developments. Such an examination also will facilitate an understanding of the recent developments in children's rights law by the lower federal courts.

The response in the lower courts has been the principled expansion of children's rights within the framework of the Supreme Court's policy. The extent of this expansion, however, varies with the particular circuit involved. In Section II, this Comment will analyze one facet of this expansion by discussing the federal case law regarding the free press rights of public high school students. Specifically, it will investigate the federal courts' application of the prior restraint doctrine in the high school setting.

Finally, this Comment will examine the impact of these developments on the school environment. This impact includes broad policy changes in favor of the accommodation of student expression as well as specific responses by

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defendant school boards to court decrees. However, as will be shown, there is still a critical need for continued efforts to secure and extend the constitutional rights of minors both in and out of the courts.

I. THEORETICAL BACKGROUND: THE SUPREME COURT'S CHANGING PERCEPTIONS OF CHILDREN'S CONSTITUTIONAL RIGHTS

A. Early Developments

In its early opinions, the Supreme Court attempted to establish and define the limits of the state's power to control its minor citizens. This is illustrated by the language and manner in which the issues were framed. In Minersville School District v. Gobitis, a 1940 decision, the Court upheld a statute making the flag-salute compulsory in public schools. Three years later, this holding was overruled in West Virginia Board of Education v. Barnette, where a statute based on the ruling and language of Gobitis was termed an infringement of First Amendment rights. Even though Barnette was, in effect, a delineation of students' rights, this effect was merely collateral since the focus of the opinion was directed at states' rights. As will be demonstrated, the Barnette decision's curtailment of the police power of the states was a drastic change in the law.

The precise issue addressed in both decisions was whether state legislatures were barred from providing compulsory school activities designed to foster patriotism and feelings of national unity. In Gobitis, the Court de-

3. 310 U.S. 586 (1940). Two children were expelled from the public school for refusing to pledge allegiance to the flag as required by the Board of Education of Minersville, Pennsylvania. The children, Jehovah's Witnesses, had been taught to believe that the Bible, as the word of God, is the supreme authority and that it forbids as idolatry saluting the flag. Id. at 591-92.

4. 319 U.S. 624 (1943). Following Gobitis, the West Virginia State Board of Education adopted a resolution ordering all students and teachers to participate in the flag salute as part of the regular program of educational activities. Failure to conform was considered to be insubordination and the child was expelled until she agreed to comply. The student was also threatened with delinquency proceedings aimed at sending the child to reformatory. The parents could also be prosecuted, with conviction resulting in a fine and jail term. Id. at 626-29. The plaintiffs in Barnette sought to enjoin enforcement of the resolution against Jehovah's Witnesses. Id. at 629.

5. "Police power" is defined as "the power vested in a state to establish laws and ordinances for the regulation and enforcement of its police as above defined." Black's Law Dictionary 1317 (rev. 4th ed. 1969). "Police" is defined as "the function of that branch of the administrative machinery of government which is charged with the preservation of public order and tranquility, the promotion of the public health, safety, and morals . . . ." Id. at 1316.

6. The difference in attitude and perspective between the Gobitis and Barnette Courts is vividly apparent when the stated issues in each decision are contrasted. In Gobitis, the Court formulated the issue as follows:

(Whether the legislatures of the various states and the authorities in a thousand counties and school districts of this country are barred from determining the appropriateness of various means to evoke that unifying sentiment [which is the appreciation of our nation's hopes and dreams, sufferings and sacrifices] without which there ultimately can be no liberties, civil or religious.
ferred entirely to the judgment of legislators and educators in selecting the methods by which to shape children's minds.\(^7\) In *Barnette*, recognizing that this deference must have some limitation, the Court held that the minimal extent of this limitation is defined by the Bill of Rights and that the courts are the appropriate agency to apply the legal principles encompassed therein.\(^8\)

Both the language and the timing\(^9\) of the *Barnette* opinion indicate that the decision was promoted not as much by concern for the right of individual school children to follow their religious convictions, as for the right of the American people to remain free from totalitarianism.\(^10\) However, the

Minersville School District v. Gobitis, 310 U.S. 586, 597 (1940). In *Barnette*, however, the Court found that "[t]he sole conflict is between authority and the rights of the individuals," West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 630 (1943), and focused on whether "this slow and easily neglected route [of instruction in history and civil liberty which will inspire patriotism and love of country] to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan." *Id.* at 631.

7. The Court declined to serve as the nation's school board and refused to debate issues of educational policy, noting only that the patriotic ends sought to be attained by the resolution were legitimate and thus justified the means, even if those means were harsh, foolish, or uncertain. Minersville School District v. Gobitis, 310 U.S. 586, 598 (1940). The state's power in this area was considered virtually plenary. It was assumed by the Court that the state possessed the general power to enforce such rules; the only issue was whether an exception would be allowable for certain religious groups. *Id.* at 594-95, 597.

8. *Id.* at 636-39, 641-42. The protections of the Fourteenth Amendment were specifically extended to boards of education in order to ensure that they exercise their largely discretionary authority within constitutional limitations. Whereas the *Gobitis* Court deferred to the administrative and educational judgment of the board, the *Barnette* Court sanctioned judicial review over boards of education precisely because of their educational functions. The Board's function in "educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes." *Id.* at 637.

9. See generally W. Kirchner, Western Civilization since 1500, 284-99 (1966). World War II began in 1939 and lasted until 1945. Hitler's dictatorship in Nazi Germany provided horrifying examples of fascist ideals brought to their logical extreme. With the state as the ultimate judge of right and wrong, civil liberties were curtailed and strict censorship was imposed to suppress anti-government opinion. National allegiance and pride gave way to chauvinism, which later resulted in the extermination of millions of people. *Id.* at 284-85, 287.

10. A significant portion of the opinion was devoted to warning of the perils of enforced patriotism. The Parent and Teacher Association, the Boy and Girl Scouts, and the Red Cross had objected to the salute as being "too much like Hitler's." West Va. Bd. of Educ. v. Barnette, 319 U.S. 624, 627-28 (1943). Phrases such as "[i]f official power exists to coerce acceptance of any patriotic creed . . . .", *Id.* at 633-34, indicate the Court's concern for potential abuse of power by the government. The Court stressed, however, that enforcing constitutionally mandated limitations on the police power of the states would not result in a weakened government. *Id.* at 636-37.

Granting the states the right to determine the method to instill national pride seemed harmless to the *Gobitis* Court in 1940. In 1943, however, upholding the imposition of harsh penalties for non-compliance with those methods could no longer be considered innocuous. See note 4 supra. Not content merely to hint at the actual purpose of the opinion, the Court concluded by stating:

As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity. . . . Ultimate futility of
chief importance of *Barnette* was its establishment of *some* level of judicial scrutiny \(^{11}\) for the review of legislation alleged to infringe upon the First

such attempts to compel coherence is the lesson of every such effort. . . . Down to the fast failing efforts of our present totalitarian enemies. . . . Compulsory unification of opinion achieves only the unanimity of the graveyard. . . . If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion or other matters of opinion or force citizens to confess by words or act their faith therein. 

Id. at 640-42.

11. Until recently, the Supreme Court has been very reluctant to rule on the constitutionality of state statutes. One evasive measure employed to this end by the Court has been termed the "Rule of Reasonableness." Shaman, *The Rule of Reasonableness in Constitutional Adjudication: Toward the End of Irresponsible Judicial Review and the Establishment of a Viable Theory of the Equal Protection Clause*, 2 Hastings Const. L. Q. 153, 154-60 (1975) [hereinafter cited as *Rule of Reasonableness*]. Under a Rule of Reasonableness analysis, there is a strong presumption of constitutionality which is overcome only when the violation is proved beyond a reasonable doubt and there is no "rational basis" for the statute (i.e., no rational relation between the statute and some "valid" state interest). Id. at 156. Because its use has consistently meant finding the statute to be constitutionally valid, this test has been characterized as "minimal scrutiny in theory and virtually none in fact . . . [sic] the 'mere rationality' requirement symbolizes virtual judicial abdication." Id. at 165, quoting Gunther, *The Supreme Court 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8, 19 (1972) [hereinafter cited as *Newer Equal Protection*]. See, e.g., Williamson v. Lee Optical Co., 348 U.S. 483 (1955); Korematsu v. United States, 323 U.S. 214 (1944).


The Burger Court has broken down this two-tiered approach into a multi-level system in which the level of scrutiny varies according to the right being litigated. Under these intermediate levels of scrutiny, the purpose and effect of the statute are examined by the courts, but with recognition of the state's broad police powers. See note 5 supra. Intermediate scrutiny has required finding that the statute be "significantly related" to a "significant" or "appropriate" state interest. *Persons Who Are Mentally Retarded*, supra at 67; *Newer Equal Protection*, supra at 17. See, e.g., Police Dep't v. Mosley, 408 U.S. 92 (1972) (school picketing); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972) (illegitimate children). Intermediate scrutiny appears to be similar to the model proposed by Professor Shaman in which the Supreme Court should "in all instances engage in a complete and realistic balancing of interests—a weighing of legislative purpose against individual rights . . . .", under which the courts would look to the relationship between the statute and its purpose *only* if the balancing of interests favored the legislative purpose. *Rule of Reasonableness*, supra at 174. Although these levels of scrutiny were de-
Amendment freedoms of children. The level of scrutiny used by the Court in *Barnette* was characterized by a balancing of the state’s police power and the individual’s interest in matters as fundamental as freedom of worship, speech, and political opinion.\(^\text{12}\)

This approach was followed again in 1944 in *Prince v. Massachusetts*,\(^\text{13}\) although this time the Court ultimately concluded that the state’s broad authority over children and its strong interest in protecting them justified certain limitations on private First Amendment rights.\(^\text{14}\) In *Prince*, the Court began to formulate the factors and standards which would be applied in future decisions where a stricter level of scrutiny was to be found appropriate.\(^\text{15}\) It recognized that one of the liberties at stake was the child-

14. *Prince*, like *Barnette*, presented the issue of a child’s right to freedom of religious practice. Mrs. Prince, a Jehovah’s Witness, was convicted of violating Massachusetts’ child labor laws, which prohibited children from selling newspapers, periodicals, etc., in any street or public place. Betty Simmons, a nine year old Jehovah’s Witness over whom Mrs. Prince had legal custody, distributed copies of *Watchtower* and engaged in preaching work on city sidewalks each week with Mrs. Prince. Both testified that they were ordained ministers and Betty believed it was her religious duty to perform this work and that “failure would bring condemnation ‘to everlasting destruction at Armageddon.’” *Prince v. Massachusetts*, 321 U.S. 158, 163 (1944).

However, absent the sensitive issue of enforced patriotism, the Court felt comfortable with the application of minimal scrutiny: although no evidence of harm to the child —either actual or potential—was presented, the Court found that the state interest in safeguarding children from abuses was sufficient to sustain the statute in question. *Id.* at 170. Justice Murphy, in a dissenting opinion, chastized the majority for accepting the asserted state interest in protecting its children from the harmful “diverse influences of the street” without proof that any grave, immediate and substantial harm was likely to emanate from the distribution of religious literature by minors under the direct supervision of an adult. He noted that it was equally likely that such experiences would be beneficial since “[g]ambling, truancy, irregular eating and sleeping habits, and the more serious vices are not consistent with the high moral character ordinarily displayed by children fulfilling religious obligations.” *Prince v. Massachusetts*, 321 U.S. 158, 174-75 (1944) (Murphy, J., dissenting).

Even allowing for some dilution of the standard of review because of the state’s broader authority to protect children, the standard applied in *Prince* fell far short of the standard the Court had consistently applied for adults. *See Bridges v. California*, 314 U.S. 252, 261-63 (1941), where the Court examined the First Amendment “clear and present danger” cases and extracted from them the principle that the harm sought to be averted by the statute must be “extremely serious” and the “degree of imminence extremely high” before expression can be punished. *See also* *Cantwell v. Connecticut*, 310 U.S. 296, 308-10 (1940); *Thornhill v. Alabama*, 310 U.S. 88, 105-06 (1940); *Whitney v. California*, 274 U.S. 357, 371-72 (1927); *Schenck v. United States*, 249 U.S. 47, 52 (1919).

15. In its recognition of the state’s authority to protect children from certain dangers, the Court named the “crippling effects of child employment” and harms arising from exposure to “all the diverse influences of the street” as being particularly appropriate for exercise of the state’s police power. *Prince v. Massachusetts*, 321 U.S. 158, 168-69 (1944). This has since been fashioned into a standard akin to the “clear and present danger” test. *See Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 513 (1969). *See also* notes 34-41 and accompanying text *infra*. However, such a development would have to wait for the application of stricter scrutiny. *See* notes 21, 42-44 and text accompanying notes 19-22, 32-48 *infra*. 
petitioner's freedom to observe the tenets and practices of her faith. This freedom, as well as others ensured by the First Amendment, occupies a preferred position among rights protected by the Constitution. The Court expressly limited Prince to its facts so that the decision would not be viewed as precedent for allowing "every state intervention in the indoctrination and participation of children in religion" which may be done "in the name of their health and welfare." Perhaps because of this limitation, Prince was to become the foundation for the protection of children's rights from state intervention.

The turning point in the Court's attitude toward children occurred in Brown v. Board of Education. In this case, the rights of children and the state's duty to protect those rights were the focal points. For the first time, the Court strictly scrutinized the effect of a law on the constitutional rights of children. After a careful examination of the impact of the school segregation laws, the Court held that equal protection had been denied the student-petitioners.

B. The Tinker Era

It would appear to be a natural progression to extend the Fourteenth Amendment protections of Brown to other constitutional rights of children.

17. Id. at 171.
18. Id.
19. 347 U.S. 483 (1954). In Brown, black students of both elementary and high school age challenged state laws and constitutions which allowed or required segregated public schools. The Court held that such segregation denied the black students equal educational opportunities, even though the physical plants and other tangible factors may have been equal.
20. For example, the Court defined the minimal extent of the state's duty when it held that "education is perhaps the most important function of state and local governments. . . . Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." Id. at 493. With regard to the rights of children, the Court found that "in the field of public education the doctrine of 'separate but equal' has no place. . . . [S]egregation in public education . . . is a denial of equal protection of the laws." Id. at 495.
21. Under strict scrutiny, the state is required to show actual evidence of the harms from which it seeks to protect children or actual evidence of the necessity for the regulations imposed. The use of strict scrutiny in Brown was, of course, prompted by the racial issue. See Brown v. Board of Educ., 347 U.S. 483, 488-92 (1954), where the Court recounted the historical background and purpose of the Fourteenth Amendment. It also must be noted that the use of strict scrutiny in Brown is apparent only from looking to what the Court did rather than to what it said; nowhere in the opinion did the Court use the language that generally signals the use of strict scrutiny. See note 11 supra. The Court, instead, expressly focused its attention on the effect of segregation on public education (i.e., on the school children themselves) in its determination of the constitutional question, Brown v. Board of Educ., 347 U.S. 483, 492 (1954), indicating its position by framing the issue in these terms: "Does segregation of children in public school solely on the basis of race . . . deprive the children of the minority group of equal educational opportunities?" Id. at 493 (emphasis added).
22. Id. at 493-95. However, it should be noted that discriminatory impact alone will not render a statute or practice unconstitutional. See, e.g., Arlington Heights v. Metropolitan Hous. Corp., 429 U.S. 252, 265 (1977); Washington v. Davis, 426 U.S. 229, 239 (1976).
However, this step was not taken for thirteen years. Finally, between 1967 and 1969, three major Supreme Court decisions were rendered regarding the constitutional rights of minors. These decisions used Brown's strict scrutiny approach to review alleged state violations of First and Fifth Amendment rights of children.

The first of these decisions, In re Gault, employed strict scrutiny and held that juveniles were entitled to Fifth Amendment due process protections in juvenile proceedings even in the face of the state's contention that such proceedings were of a civil rather than criminal nature. However, the second decision, Ginsberg v. New York, appeared to retreat from the trend of expanding children's rights and freedoms. The Ginsberg Court employed the rational relation test associated with minimal scrutiny and upheld a New York statute which prohibited the sale of obscene materials to a minor under seventeen. On a closer examination of the Court's reasoning, though, it becomes apparent that the use of this approach was due to the presence of the obscenity issue, rather than a move to restrict the expansion of children's constitutional freedoms. Although the case could have been disposed of fairly simply on the basis of the wide latitude accorded the

24. 387 U.S. 1 (1967). Gerald Gault, fifteen, was taken into custody after a complaint was made alleging that he had made lewd telephone calls. Following hearings in juvenile court, he was committed to the State Industrial School as a juvenile delinquent. There was no semblance of due process in the Gault case: neither Gault nor his parents were given notice of the charges; he was denied the opportunity to confront and cross-examine his complainant; he was not advised of his right to retain counsel and no counsel was appointed for him; he was not advised of his right to refrain from self-incrimination; no transcript was made of the juvenile court proceedings; and no appeal was permitted from the juvenile court case. In holding (or implying, in the case of the last two rights) that all of these safeguards must be made available to children in juvenile court proceedings, the Court stated that "[u]nder our Constitution, the condition of a boy does not justify a kangaroo court." Id. at 28.
25. Id. at 21-22, 24-25, 30. After exploring the historical development of the juvenile justice system as a "civil" system, id. at 14-27, the Court found that, euphemisms aside, the penalty imposed in Gault was incarceration in a state institution for a term of years where the child would be surrounded by guards and "delinquents" who might range from "wayward children" to rapists and murderers. Id. at 27-28. The Court concluded that such a system must be required to employ the "procedural regularity and the exercise of care implied in the phrase 'due process'" in the adjudicatory phase of the delinquency proceeding. Id. at 27-28, 30-31.
27. 390 U.S. 629 (1968).
28. See note 11 supra.
29. The owner of a stationery store was convicted of selling pornographic magazines to a sixteen year old boy in violation of a New York statute forbidding the sale to a minor under seventeen of "any picture which depicts nudity . . . and which is harmful to minors" or any magazine containing such pictures which "taken as a whole, [are] harmful to minors." Ginsberg v. New York, 390 U.S. 629, 633 (1968). It was unquestioned that the materials involved would not be obscene if sold to an adult. The appellant did not assert that the materials were not harmful to minors within the definition of the statute. Rather, he attacked the power of the state to adopt a variable concept of obscenity which would be dependent on the age of the audience. Id. at 636.
The result of this analysis was the application of the rational relation test. However, the tenor of the opinion, as well as the presence of this type of analysis, indicates that the Court was particularly interested in the protection of children's rights. Thus, the opinion suggests that more rigorous scrutiny would still be used in the determination of issues concerning the constitutional rights of children.

This evaluation of the Court's approach in Ginsberg is affirmed by the strong language of Tinker v. Des Moines Independent Community School District. Tinker firmly established the courts as agents for securing the constitutional rights of children in their capacity as students. The Court adopted without revision the “material and substantial interference” test.


31. Prince v. Massachusetts, 321 U.S. 158, 170 (1943), was heavily relied upon as authority for the state's power to protect the well-being of its children. Ginsberg v. New York, 390 U.S. 629, 630, 638-39 (1968). The right of parents to exercise primary authority in the care and up-bringing of their children was also viewed as being particularly important in the assessment of whether the state could impose limitations on the availability of sex-related materials to minors. Id. at 639.

32. 393 U.S. 503 (1969). In Tinker, the “black armband” case, three public school students of junior high and high school age were suspended for wearing black armbands to protest the government's Vietnam policy. Although the students knew that school policy prohibited the wearing of armbands to school, there was no indication of any disruption of school activities and the protest was passive and did not infringe on the rights of other students. Only a few of the 18,000 students in the school system wore armbands and only five were suspended. The school order did not seek to prohibit the wearing of all symbols—students were allowed to wear national campaign buttons and Iron Crosses (a traditional symbol of Nazism).

33. Beginning with the powerful “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” id. at 506, the Court stressed that this “has been the unmistakable holding of this Court for almost 50 years,” and cited to a long line of cases which have established that the state cannot impose conditions upon attendance or employment at public schools which are in violation of fundamental constitutional rights. Id. See Epperson v. Arkansas, 393 U.S. 97 (1968) (an Arkansas public school teacher successfully challenged a statute prohibiting the teaching of evolution as a violation of the Establishment Clause of the First Amendment); Keyishian v. Board of Regents, 385 U.S. 589 (1967) (statute requiring loyalty oath of state university faculty members certifying that they are not Communists); Engel v. Vitale, 370 U.S. 421 (1962) (official state prayer required to be recited in public schools); Shelton v. Tucker, 364 U.S. 479 (1960) (statute requiring each teacher to file an annual listing of every organization to which he or she had belonged or contributed); Sweezy v. New Hampshire, 354 U.S. 234 (1957) (statute prohibiting employment of “subversive persons” by any public educational institution); West Va. Bd. of Educ. v. Barnette, 319 U.S. 624 (1943) (statute requiring school children to salute the flag and pledge of allegiance); Pierce v. Society of Sisters, 268 U.S. 510 (1925) (requiring children to be educated at public schools).

34. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509, 513 (1969). This test provides that “where there is no finding and no showing that engaging in the forbidden [speech and expression] would 'materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,'” the regulation violates the
formulated by the Fifth Circuit\textsuperscript{35} for determining the validity of restrictions on student speech and expression. In practical effect, this test is equivalent to the clear and present danger test,\textsuperscript{36} tempered by time, manner, and place restrictions.\textsuperscript{37} One of the cornerstones of the clear and present danger test is that the circumstances of the expression are critical in determining whether the speech poses a danger.\textsuperscript{38} The school or classroom setting does 

First Amendment rights of the students. Id., quoting Burnside v. Byars, 363 F.2d 744, 749 (5th Cir. 1966).

35. Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966). Burnside presented facts similar to Tinker. The Fifth Circuit held that the wearing of “freedom buttons” inscribed with the wording, “One Man One Vote,” could not be prohibited except in accordance with the standards set out by the court.

The district court which upheld the constitutionality of the school policy in Tinker referred to the Fifth Circuit’s holding in Burnside, but expressly declined to follow it, finding instead that school officials must be given wide latitude to forestall any disturbance. Tinker v. Des Moines Independent Community School Dist., 258 F. Supp. 971, 973 (S.D. Iowa 1966).

36. The Court has long recognized that certain types of speech may be prohibited under a state’s police powers. However, great care must be taken to ensure that speech is not curtailed because the state officials do not agree with its content. Police Dep’t v. Mosley, 408 U.S. 92, 96 (1972); Healy v. James, 408 U.S. 169, 187-88 (1972), quoting Communist Party v. SACB, 367 U.S. 1, 137 (1961) (Black, J., dissenting); New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964).

The clear and present danger test was first developed in Schenck v. United States, 249 U.S. 47 (1919), as a guide for determining which types of speech could properly and constitutionally be made subject to prior restraints. The test was perhaps best characterized in that case:

We admit that in many places and in ordinary times the defendants in saying all that was said in the circular would have been within their constitutional rights. But the character of every act depends upon the circumstances in which it was done . . . The most stringent protection of freedom of speech would not protect a man in falsely shouting fire in a theatre and causing panic. It does not even protect a man from an injunction against uttering words that might have all the effect of force . . . The question in every case is whether the words 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. It is a question of proximity and degree.

Id. at 52. See also Dennis v. United States, 341 U.S. 494 (1951). The clear and present danger test was subsequently modified to require that such speech be “directed to inciting or producing imminent lawless action and . . . likely to incite or produce such action.” Brandenburg v. Ohio, 395 U.S. 444, 447 (1969). See Shaman, Revitalizing the Clear-and-Present Danger Test: Toward a Principled Interpretation of the First Amendment, 22 VILL. L. REV. 60, 69-70 (1976).

37. Thus, it is the same test, with the same restrictions, as is applied in the review of adult freedom of expression. Although the states may not censor speech on the basis of its content, see note 36 supra, they may make reasonable regulations respecting the time, place and/or manner of speech. These restrictions may not be applied in a discriminatory manner, and they may not operate to totally eliminate a recognized First Amendment forum. See Grayned v. City of Rockford, 408 U.S. 104, 115-17 (1972); Adderly v. Florida, 385 U.S. 39, 48 (1966); Brown v. Louisiana, 383 U.S. 131, 141-42 (1966); Cox v. Louisiana, 379 U.S. 536, 559 (1965); Cantwell v. Connecticut, 310 U.S. 296 (1940).

nothing more to alter this constitutional right than to provide the circumstances which act as a backdrop against which the right must be measured. Similarly, the "danger" against which the states are empowered to protect their citizens may vary according to the circumstances. However, under the Tinker test neither the state's disapproval of the content of the speech nor an undifferentiated fear of disturbance is enough to overcome the right to freedom of expression. Again, this rationale parallels the approach used by the Court in discussing the First Amendment rights of adults.

Tinker presented a clear use of strict scrutiny. This was the first time that this standard of review was explicitly used in the determination of a children's rights issue. In so doing, the Court summarily rejected the asserted state interest in the prevention of any disturbances in the school as insufficient to contravene the constitutional mandate for freedom of

U.S. 290, 297-98 (1961). See also Cox v. Louisiana, 379 U.S. 536, 551 (1965) (the situation was characterized as "a far cry from Feiner" and thus remained protected); Feiner v. New York, 340 U.S. 315, 321 (1951) (speech ceases to be protected when a speaker "passes the bounds of argument or persuasion and undertakes incitement to riot"); Cantwell v. Connecticut, 310 U.S. 296, 308-11 (1940) (the state has the power to punish speech which "exhorts others to physical attack" or which creates an immediate danger to the public safety).

39. For adults in an open First Amendment forum, the danger is usually of physical violence to persons present. For children in public schools, the danger is of material disruption of the educational process, although imminent danger of physical violence also would be sufficient to justify restrictions on students' speech.


42. The Court recognized that students are "persons" under the Constitution and have fundamental rights which must be respected by the states. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 507, 511 (1969). Strict scrutiny has traditionally been applied in cases involving (adult) rights which have been characterized as being "fundamental." See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Shapiro v. Thompson, 394 U.S. 618 (1969); Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma, 316 U.S. 535 (1942); Meyer v. Nebraska, 262 U.S. 390 (1923).

The Court cited with approval the Barnette Court's recognition of the need for "scrupulous protection" of the constitutional rights of students, Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 507 (1969), quoting West Va. Bd. of Educ. v. Barnette, 319 U.S. 390 (1943). The Tinker Court then applied that level of protection to the classroom context:

The Constitution says that Congress (and the States) may not abridge the right to free speech. This provision means what it says. We properly read it to permit reasonable regulation of speech-connected activities in carefully restricted circumstances. But we do not confine the permissible exercise of First Amendment rights . . . to supervised and ordained discussion in a school classroom.

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969) (emphasis added). Elsewhere, the Court stated that "[i]n the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." Id. at 511 (emphasis added). School authorities are not permitted to restrict student expression merely because the sentiments so expressed do not have official blessing. Id.

43. The effect of the discussion in Brown was the application of strict scrutiny, but nowhere in the opinion did the Court expressly state its intent to use this test when determining questions regarding children's rights. See notes 19-22 and accompanying text supra.
speech.\footnote{44} School authorities again\footnote{45} were told that they must exercise their authority within the limitations of the Bill of Rights.\footnote{46} Thus, the Court applied the same compelling state interest test in \textit{Tinker} as it had used in adult First Amendment cases.\footnote{47} Consequently, this case provides a strong precedential basis for the enforcement of constitutional protections for children.\footnote{48}

\textbf{C. Post-Tinker Decisions}

The \textit{Gault-Ginsberg-Tinker} trilogy clearly announced that constitutional rights and freedoms apply to minors, and that the courts are the appropriate forum for their vindication. In \textit{Gault} and \textit{Tinker}, the Court applied strict scrutiny. In \textit{Ginsberg} the scrutiny was more rigorous than that utilized in cases involving obscenity statutes. The pendulum, however, now appears to be swinging back, perhaps in reaction to the strong stance taken by the Court in these three cases. More recent cases dealing with children’s rights indicate that the Burger Court may be attempting to limit constitutional protections in this area.\footnote{49} For example, in both \textit{Planned Parenthood of Mis-}

\begin{footnotes}
\item[44] Strict scrutiny necessarily requires a showing of a compelling state interest. See \textit{Roe v. Wade}, 410 U.S. 113, 155 (1973); \textit{Shapiro v. Thompson}, 394 U.S. 618, 634 (1969); Persons Who Are Mentally Retarded, \textit{supra} note 11, at 66. In \textit{Tinker}, however, the school failed to establish a compelling interest to be achieved by the armband prohibition. There was no evidence that school officials anticipated any major disturbances as a result of the armbands. The official memorandum which listed the reasons for the ban did not refer to fear of disruption and trial testimony indicated that it was, in fact, the “principle of the demonstration” itself that provided the impetus for the regulation. \textit{Tinker v. Des Moines Independent Community School Dist.}, 393 U.S. 503, 509 n.3 (1969).

Of even greater concern to the Court was the school’s use of a ban on symbolic speech in a selective manner so as to prohibit only expression relating to the United States involvement in Vietnam. \textit{Id.} at 510-11. Such selectivity made it eminently clear that the regulation was put into operation to stem expression solely on the basis of its content. This has not been constitutionally permissible with regard to adult speech. See \textit{Cohen v. California}, 403 U.S. 15 (1971); \textit{Schacht v. United States}, 398 U.S. 58 (1970); \textit{Near v. Minnesota}, 283 U.S. 697 (1931). See also note 36 \textit{supra}. \textit{Tinker} extended this protection to minors as well. \textit{Tinker v. Des Moines Independent Community School Dist.}, 393 U.S. 503, 511 (1969).

\item[45] See note 8 and text accompanying notes 4-12 \textit{supra}.


\item[48] Ironically, Mary Beth Tinker, one of the participants in the armband demonstration, does not see the decision as being of major significance. Six years after the ruling she told a newspaper reporter that she didn’t believe it “had any sweeping consequences” and felt that it “mainly has been applied to defend students who defied school dress codes.” \textit{What Happened to Mary Beth?}, \textbf{4 INDIVIDUAL RIGHTS & RESPONSIBILITIES NEWSLETTER} 5 (1977), quoting The Des Moines Sunday Register.

souri v. Danforth and Carey v. Population Services, International, the Court retreated to an intermediate scrutiny/significant state interest position. Although in Danforth it was acknowledged that minors have constitutional rights, these later decisions illustrate the Court's position that the very fact of the state's broader authority to regulate children's activities warrants application of the less stringent test.

In Danforth, the statutory requirement of parental consent for minors' abortions was held to be unconstitutional even under intermediate scrutiny because it imposed an absolute limitation on the rights of minors without sufficient justification. However, it was emphasized in dicta in both Danforth and its companion case that the state's broad authority to regulate

52. The Danforth Court stated that "[t]he Court ... long has recognized that the State has somewhat broader authority to regulate the activities of children ... It remains, then, to examine whether there is any significant state interest ... that is not present in the case of an adult." Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 74-75 (1976) (citations omitted). It is this emphasis on the priority of the state's interest, coupled with the use of the significant state interest test, which signals the retreat to a less strict level of scrutiny. The requirement of a "significant state interest" to justify infringement on an individual right is usually associated with a considerably lower level of scrutiny than the requirement of a "compelling state interest." See note 11 supra.
55. This was a suit brought by two physicians and a not-for-profit corporation to challenge a Missouri abortion statute which, inter alia, required that before obtaining an abortion during the first twelve weeks of pregnancy an unmarried woman under the age of eighteen must have the written consent of a parent or person in loco parentis, unless a licensed physician certified that the abortion was necessary to save the mother's life. The Court held that the state did not have the authority to impose such a blanket provision and that the significant state interest test was not met by the asserted interest in safeguarding the family unit and parental authority. Id. at 74-75. See also Bellotti v. Baird, 428 U.S. 132 (1976) (companion case).
56. Planned Parenthood of Mo. v. Danforth, 428 U.S. 52, 74-75 (1976). The Court felt that the reasoning which had been applied earlier in the decision with regard to adult married women should be used here as well. Id.
57. Bellotti v. Baird, 428 U.S. 132 (1976). Bellotti, decided on the same day as Danforth, involved a Massachusetts statute which required the consent of the mother and her parents if the mother was unmarried and under eighteen, with the additional proviso that if the parents refused consent, it might be obtained by court order upon a showing of good cause. Id. at 134-35. The statute had not yet been interpreted by the Massachusetts courts. The appellants, the officials charged with the enforcement of the statute, urged an interpretation which would permit a child determined by the court to be mature enough to give informed consent, to be able to do so without requiring parental consent. Id. at 144. The Court abstained from ruling on the constitutionality of the statute, finding it to be susceptible of such a construction which would create a preference for parental consultation without giving a minor's parents absolute veto power. Id. at 145, 146-47, 148.
the activities of minors might justify some restrictions.\textsuperscript{58} The use of intermediate scrutiny in such situations was justified by the Court in the plurality opinion of \textit{Carey} \textsuperscript{59} where it stated:

This test is apparently less rigorous than the "compelling state interest" test applied to restrictions on the privacy rights of adults. . . . Such lesser scrutiny is appropriate both because of the States' greater latitude to regulate the conduct of children . . . and because the right of privacy implicated here is "the interest in independence in making certain kinds of important decisions" . . . . and the law has generally regarded minors as having a lesser capability for making important decisions. . . .\textsuperscript{60}

While the aforementioned cases dealt with privacy issues, if read together with the Burger Court's trend toward restricting judicial protection of personal liberties,\textsuperscript{61} they appear to portend a general application of intermediate scrutiny to all children's rights cases. This use of the significant state interest test for review of restrictions on decisional privacy was justified by the Court in \textit{Danforth} and \textit{Carey} because children are less capable than

\textsuperscript{58} Planned Parenthood of Mo. v. Danforth, 428 U.S. 52 (1976). The \textit{Danforth} Court emphasized that its holding did not mean that every minor, regardless of age or maturity, could give effective consent. \textit{Id.} at 75. In \textit{Bellotti}, the Court merely required that state regulations not "unduly burden" the right to seek an abortion. \textit{Bellotti} v. \textit{Baird}, 428 U.S. 132, 147 (1976). The Court, however, declined to rule on the constitutionality of the statute before the Massachusetts Judicial Court had rendered its interpretation of the statutory requirements. In doing so, Justice Blackmun, writing for a unanimous Court, expressed the hope that the Massachusetts court would consider at least those factors used by the Supreme Court in \textit{Danforth}. He further urged that the statute not be interpreted to require a parental veto, ignore the best interests of the minor, or impose burdens upon a minor capable of giving informed consent. \textit{Id.} at 147, 151. The opinion thus indicated that, although a statutory requirement for consent might be found constitutional, an intermediate level of scrutiny would be applied in making that determination.

\textsuperscript{59} Carey v. Population Servs. Int'l, 431 U.S. 678 (1977). \textit{But see note 67 infra.} \textit{Carey} was a suit brought by distributors of contraceptives to challenge the constitutionality of a New York statute which, \textit{inter alia}, prohibited distribution of nonprescription contraceptives to any person under sixteen, except by a physician in the course of his/her practice. The asserted interest in discouraging sexual activity in minors by increasing the hazards of such activity was rejected because there was no evidence of a deterrent effect. In addition, considerable evidence was introduced to indicate that no such effect existed. \textit{Id.} at 695-96. Arguing from \textit{Danforth}, the Court concluded that the "constitutionality of a blanket prohibition of the distribution of contraceptives to minors is \textit{a fortiori} foreclosed" since the state interest in the minors' health is "clearly more implicated by the abortion decision than by the decision to use a nonhazardous contraceptive." \textit{Id.} at 694. Distribution by physicians was also insufficient to save the statute. \textit{Id.} at 697-99.

\textsuperscript{60} \textit{Id.} at 693 n.15. But it is clear that intermediate scrutiny was employed in \textit{Carey}. Although in footnote 15 strict scrutiny was expressly rejected, the Court also rejected minimal scrutiny when it reaffirmed the principle that when a State, as here, burdens the exercise of a fundamental right, its attempt to justify that burden as a rational means for the accomplishment of some significant State policy requires more than a bare assertion, based on a conceded absence of supporting evidence, that the burden is connected to such a policy. \textit{Id.} at 696.

\textsuperscript{61} See note 49 supra.
adults of making important decisions. One may argue that the restrictions allowed on decisional privacy also can be justified in the area of speech, where a similar level of maturity is required for appropriate decision-making. But such an extension would signal an erosion of the constitutional protection given to minors in previous decisions. Moreover, it should be noted that any extension of the significant state interest test beyond the privacy area would not only be without precedent but also would be unnecessary. This is so because First Amendment questions have traditionally invoked the strictest scrutiny, whereas privacy issues have not consistently been given this protection. It is possible, therefore, that Carey will not be seen as a limitation on Tinker.

62. See notes 58, 60, and accompanying text supra.
63. Important decisions are involved in the speech area—decisions about what to print or say, about the credence to be given to what is read or heard, about whether to respond to the expression and about what form that response should take.
67. Carey's precedential value on this point is limited. The opinion presents a confusing web of concurrences for each of its five sections. Section IV, regarding minors' rights, was written by Justice Brennan and joined by Justices Stewart, Marshall, and Blackmun. Justice White concurred in the result because the states failed to demonstrate that the prohibition actually deterred premarital sexual activity. Carey v. Population Servs. Int'l, 431 U.S. 678, 702 (1977). Justice Powell stated that there is "no justification for subjecting restrictions on the sexual activity of the young to heightened judicial review," id. at 705, but found the statute invalid because it interfered with parental guidance and authority. Id. at 708. Justice Stevens found that the state had a significant interest in discouraging sexual activity among minors, but concluded that the statute was invalid as a form of propaganda. Id. at 714-16.

In two recent cases involving children's rights, the Court has taken opposite positions with regard to whether the level of scrutiny to be applied should be less because the case involved minors. In Ingraham v. Wright, 430 U.S. 651 (1977), after holding that the Cruel and Unusual Punishment Clause of the Eighth Amendment did not apply to disciplinary corporal punishment in public schools, the Court found that virtually no procedural due process was required for the application of "reasonable corporal punishment in school" because state laws allowing it "represent...the balance struck by this country...between the child's interest in personal security and the traditional view that some corporal punishment may be necessary in the course of a child's education." Id. at 1415. This use of minimal scrutiny was thought to be justified because of the availability of civil and criminal penalties for "unnecessarily severe" corporal punishment, and because the "uncontradicted evidence suggest[ed] that the...punishment...was, 'with the exception of a few cases,...unremarkable in physical severity'" Id. at 1416.

At the other extreme, in Carey v. Piphus, 435 U.S. 247 (1978), the Court applied adult standards when finding that students temporarily suspended from school without due process
The Court need not extend the application of the significant state interest test to the resolution of non-privacy constitutional issues regarding minors. It is not a contradiction to employ the compelling state interest test while recognizing that the states have wide latitude in regulating the activities of children. An interest which would be compelling where children are involved might not be when applied to adults.68 The Court should not be reluctant to apply strict scrutiny on behalf of children—it would not mean that the states would be deprived of the power to protect children, only that they would have to exercise that power within the bounds of the Constitution. This has always been considered a reasonable and warranted restraint on the states' sovereign powers in the determination of questions of adults' constitutional rights. It is no less reasonable when the citizen whose rights are at issue happens to be below the age of majority.

II. THEORY IN APPLICATION: FEDERAL COURTS EXAMINE HIGH SCHOOL PRIOR RESTRAINT REGULATIONS

Most First Amendment issues regarding children's rights have arisen in the context of the educational process.69 Since children spend such a great deal of their time in school, their classmates, teachers, and school administrators are most likely to be the targets of children's expression. To restrict

would be able to collect damages from the school board. The Court did not expressly state the standard of review used in this case but went through a detailed analysis of the applicable (adult) tort law of damages. There was no indication that the case was decided any differently than if the plaintiffs had been adults. It must be remembered that the Court's justification for its result in Ingraham was that civil remedies were available to students whose constitutional rights may have been violated by the schools. However, the civil remedy can only be pursued if a recognized right has been violated. These cases indicate that the Court is still using a case-by-case approach for children's rights issues and has not yet committed itself to the use of the significant state interest test in all circumstances.

68. For example, a student's expression may be limited in order to avoid material disruption of school discipline, whereas an adult's expression is limited only by the clear and present danger test. See note 36 supra. The latter test allows a greater degree of excitement and dissent to be created by the speech.


The First Amendment was incorporated by the Fourteenth Amendment in Fiske v. Kansas, 274 U.S. 380, 385-87 (1927). See T. Emerson, THE SYSTEM OF FREEDOM OF EXPRESSION 102-03 (1971). Since boards of education, whether state, county or local, are arms of the state and derive their authority from the state, they may not promulgate regulations or adopt policies which are violative of the First Amendment rights of students, teachers, or administrators. 68 AM. JUR. 2d Schools § 14 (1973). This, of course, applies only to public educational facilities; students attending private schools cannot seek legal enforcement of their First Amendment rights as against such institutions. However, many private schools voluntarily recognize these rights. See Manual for Student Expression: THE FIRST AMENDMENT RIGHTS OF THE HIGH SCHOOL PRESS 9-10 (1976). This manual may be obtained from the Student Press Law Center. See note 164 infra. See also Developments in the Law: Academic Freedom, 81 Harv. L. Rev. 1045, 1056-64 (1968).
children's expression to non-school forums would be to deny them meaningful communication. For adults, the presence of adequate alternative avenues of communication must be shown before access to a particular forum can be denied. There is no reason why this theory should not be applied to children's expression as well. Accordingly, if children are to have First Amendment freedoms, these freedoms must be protected in the school environment.

The federal courts, armed with the strict scrutiny of the Gault-Ginsberg-Tinker trilogy and a strong policy for protection of academic freedom and inquiry, have developed a body of law designed to secure the classroom and school grounds as a First Amendment forum. Although this policy was formed in cases involving teachers' rights, the language of those decisions explicitly extends their application to students.

In one of the most significant of the teachers' rights cases, Keyishian v. Board of Regents, the Court designated the classroom as "peculiarly the 'marketplace of ideas'" in which students should be allowed to develop positions of their own. However, realization of this goal requires vigilant protection of constitutional freedoms in the public schools. As in other First Amendment forums, certain overriding state interests must be recognized, but judicial intervention has been mandated when regulations adopted in furtherance of such state interests directly implicate and contravene basic constitutional values.

70. Lloyd Corp. v. Tanner, 407 U.S. 551, 566-67 (1972). The Court relied in part on the availability of "adequate alternative avenues of communication" to hold that owners of private shopping malls could adopt regulations forbidding handbilling on mall premises without violation of the First Amendment. See also NLRB v. Babcock & Wilcox Co., 351 U.S. 105 (1956) (employer may prohibit non-employee distribution of union literature on his/her premises if the union can reach the employees by reasonable efforts through other available channels of communication).

71. But see notes 137-62 and accompanying text infra, in which the Second Circuit applied minimal scrutiny.

72. 385 U.S. 589 (1967).

73. Id. at 603. Reasoning that the goal of producing generations of informed, thinking citizens can be met only by allowing students to explore diverse views and positions, the Court stated that "the Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues, [rather] than through any kind of authoritative selection.'" Id., quoting United States v. Associated Press, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). This premise had been recognized in cases prior to Keyishian as well. See Shelton v. Tucker, 364 U.S. 479 (1960), in which it was noted that "teachers and students must always remain free to inquire, to study and to evaluate." Id. at 487, quoting Sweezy v. New Hampshire, 354 U.S. 234, 250 (1956).

74. The Court has recognized this need. In Keyishian v. Board of Regents, 385 U.S. 589 (1967), the Court explicitly stated its policy to afford such protection: "Our Nation is deeply committed to safeguarding academic freedom, which is of transcendental value to all of us . . . . That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom." Id. at 603.

75. With regard to student freedoms, the courts have recognized that state and local school boards must retain control over the daily operation of the schools and the educational process. See, e.g., Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 507
Student newspapers are the primary means by which students express their views, suggestions, and criticisms. Not surprisingly, these papers often have been the target of suppression and censorship by school administrators. Although this has taken the form of both prior restraints and post-publication penalties, this Comment will examine only those issues raised by school regulations which impose prior restraints on student publications.

A. The Prior Restraint Doctrine

The Supreme Court has interpreted the First Amendment to forbid federal, state, and local governments from imposing any system of prior restraint, with certain limited exceptions, on speech protected by the First Amendment. The prior restraint doctrine is much more stringent than


76. Student publications include both school-supported and underground newspapers. The interests which must be balanced against the students' rights to free expression vary depending on which type of publication is involved. If the newspaper is financed in whole or substantial part by the school or is operated in conjunction with a regular academic program (e.g., a journalism class for which participating students receive academic credit), the school administrators might assert a legitimate interest in the format, educational goals to be achieved, and/or types of articles to be included. See generally Commission of Inquiry into High School Journalism, Captive Voices: High School Journalism in America 25-49 (1974). In contrast, where underground papers are involved, administrators' concerns properly should extend only to protecting the student audience from materials which are libelous, obscene, violence-provoking, or which substantially disrupt normal school activity.

77. Post-publication penalties allow expression to take place but then impose a civil or criminal sanction on the speaker. Examples include defamation actions and criminal prosecutions for selling obscene materials or for violating valid time, place, and manner restrictions. Cases involving post-publication penalties turn upon a variety of factors, including the precise rules sought to be imposed by the school administrators, notice of those rules to the students, whether the publication had a materially disruptive effect on the student body and educational process, and the severity of the punishment imposed. See, e.g., Scoville v. Board of Educ., 425 F.2d 10 (7th Cir. 1970), cert. denied, 400 U.S. 826; Sullivan v. Houston Independent School Dist., 33 F. Supp. 1149 (S.D. Tex. 1971), 307 F. Supp. 1328 (S.D. Tex. 1969) (The second Sullivan opinion was on motion for an order for school officials to show cause why they should not be in contempt of the permanent injunction issued in the first opinion, in addition to supplemental injunctive relief and damages involving the contempt. Only the supplemental relief was granted); Zucker v. Panitz, 299 F. Supp. 102 (S.D.N.Y. 1969).

78. Prior restraints are official restrictions imposed on expression in advance of intended publication which prevent the publication from occurring. See Emerson, The Doctrine of Prior Restraint, 20 L. & Contemp. Probs. 643, 648-49, 655-58 (1965). The issue in prior restraint cases generally concerns the constitutional validity of the method used to restrict the speech.

Id.

79. Near v. Minnesota, 283 U.S. 697 (1931), established the prior restraint doctrine in this country. The Court held that the chief purpose of the First Amendment guarantee of a free press was to prevent prior restraints upon publication. Id. at 713. On this basis, the Court found a statute to be unconstitutional because its operation and effect enjoined as a public nuisance the publication of newspapers or periodicals determined to be "obscene, malicious or
similar rules restricting post-publication punishments.\textsuperscript{80} The reason is simple. The prior restraint of a certain form of publication, such as a specific newspaper, will prevent both protected and unprotected speech.\textsuperscript{81} On the other hand, a post-publication penalty directed at the same paper ideally will operate only against that expression which is not protected, or which may be limited as to time, place, and manner under the First Amendment. Prior restraints, in preventing communication from occurring at all, are in direct conflict with the underlying First Amendment principle of assuring the existence of a “free marketplace of ideas,”\textsuperscript{82} no matter how unpopular or critical those ideas may be.\textsuperscript{83}

The combination of \textit{Tinker}, holding that First Amendment principles of free speech apply to public school students,\textsuperscript{84} and \textit{Near v. Minnesota}, holding that those principles embody the right to distribute a publication without scandalous.” \textit{Id.} at 712-13, 722-23. The Court, quoting Blackstone, established a policy protecting the press from prior censorship: “The liberty of the press is indeed essential to the nature of a free state; but this consists in laying no previous restraints upon publications, and not in freedom from censure for criminal matter when published.” \textit{Id.} at 713, quoting 4 W. Blackstone, \textit{Commentaries} 151-52 (1769). The Court noted, though, that this protection is not absolute. \textit{Id.} at 716. Constitutionally permissible limitations on the prior restraint doctrine have been developed most recently in the area of obscenity. See, e.g., \textit{Southeastern Promotors, Ltd. v. Conrad}, 420 U.S. 546 (1975); Freedman v. Maryland, 380 U.S. 51 (1965).

81. The First Amendment does not expressly state that some speech will not be protected. However, judicial interpretation of the amendment has added a gloss to this effect. Through the use of legal fiction, the Court has determined that some words, symbols, etc. are not “speech” protected by the First Amendment. \textit{FCC v. Pacifica Foundation}, 438 U.S. 726 (1978) (profanity); \textit{Roth v. United States}, 354 U.S. 476 (1957) (obscenity).
83. The Court in \textit{Nebraska Press Ass’n v. Stuart}, 427 U.S. 539 (1976), noted that a “prior restraint, by contrast to a post-publication penalty and by definition, has an immediate and irreversible sanction. If it can be said that a threat of criminal or civil sanctions after publication ‘chills’ speech, prior restraint ‘freezes’ it at least for the time.” \textit{Id.} at 559. Justice Harlan, dissenting in \textit{A Quantity of Books v. Kansas}, 378 U.S. 205 (1964), previously had cautioned:

One danger of a censorship system is that the public may never be aware of what an administrative agent refuses, to permit to be published or distributed. A penal sanction assures both that some overt thing has been done by the accused and that the penalty is imposed for an activity that is not concealed from the public.

\textit{Id.} at 223 (Harlan, J., dissenting). Accordingly, the primary issues to be considered when reviewing the constitutionality of a prior restraint rule are matters of administration, techniques of enforcement, methods of operation, and the effect of these on the basic objectives of the First Amendment. Emerson, \textit{The Doctrine of Prior Restraint}, 20 L. & CONTEMP. PROB. 648 (1965).

Prior restraints of protected adult speech are unconstitutional per se. See note 79 supra. However, prior restraints of certain types of adult speech and expression have been held not to violate the First Amendment if specified procedural safeguards are utilized to ensure that only those areas are being restrained. For example, obscenity is considered to be outside the protection of the Constitution. See note 81 supra. Therefore, statutes may prohibit the dissemination of obscene materials as long as non-obscene materials are not also prohibited, and as long as due process rights are afforded the would-be speaker. \textit{Southeastern Promotors, Ltd. v. Conrad}, 420 U.S. 546 (1975); \textit{Miller v. California}, 413 U.S. 15 (1973); \textit{Freedman v. Maryland}, 380 U.S. 51 (1965); \textit{Roth v. United States}, 354 U.S. 476 (1957).
84. See notes 42 and 44 supra.
prior censorship, should result in the application of the prior restraint doctrine to student publications. However, some appellate courts have indicated that prior restraints on the student press may be constitutionally permissible, and the majority of circuits have refused to recognize the per se unconstitutionality of such prior restraints. Only one case has expressly upheld the prior restraint of student publications.

B. The Majority Position

The most extensive development of student prior restraint law has occurred in the Fourth Circuit, where nearly one-third of such cases have been litigated. The moderate position taken by this circuit had its origin in the rather tentative requirement that prior restraint rules must be justified by a reasonable belief in their necessity. This led to the development of the current standard, which requires the strict application of most adult prior restraint procedural safeguards in the high school setting.

The Fourth Circuit's first decision regarding prior restraint of student expression was *Quarterman v. Byrd*. The case squarely analyzed the con-

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85. See note 79 supra.
86. See, e.g., *Risman v. School Comm.*, 439 F.2d 148 (1st Cir. 1971), in which the First Circuit struck down a junior high school's prior restraint rule which forbade the use of the school facilities for the advertisement or promotion for any community or non-school organization without the authorization of the School Committee. In this instance, the Committee had refused to allow students to distribute anti-war leaflets and copies of a "High School Bill of Rights" on school grounds during school hours. The court found the rule to be unconstitutionally vague, since it could be used to hinder expression protected by the First Amendment. *Id.* at 149. Although the court did not hold that restriction of student expression was unconstitutional per se, it refused to allow use of this rule to prohibit the distribution of student publications because it "did not reflect any effort to minimize the adverse effect of prior restraint." *Id.*

This has been the most definitive statement made by the First Circuit regarding the permissibility of prior restraints in public schools. *But see* *Cintron v. State Bd. of Educ.*, 384 F. Supp. 674 (D.P.R. 1974), in which the district court, without reference to *Risman*, struck down a prior restraint regulation as unconstitutional. Reasoning that "the fact that these cases involve high school and junior high school students does not affect the standards to be applied, although it may, under certain circumstances, affect the practical application of those standards," *id.* at 678 n.4 (emphasis in original), the court applied the adult prior restraint standards found in *New York Times Co. v. United States*, 403 U.S. 713 (1971), and *Marin v. University of Puerto Rico*, 377 F. Supp. 613 (D.P.R. 1973), and found the regulations to be void on their face.

87. See, e.g., *Shanley v. Northeast Independent School Dist.*, 462 F.2d 960 (5th Cir. 1972), where the Fifth Circuit expressly held that requiring student publications to be submitted for approval prior to publication was not unconstitutional per se. *Id.* at 969. The court required only that this type of rule must clearly state the means by which students are to submit proposed materials, the time period within which approval is to be granted or denied, and the procedure for review of the administrator's decision. *Id.* at 978.


89. The Fourth Circuit is comprised of Maryland, Virginia, West Virginia, North Carolina, South Carolina, and Washington, D.C.

90. 453 F.2d 54 (4th Cir. 1971). The applicable North Carolina school regulation prohibited distribution of "any advertisements, pamphlets, printed material, written material, announce-
stitutionality of a regulation imposing a prior restraint. However, the court did not use a prior restraint analysis. Rather, it purported to apply the Tinker material disruption standards. Although the words of the Tinker test were used, they were applied with substantially less scrutiny than Tinker required. Tinker clearly contemplated that objective evidence would be necessary to substantiate a school administrator’s claims that material disruption would ensue in the absence of a prior restraint. Nevertheless, the Quarterman court held that a prior restraint rule could be used if the school officials reasonably believed it to be necessary. This rather anomalous application of the Tinker test created a rule of law under which prior restraint regulations again could be justified by the school officials’ “undifferentiated fear or apprehension of disturbance.”

Distributed without permission was an underground newspaper which proclaimed that “WE [the students] HAVE TO BE PREPARED TO FIGHT IN THE HALLS AND IN THE CLASSROOMS . . . WE’LL BURN THE BUILDINGS OF OUR SCHOOLS DOWN TO SHOW THESE PIGS THAT WE WANT AN EDUCATION THAT WON’T BRAINWASH US INTO BEING RACIST.” Id. at 55-56 (capitals in original). The opinion struck down the regulation, even though it was argued that the publication was inflammatory and potentially disruptive, because the plaintiff was punished not for the content of the newspaper, but rather for distributing it without permission. Id. at 57.

Indeed, the court stated that “we are concerned only at this point with the constitutional validity of the regulation.” Id. at 57. However, although the regulation was held to be facially invalid, the court observed that “its basic vice does not lie in the requirement of prior permission for the distribution of printed material” since the First Amendment rights of children are not “co-extensive with those of adults.” Id. at 57-58, citing Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 515 (Stewart J., concurring).

92. Under Tinker, school authorities do not have to wait until a material disruption actually takes place. However, this test cannot be used to justify a broad prior restraint. The Court in Tinker was explicit in stating the criteria to be applied when reviewing such a rule. School officials seeking to justify restraints on student expression “must be able to show” that the expression would “materially and substantially interfere” with the education process. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 509 (1969) (emphasis added). The Tinker Court specifically found that an “undifferentiated fear or apprehension of disturbance” would not be enough to overcome the right of freedom of expression. Id. at 508.

93. Throughout its opinion, the Tinker Court emphasized the need for objective evidence of a reasonably anticipated disturbance. For example, the Court found that “[t]here is here no evidence . . . of . . . interference . . ., no indication that the work was disrupted,” id. at 508, and that “our independent examination of the record fails to yield evidence that the school authorities had reason to anticipate that the wearing of the armbands would substantially interfere . . . .” Id. at 509. See also id. at 514. In stressing the importance of student First Amendment rights, the Court held that “in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression . . . .” Id. at 511. Thus, the burden was placed on the state to show that its regulations were not prompted merely by disagreement with the content of the speech or expression. Id. at 509.

94. Quarterman v. Byrd, 453 F.2d 54, 58 (4th Cir. 1971). Specifically, the court determined that students’ free speech rights may be subject to regulations “reasonably designed to adjust these rights to the needs of the school environment,” “id., quoting Antonelli v. Hammond, 308 F. Supp. 1329, 1336 (D.C. Mass. 1970), especially in those circumstances where school officials could “reasonably forecast substantial disruption of or material interference with school activities.” Id., quoting Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 806-07 (2d Cir. 1971). The court did
Two years later, the Fourth Circuit modified its approach to bring its criteria regarding prior restraints more in line with those established by Tinker. In Baughman v. Freienmuth, in which the facts and the school regulation at issue were substantially the same as those in Quarterman, the court again began with the premise that children's First Amendment rights are not co-extensive with those of adults. However, it went on to establish criteria for permissible prior restraints of student publications which were narrower than those developed in Quarterman. In addition, the court applied the same presumption of unconstitutionality that has been used in situations involving adults. These criteria required: (1) a clear definition of "distribution," especially as it may apply to different kinds of materials; (2) a provision for prompt approval/disapproval; (3) a statement informing the students of the effect of a failure to take prompt administrative action; and (4) a provision for an adequate and prompt appeal.

Students' rights were thus expanded to more closely approximate adults' rights. This ruling did not, however, incorporate in their entirety the require, however, the establishment of criteria for determining whether such permission should be granted. Id. at 59. In addition, procedural safeguards in the form of an expedited review must be available. Id. While these requirements parallel some of those afforded adults by Freedman v. Maryland, 380 U.S. 51 (1965), see note 101 infra, Freedman's safeguards of speech and expression were all but emasculated by their application to students in Quarterman.

95. 478 F.2d 1345 (4th Cir. 1973). The literature sought to be suppressed was a pamphlet criticizing the school's prior restraint regulations. The regulation was slightly more specific than the one in Quarterman because approval could be withheld only if, in the opinion of the principal, it contained "libelous or obscene language, advocate[d] illegal actions, or [was] grossly insulting to any group or individual." Id. at 1347.

96. Id. at 1348, 1351.

97. See notes 90-94 and accompanying text supra.

98. Freedman v. Maryland, 380 U.S. 51, 57 (1965); Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70 (1963); Cantwell v. Connecticut, 310 U.S. 296, 306 (1940); Lovell v. Griffin, 303 U.S. 444, 451-52 (1938); Near v. Minnesota, 283 U.S. 697, 713-16 (1931). The Baughman court held that this presumption can be rebutted only if the regulation contains the precise criteria to be followed by the school authorities in approving the publication and if it provides for procedural safeguards including prompt and adequate review of the decision. Baughman v. Freienmuth, 478 F.2d 1345, 1348 (1973). The court cited Quarterman v. Byrd, 453 F.2d 54, 58-59 (4th Cir. 1971), as authority for this requirement. However, it should be noted that Quarterman contained only the bare assertion that procedural safeguards are required, without specifying what procedures would be sufficient.

99. For instance, some types of materials cannot be made subject to prior restraints unless a substantial disruption is contemplated and certain types of limited circulation material may never be able to provoke the sort of substantial disruption against which school authorities may protect. Eisner v. Stamford Bd. of Educ., 440 F.2d 803, 811 (2d Cir. 1971). See notes 148-52 and accompanying text infra. Other types of material, for example that which is obscene or libelous, may be the subject of valid prior restraints regardless of the extent of distribution, provided that the regulation defines precisely what is forbidden. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 514 (1969); Baughman v. Freienmuth, 478 F.2d 1345, 1349 (4th Cir. 1973).


101. The effect of the Baughman ruling was to prevent the use of "unbridled discretion of school officials," Southeastern Promotors, Ltd. v. Conrad, 420 U.S. 546, 553 (1975), and to provide for prompt findings and an expedited appeal, two of the safeguards required by the
procedural safeguards required by *Freedman v. Maryland*, an earlier Supreme Court decision dealing with prior restraints imposed under a state motion picture censorship statute. The *Freedman* safeguards placed the burden of proof on the censor, allowed prior restraints only for a brief time before a judicial determination on the merits, and required a prompt judicial review of the censor's decision. In contrast, the *Baughman* court did not place the burden of proof upon the school officials to prove non-conformity with the standards. More importantly, the new rule did not specifically require the inclusion of any type of adversary proceeding. However, from a practical standpoint, such a hearing is crucial. Unless the student is allowed some participation in this determination, the path will be clear once again for the exercise of unilateral discretion by school officials in censoring student speech and expression.

This lack of procedural safeguards was corrected in *Nitzberg v. Parks*. In that case, the school board's policies were rejected because they did not properly detail the elements of libel and obscenity when prohibiting the publication or distribution of libelous or obscene materials. Their most

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*Freedman v. Maryland* involved the constitutional challenge of a state censorship statute which required the submission of motion pictures to a state board of censors for prior review and approval. In that case, the Court held that certain procedural safeguards must be present in order to rebut the presumption that a prior restraint statute is unconstitutional. *Freedman v. Maryland*, 380 U.S. 51, 57-58 (1965). The safeguards required: (1) the censor to prove that the speech was not protected by the First Amendment; (2) any restraint imposed prior to judicial review to be limited to preserving the status quo and also limited to the shortest period of time compatible with sound judicial resolution; and (3) a prompt and final judicial review to minimize the deterrent effect of an interim and possibly erroneous denial of a license. *Id.* at 58-59.


103. It is not suggested here that a judicial-type hearing is necessary, but only that some hearing with bona fide student participation is required. See generally *Goss v. Lopez*, 419 U.S. 565 (1975).

104. 525 F.2d 378 (4th Cir. 1975). In this case, two private student newspapers were ordered to cease publication under a regulation authorizing prior restraint of "non-school literature." The district court had enjoined implementation of the regulation for reasons of vagueness and overbreadth and ordered a series of four revisions before finding that the rule met the constitutional standards previously adopted by the court of appeals in *Baughman*. *Id.* at 380-81. See notes 95-103 and accompanying text *supra*. The court of appeals disagreed and issued an opinion addressing the details of its prior rulings.

105. *Nitzberg v. Parks*, 525 F.2d 378, 381-83 (4th Cir. 1975). The relevant portion of the regulation states:

> Literature may be distributed and posted by the student of the subject school in designated areas on school property as long as it is not obscene or libelous (as defined below) and as long as the distribution of said literature does not reasonably lead the principal to forecast substantial disruption of or material interference with school activities.

*Id.* at 381. The indicated definitions of libel and obscenity were written in legal terminology. The court struck down the libel definition because it failed to apply the standard of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), and its progeny. *Nitzberg v. Parks*, 525 F.2d 378, 383 (4th Cir. 1975). However, it can also be argued that the highly sophisticated wording of the
crucial flaw, however, was procedural. The court took special note of the fact that the regulation lacked guidelines for determining what would constitute a "substantial disruption of or material interference with school activities," as well as for what would be the appropriate criteria an administrator might use to reasonably predict the occurrence of such a disruption.

While the court relied on Quarterman and Baughman, quoting extensively from each decision, the holding in Nitzberg was in effect a complete rejection ofQuarterman's interpretation and use of the Tinker material disruption standard as a test of the constitutionality of student prior restraints. The court did not expressly overrule or modify Quarterman, but it did question the validity of the decision's reasoning.

The detail Nitzberg required of student prior restraint regulations is significant, therefore, in that it indicates that strict scrutiny is now being applied by the Fourth Circuit.

The regulation did not provide its intended audience (high school students and administrators) with meaningful notice of the types of materials prohibited.

106. Id.

107. Id. The court also found that these regulations lacked the requisite procedural safeguards adopted in Baughman. Specifically, they did not provide for adequate notice of their existence (a copy was to be "made available to all students in a readily accessible and announced location"), id. n.4; review procedures and their timing were unclear (the court found that requiring an approval/disapproval decision within a certain number of "pupil days" was not sufficiently specific unless "pupil days" was defined), id. at 383-84; and the nature of the review was too vague (since violation of the rule could result in suspension, due process requirements of confrontation and a hearing must be afforded), id. at 384.

108. In addition to quoting the "controlling constitutional principles in student publication cases for this Circuit" as set forth in Quarterman, id. at 382, quoting Quarterman v. Byrd, 453 F.2d 54, 57-58 (4th Cir. 1971), the court noted that Judge Craven, in Baughman, had "re-emphasized the necessity of 'narrow, objective and reasonable standards' as the essential element in any system of prior restraint," Nitzberg v. Parks, 525 F.2d 378, 382 (4th Cir. 1975), quoting Baughman v. Freienmuth, 478 F.2d 1345, 1350 (4th Cir. 1973). Not content merely to cite to Baughman, the Nitzberg court stressed the importance of the requirements set out in that opinion by repeating them verbatim. Id. at 382.

109. See notes 90-94 and accompanying text supra.

110. Nitzberg v. Parks, 525 F.2d 378, 383 (4th Cir. 1975), quoting Jacobs v. Board of School Comm'rs, 490 F.2d 601, 605 (7th Cir. 1973). For further discussion regarding the Jacobs decision, see notes 130-136 and accompanying text infra.

111. The court in Nitzberg found that the prior restraints were unconstitutionally vague and overbroad because of their definitional and procedural deficiencies. 525 F.2d 378, 383 (4th Cir. 1975).

112. However, this should not be interpreted as a sign of an "interventionist court." There is, and should be, a general judicial reluctance to interfere with school board decisions regarding daily operations of the school system. See note 75 supra. However, the Nitzberg court felt that its duty to uphold the Constitution required some supervision of school authorities. The court noted: "[W]e cannot remain silent when we truly believe that the regulations as presently written will raise more problems than they will solve. We have both compassion and understanding of the difficulties facing school administrators, but we cannot permit those conditions to suppress First Amendment rights of individual students." Nitzberg v. Parks, 525 F.2d 378, 384 (4th Cir. 1975). See also Leibner v. Sharbaugh, 429 F. Supp. 744 (E.D. Va. 1977), where the court found the regulation to be "a monument to vagueness." Id. at 748. This opinion echoed the appellate court's impatience with school officials for necessitating yet more litigation in this area,
In Gambino v. Fairfax County School Board,113 a Virginia district court decision, the regulations were found to be facially valid but unconstitutional as applied to prohibit publication of the article in question.114 The Gambino opinion, remaining consistent with both the letter and spirit of other Fourth Circuit cases,115 presented a sophisticated First Amendment analysis of the prior restraint, as opposed to a student-First Amendment analysis. Thus, the court viewed the key issue as whether the student newspaper was a proper First Amendment forum.116 No distinctions were made between a student-forum and an adult-forum,117 and adult First Amendment cases were used to determine both the forum's existence and the validity of regulations seeking to restrict it.118 In finding that the newspaper was indeed a First

noting that a virtually identical provision was struck down in Nitzberg, id. at 749, and that the regulation at bar presented the same type of vagueness which had led to invalidation of regulations in Quarterman and Baughman. Id. at 748. Perhaps the court's impatience was not unwarranted; also under consideration was Gambino v. Fairfax County School Bd., 429 F. Supp. 731 (E.D. Va. 1977), an opinion issued two days after Leibner. See notes 113-24 and accompanying text infra. In addition, Leibner addressed the question of whether irreparable harm would result if the court, in finding that the plaintiff was likely to prevail on the merits, was to refuse issuance of a temporary restraining order. Leibner v. Sharbaugh, 429 F. Supp. 744, 748 (E.D. Va. 1977). The court held that such harm, in the form of a chilling effect on protected expression, was likely if an order prohibiting enforcement of the prior restraint was not issued. Id. at 749. The Leibner court emphasized the Fourth Circuit policy that the public interest is advanced by the protection rather than repression of First Amendment activity of students. Id. at 749-50. The clear import of this finding is that administrative prerogative may not be used to subordinate the constitutionally protected rights of students. See also Nitzberg v. Parks, 525 F.2d 378, 384 n.5 (4th Cir. 1975).

114. Id. at 736-37.

115. See Nitzberg v. Parks, 525 F.2d 378 (4th Cir. 1975); Baughman v. Freienmuth, 478 F.2d 1345 (4th Cir. 1973); Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971).


117. Id. at 735 n.2, where the court stated that "[t]he youth of the audience is not determinative of the existence vel non of First Amendment protection."

118. Id. at 734-35. See, e.g., Lehman v. City of Shaker Heights, 418 U.S. 298 (1974) (regarding the captive audience principle); Packer Corp. v. Utah, 285 U.S. 105 (1932) (the application of the captive audience principle to newspapers); Bazaar v. Fortune, 476 F.2d 570 (5th Cir. 1973) (once a state university recognizes a student activity that has elements of free expression, it can act to censor that expression only if its acts are consistent with First Amendment guarantees); Antonelli v. Hammond, 308 F. Supp. 1329 (D. Mass. 1970) (state funding does not preclude application of First Amendment protection).

In addition, the Gambino court found it necessary to place the effect of the school setting in its proper constitutional perspective, holding that "[w]hile the scope of constitutional freedoms may vary with the nature of the environment and the maturity of the individuals affected, the
Amendment forum, the court noted that it had been "conceived, established and operated as a conduit for student expression on a wide variety of topics" rather than an "in-house organ of the school system." Since it could not be viewed as an integral part of the school curriculum, the court felt it could not properly be made subject to the curriculum regulation.

The court also rejected the board's argument that a greater degree of restriction was justified because the students constituted a "captive audience." It found that no qualitative distinction could be made between the "forced exposure" present in this case and that found in Tinker. Furthermore, a distinction in degree would not serve to enhance the school board's position. In Gambino, the students had to act affirmatively to pick up and read the newspaper in order to be exposed to its contents, whereas in Tinker the students had to act affirmatively (look away) in order not to be so exposed.

To summarize, the current state of the student prior restraint law in the Fourth Circuit approximates adult prior restraint law. This is evidenced by strict application of the Tinker test, which has the effect of using the clear and present danger test in the school environment. The procedural safeguards of Freedman have been adapted to the context of the public high school as far as is practicable. Most importantly, courts in the Fourth Circuit are applying strict scrutiny to make these determinations.


119. Id. at 735.
120. Id. at 734, 736.
121. The court specifically found the newspaper to be more akin to the school library, which contained information on birth control and was available to students despite the board's curriculum regulation. Id. at 736.
122. Id. at 735-36. In Lehman v. City of Shaker Heights, 418 U.S. 298 (1974), the Court distinguished a potential audience in an open First Amendment forum from a "captive audience" which has "no 'choice or volition' to observe [the speech]." Id. at 302, quoting Packer Corp. v. Utah, 285 U.S. 105, 110 (1932). This factor was held to alter the forum sufficiently to justify reasonable and nondiscriminatory regulations upon access to it. Id. at 304. The school board in Gambino argued that the captive audience principle should be applied because the distribution of the newspapers in homerooms, the official status of the newspaper, the requirement that students desiring a yearbook subscribe to the paper and peer pressure would all work to compel student exposure to the newspaper's contents. Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 735-36 (E.D. Va. 1977).
123. Id. at 736.
124. Id. The regulation was found not to be facially invalid even though it lacked the detailed criteria required by Baughman and Nitzberg. See notes 95-103, 104-12, and accompanying text supra. The court did find, however, that the regulation could not be applied to prohibit publication of the article in question. Gambino v. Fairfax County School Bd., 429 F. Supp. 731, 736 (E.D. Va. 1977). Nevertheless, this does not represent a loosening of the standards used to test the facial validity of student prior restraints. The regulation in question was intended as a policy statement regarding permissible curriculum subjects and was not aimed at limiting student expression.
C. Minority Positions

The Seventh Circuit — A Per Se Rule for Student Prior Restraints

The Seventh Circuit has adopted a more stringent position, holding that pre-publication censorship of student literature amounts to an unconstitutional prior restraint. In one case, Fujishima v. Board of Education, the Tinker forecast rule was rejected as a justification for such prior restraints. The court decided that the Tinker test should govern only the constitutionality of post-publication penalties, and not that of prior restraints on expression. This stance was followed in Jacobs v. Board of School Commissioners, in which a similar prior restraint regulation was found to be unconstitutional.

125. Although only the Seventh Circuit expressly prohibits prior restraints, the Fourth Circuit's very strict scrutiny of such regulation approaches the same result. See notes 104-12 and accompanying text supra.

126. Jacobs v. Board of School Comm'rs, 490 F.2d 601 (7th Cir. 1973); Fujishima v. Board of Educ., 460 F.2d 1355 (7th Cir. 1972).

127. 460 F.2d 1355 (7th Cir. 1972). This case involved a board of education rule that prohibited the distribution on school premises of any book or publication without the approval of the superintendent of schools. In one instance, two students were suspended for distributing copies of an underground newspaper before and between classes and during the lunch period. In the other, a student was suspended twice: once for giving another student an unsigned copy of a petition concerning the Vietnam war and again for distributing leaflets about the war during a fire drill. In no case did the distribution cause any disturbance or interfere with educational process.

128. Id. at 1358-59. The court specifically found Eisner v. Stamford Bd. of Educ., 440 F.2d 803 (2d Cir. 1971), to be "unsound constitutional law" in its interpretation of Tinker as "allow[ing] prior restraint of publication—long a constitutionally prohibited power—as a tool of school officials in 'forecasting' substantial disruption of school activities." Fujishima v. Board of Educ., 460 F.2d 1355, 1358-59 (7th Cir. 1972). See notes 137-52 and accompanying text infra. The Fujishima court also rejected the Fourth Circuit's early effort in this area, Quarterman v. Byrd, 453 F.2d 54 (4th Cir. 1971). Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972). See notes 90-94 and accompanying text supra. As suggested above, the current state of the law in the Fourth Circuit is more in line with that of the Seventh Circuit than it was at the time of the Fujishima decision. See note 125 supra.

129. Fujishima v. Board of Educ., 460 F.2d 1355, 1358 (7th Cir. 1972). The court did not feel, however, that a school board could be prevented from issuing "reasonable, specific regulations setting forth the time, manner and place in which distribution of written materials may occur." Id. at 1359. This is consistent with the Tinker test, both as developed in the Supreme Court opinion, ("[b]ut conduct by the student, in class or out of it, which for any reason—whether it stems from time, place or type of behavior—causes a material disruption] . . . is, of course, not immunized by the constitutional guarantee of freedom of speech," Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969)), and as interpreted by the Seventh Circuit. See text. It is also the same limitation that is imposed on adult speech and expression. See note 37 supra. The Fujishima court held that, while the board properly could prohibit the distribution of any publication or literature during fire drills, such a rule could not be applied ex post facto to the plaintiff. Fujishima v. Board of Educ., 460 F.2d 1355, 1359 (7th Cir. 1972). Similarly, it found that regulations providing for post-publication punishments for students who distribute obscene or libelous material might be permissible. Id. at 1359.

130. 490 F.2d 601 (7th Cir. 1973). The plaintiffs had published and distributed four issues of their newspaper but just prior to distribution of the fifth issue the school authorities imposed a
The court in Jacobs found that the use of "careful scrutiny" was warranted when testing the regulation for vagueness. The major thrust of the Jacobs opinion was directed at reviewing the regulations for vagueness and overbreadth. At first glance this may seem to be a significant modification of Fujishima's absolute prohibition of prior restraints on student publications, but an examination of the effect of the decision, rather than the methodology, reveals that this is not the case.

The court found that the regulations were vague because they did not define the circumstances which would make the distribution of literature unlawful. Proposing examples of behavior which conceivably could be included in the regulation's prohibition, the court indicated that "consequences" which did not amount to obscenity, libel, or threat of an actual and substantial disruption would not be sufficient to sustain the regulation. The effect was to require a degree of statutory precision which only would restrain either speech not protected by the First Amendment—obscenity and libel—or speech meeting the clear and present danger criteria.

rule prohibiting its sale or distribution at school without the express prior approval of the superintendent. The superintendent forbade circulation of their paper because it contained obscene materials. Even though the rules were amended after the litigation began, the court found that they were both vague and overbroad. Id. at 604. Curiously, although the Jacobs court utilized the same basic approach as the Fujishima court had, the latter decision was not cited in Jacobs as precedent for prohibiting prior restraint of student publications.

131. The court first detailed the policy reasons for requiring precision in criminal statutes. Id. at 604-05. See Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); United States v. Dellinger, 472 F.2d 340, 355 (7th Cir. 1972), cert. denied, 410 U.S. 970 (1973). Then, recognizing that the regulation in question was not a criminal statute, the court nevertheless found that the possible penalties of suspension or expulsion were "sufficiently grievous to mandate careful scrutiny." Jacobs v. Board of School Comm'rs, 490 F.2d 601, 605 (7th Cir. 1973).


133. Jacobs v. Board of School Comm'n's, 490 F.2d 601, 605 (7th Cir. 1973). The "consequences" were articulated in the board's regulations as "significant disruption of the normal educational processes, functions or purposes in any of the Indianapolis schools, or injury to others." Id. at 604-605.

134. The court queried: "Is decorum in the lunchroom a 'normal educational . . . purpose'? If an article sparks strident discussion there, is the latter a 'disruption'? . . . The phrase 'injury to others' is also vague . . . Does it include hurt feelings and impairment of reputation by derogatory criticism, short of defamation . . . ?" Id. at 605.

135. Id.

136. This was the same approach taken by the Supreme Court when defining constitutionally permissible prior restraints of obscene materials for adults. See, e.g., Miller v. California, 413 U.S. 15, 23-24 (1973), where the Court held that "[s]tate statutes designed to regulate obscene materials must be carefully limited . . . [W]e now define the permissible scope of such regulation to works [depicting sexual conduct as] specifically defined by the applicable state law." See also Interstate Circuit, Inc. v. City of Dallas, 390 U.S. 676, 682-85, 690 (1968) ("the absence of narrowly drawn, reasonable and definite standards . . . is fatal"). In these limited contexts, assuming there are appropriate procedural safeguards, Freedman v. Maryland, 380 U.S. 51 (1965), see note 101 supra, prior restraint regulations also have been upheld in adult situations. See, e.g., Southeastern Promotors, Ltd. v. Conrad, 420 U.S. 546 (1975) (prior restraints are not
The Second Circuit—Minimal Scrutiny of Prior Restraints

The Second Circuit, also in a minority, has adopted a position which is nearly the antithesis of that taken by the Seventh Circuit, both in approach and ultimate result. In *Eisner v. Stamford Board of Education*, the Connecticut district court found impermissible a regulation requiring the submission of the specific content of a publication for approval prior to its distribution. Although the finding of unconstitutionality was upheld on appeal, the Second Circuit, applying minimal scrutiny, held that the school officials could validly restrain the distribution of disruptive matter to the extent allowed by *Tinker*. With this in mind, the court imposed an additional requirement upon the school regulation so that it would approximate the *Tinker* standard: “[A]lthough the policy does not specify that the foreseeable disruption be either ‘material’ or ‘substantial,’ as *Tinker* requires, we assume that the Board would never contemplate the futile as well as unconstitutional suppression of matter that would create only an immaterial disturbance.” After saving it from fatal overbreadth through the use of this legal fiction, the court went on to impute factors to the regulation which served to lessen its vagueness. For instance, since the regulation did not authorize any punishment, the court believed it would have no chilling effect. Further, because it operated only on school property, the rule was unconstitutional per se; *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 n.10 (1961); *Near v. Minnesota*, 283 U.S. 697, 716 (1931). For these reasons, prior restraints in similar circumstances would be permissible when applied to students. However, prior restraints on otherwise protected speech and expression remain illegal in the Seventh Circuit.

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138. Id. at 835. Students here sought to distribute, free of prior restraints, copies of a newspaper they had written as well as other printed and written literature. The district court held that the prior restraint was unconstitutional on two grounds: (1) a requirement of prior approval of the contents of the publication, in the absence of even a “scintilla of proof” to justify it, is invalid under *Near v. Minnesota*, 283 U.S. 697 (1931); and (2) the regulation lacked adequate procedural safeguards as specified in *Freedman v. Maryland*, 380 U.S. 51 (1965). *Eisner v. Stamford Bd. of Educ.*, 314 F. Supp. 832, 834-36 (D. Conn. 1970).
140. Id. at 807. Illustrative of the minimal scrutiny applied by the Second Circuit is its deference to state assertions of the “potential evils” which the prior restraint rule sought to eliminate. It was noted that “[e]arly involvement in social comment and debate is a good method for future generations of adults to learn intelligent involvement. But we cannot deny that Connecticut has authority to minimize or eliminate influences that would dilute or disrupt the effectiveness of the educational process as the state conceives it.” Id. (emphasis added). This is not the authority defined by the Supreme Court in *Tinker* as being constitutionally exercisable by boards of education. Rather, it is precisely that “undifferentiated fear or apprehension of disturbance” which the *Tinker* Court rejected as insufficient under the First Amendment. *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 508 (1969). It is also a restriction of the “marketplace of ideas” concept of classroom discussion which was similarly rejected in *Tinker* as constitutionally invalid. Id. at 512-13.
142. Id. at 808 (emphasis in original).
143. Id.
not considered unreasonable since it did not restrict the students' right to distribute the newspapers outside of school. The court concluded, therefore, that the students' First Amendment freedoms would not be unduly hampered.

Nevertheless, the regulation was found unconstitutional because it lacked the procedural safeguards required by Freedman v. Maryland. This finding, however, does not provide adequate protection. The only safeguards the court demanded were: (1) a provision for an expedited review procedure, and (2) a precise definition of the term "distribute." In regard to the latter, the court assumed that the school board intended "distribution" to mean "substantial distribution." It held, though, that the definition must be more precise so that the "distribution" of a single copy of a publication (such as Newsweek) by one student to another would not fall within the scope of the regulation. It is curious that this language was found to be unconstitutionally vague in light of the court's finding that the "disruption" section of the regulation was not vague because it could be presumed that the school board meant "substantial disruption." By definition, the term "distribution" eliminates this type of vagueness, whereas "disruption" does not. As a result of Eisner, as long as the school officials define

144. Id.
145. Specifically, the court of appeals held that the First Amendment was not offended by the regulation because it was "in many ways narrowly drawn to achieve its permissible purposes, and indeed may fairly be characterized as a regulation of speech, rather than a blanket prior restraint." Id.
146. Id. at 810-11; see note 101 supra. The court stated that the board's policy did not impose "nearly so onerous a 'prior restraint' as was involved in Freedman." Id. at 810. Therefore, it held that not all of the Freedman requirements were necessary in the school environment. Id. School officials were not required to seek a judicial determination before denying approval for distribution. Id. Under Freedman, the state is required to assume the burden of proving that approval should not be granted. The Eisner court found, however, that since school authorities would have to demonstrate a reasonable basis for the decision if the student chose to litigate, this would be sufficient to satisfy Freedman in the special context of the school setting. Id. Since the court had already dismissed the need for a prior judicial determination, such postponement affords little protection of students' First Amendment freedoms and fails to eliminate the possibility of arbitrary decision-making by the designated officials which was prohibited in Southeastern Promotors, Ltd. v. Conrad, 420 U.S. 546 (1975).
148. Id. at 811.
149. Id.
150. See text accompanying note 142 supra.
151. "Distribute: ... 1a: to divide among several or many ... especially to members of a group." Webster's Third New International Dictionary of the English Language 660 (1961) (emphasis added).
152. "Disrupt: ... 1b: to throw into disorder or turmoil. 2: to interrupt to the extent of stopping, preventing normal continuance of, or destroying." Id. at 656.

An examination of this definition reveals that the addition of the modifier "substantial" is relevant to the determination of the constitutionality of the disruption standard, since Tinker in essence requires an approximation of the "clear and present danger" test. See notes 34-41 and
“distribution” and provide for a prompt review, students in the Second Circuit will have little protection from prior restraints.

The most recent Second Circuit venture into this area, *Trachtman v. Anker*, appears to be even less solicitous of student rights. In addition to being the only reported student prior restraint decision in which the students have lost at the appellate level, *Trachtman’s* approach was unique. The case bears substantial similarity to *Ginsberg v. New York* in that its central issue involves a restriction imposed on the distribution of sexually-oriented materials to minors. Student staff members of the high school newspaper were denied permission to survey the sexual attitudes of students and publish their interpretation of the results. As in *Ginsberg*, it is impossible to determine the extent to which the result was prompted by the presence of the obscenity issue, rather than by prior restraint consideration. The similarity, however, ends at this point, for in *Ginsberg* the Supreme Court considered itself bound to scrutinize the state’s asserted justifications. The *Trachtman* court, however, used a rational basis/minimal scrutiny test. Although the Second Circuit indicated that “bare allegations” of harm would not satisfy this test, it nevertheless upheld the prior restraint by relying upon expert affidavits which presented little more than assertions that potential emotional harm might be suffered by “at least some students” as a result of the survey.

accompanying text *supra*. However, requiring that the term “distribute” also be modified by “substantial” has no constitutional effect since speech has never been protected or not protected on the basis of audience size.

154. See notes 27-31 and accompanying text *supra*.
155. The survey proposed was a randomly distributed questionnaire accompanied by a cover letter cautioning the student to not answer questions about which he or she felt uncomfortable. The principal’s decision was upheld in successive appeals. The appeal process, which culminated with an action in the federal courts, took nearly nine months to resolve. *Trachtman v. Anker*, 563 F.2d 512, 514-15 (2d Cir. 1977). This was hardly the “expedited appeal” contemplated by *Freedman* and found to be applicable to the student press by a majority of appellate courts, see notes 99-103 and accompanying text *supra*, but the *Trachtman* court nonetheless did not address the issue of procedural safeguards.
156. See notes 27-31 and accompanying text *supra*.
157. The court took the position that: “[i]n determining the constitutionality of restrictions on student expression such as are involved here, it is not the function of the courts to reevaluate the wisdom of the actions of state officials charged with protecting the health and welfare of public school students,” particularly where a rational basis exists for the restrictions imposed. *Trachtman v. Anker*, 563 F.2d 512, 519 (2d Cir. 1977).
158. *Id*. at 517.
159. *Id*. at 517-19. Admittedly, there was expert testimony on both sides of the issue of psychological harm. However, the all-important context of the proposed speech must be considered as well. See *Healy v. James*, 408 U.S. 169, 186 (1972); *Tinker v. Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969); note 38 and accompanying text *supra*. As Judge Mansfield pointed out in his dissent in *Trachtman*, the students of this New York City high school were literally “bombarded by sexually-laden stimuli” in the media and on the way to school. *Trachtman v. Anker*, 563 F.2d 512, 524 (2d Cir. 1977) (Mansfield, J., dissenting). In addition, the school provided an extensive sex education program including peer rap groups. *Id*. In this context it is difficult to believe that a voluntary, anonymous survey can be said to cause
In addition, Trachtman was the first decision to employ the forgotten second half of the Tinker test. That test also held that conduct shown to substantially invade the rights of others is not protected by the First Amendment and, therefore, may properly be subjected to procedurally valid prior restraints. The students in Trachtman sought to elicit information about sexuality. This, the court found, would "invade the rights of other students by subjecting them to psychological pressures which may engender significant emotional harm" and, therefore, could be prohibited by the school board without offending Tinker.

D. Supreme Court: Action by Inaction?

The Supreme Court, by virtue of its uncertain stance regarding the level of scrutiny to be applied in this area, has provided the lower courts with a wealth of theories, tests, and justifications from which to choose when deciding children's rights cases. In the absence of strong leadership from the Supreme Court, each circuit has developed a separate and somewhat unique body of law concerning the issue of student prior restraints. Although the results have been admirable in that student First Amendment rights are almost uniformly protected, the diversity of theories applied to achieve this protection has resulted in the confusing and chaotic development of the law. However, the rights of children are too important to permit the law to continue to develop on such a piecemeal basis.

With this in mind, it may seem unfortunate that the Supreme Court did not grant certiorari in Trachtman. However, Trachtman would not have been the best vehicle to use in attempting to "settle" this area of the law, since the presence of the sexual materials issue might have obscured the Court's consideration of the more crucial issues. The Court's position on the additional anxiety about sexual matters. Judge Mansfield's dissent also noted that "[t]he danger ... is ... minute compared with the enormous benefit to be derived from students learning that their concerns are common and developmentally normal." Id. at 525 (Mansfield, J., dissenting).

160. The test adopted in Tinker reads:

But conduct by the student, in class or out of it, which for any reason—whether it stems from time, place or type of behavior—materially disrupts classwork or involves substantial invasion of the rights of others is, of course, not immunized by the constitutional guarantees of freedom of speech.

Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 513 (1969) (emphasis added). But see Trachtman v. Anker, 563 F.2d 512, 520 (2d Cir. 1977) (Mansfield, J., dissenting). Judge Mansfield interprets the test used by the majority as dicta from Tinker which was inapplicable to the issue presented in Trachtman because it "represents an entirely too vague and nebulous extension of the concept of 'rights' to support the drastic type of censorship sought by the defendants." Id. at 521.

161. Id. at 514-16. The court found that the factual situation in Trachtman was distinguishable from those in Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972), see note 87 supra, and Bayer v. Kinzler, 383 F. Supp. 1164 (E.D.N.Y. 1974), aff'd, 515 F.2d 504 (2d Cir. 1975), because those cases involved only the distribution of information about birth control. Trachtman v. Anker, 563 F.2d 512, 516 n.2 (2d Cir. 1977).

162. Id.

state's power over minors with respect to obscenity and sexual materials was stated clearly in *Ginsberg*. What is needed now is a ruling which deals solely with the student press issue. Until such a ruling is made, each circuit will continue to develop and apply its own unique theory. However, the case law in each circuit is sufficiently well developed so that, barring a major change by the Supreme Court, the burden is now on the educational profession to revise and amend their policies and regulations to conform with the guarantees of the Constitution.

III. THEORY IN PRACTICE: EFFECT ON EDUCATION

Although the level of protection varies among the circuits, it is undisputed that children have First Amendment rights and that these rights include the freedom to publish and distribute literature in and near public high schools. Proponents of student press rights have made significant advances in the decade since *Tinker*. However, these advances will be meaningless if they are applied only to those students who have the initiative and parental support to challenge prior restraints in the federal courts. Non-legal responses to the changing law fall into four basic categories: student, administrative, legislative and curricular. But it remains to be seen whether the educational system will give full effect to the rights enunciated by the courts.

A. Student Response

A major fear, which has hampered more widespread acceptance of the prior restraint doctrine in the school setting, is that such an application would result in disruption of the educational process by irresponsible student speech and expression. This position was forcefully presented in Justice Black's dissent in *Tinker*, where he predicted "the beginning of a new revolutionary era of permissiveness in this country fostered by the judiciary."

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164. The activity in this area has been sufficient to warrant the establishment of the Student Press Law Center, a national organization devoted exclusively to protecting the First Amendment rights of high school and college journalists. The Center provides legal assistance and information to student journalists and faculty advisors experiencing censorship or other legal problems. The Student Press Law Center Report summarizes current cases, controversies, and studies involving student press rights. It can be obtained by contacting: Student Press Law Center, Suite 1112, 1750 Pennsylvania Avenue, NW, Washington, D.C. 20005; (202) 347-6888.


Uncontrolled and uncontrollable liberty is an enemy to domestic peace. ... One does not need to be a prophet... to know that after the Court's holding today some students in Iowa schools and indeed in all schools will be ready, able, and willing to defy their teachers on practically all orders... Turned loose with lawsuits... against their teachers... it is nothing but wishful thinking to imagine that young, immature students will not soon believe it is their right to control the schools... [which will subject] all the public schools in the country to the whims and caprices of their loudest-mouthed, but maybe not their brightest, students.

Id. at 524-25.
By all available evidence, Justice Black's "Tinker 'forecast'" has not materialized. A number of recently conducted surveys indicate, not that dissident students have taken over the nation's schools, but rather that the judicial turmoil over student press rights has had no significant impact on the educational process. Apparently, very few schools have altered their prior restraint policies or regulations in response to changes in the law, although the surveys also show that most school administrators do not require prior review of all student publications. One survey found that since Fujishima there has been no increase in the number of underground newspapers and only eight schools out of 1200 have experienced an increase in disruptions. However, the report does not indicate whether these disruptions were related to student publications or even whether these eight schools had adopted the Fujishima no-prior restraint policy.

The evidence thus demonstrates that Justice Black's dire predictions of increased disruption of the educational process by students wielding First Amendment rights have not been realized. As a result, a circular relationship has developed between the judicial and student responses. In future decisions, the courts will be forced to consider this evidence that students have not abused their First Amendment rights when given the opportunity and freedom to exercise them. It is significant that surveys were conducted in the Seventh Circuit, which has been the most liberal in granting First Amendment freedoms to students. If that circuit's absolute ban on

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167. It should be noted, however, that Justice Black's words were written in an environment of general campus unrest, both at the college and high school levels, which was marked by "break-ins, sit-ins, lie-ins and smash-ins." Id. at 525. With the abatement of that unrest, extending freedom of expression to students may no longer appear to be a "clear and present danger" in and of itself, without reference to the circumstances and the likelihood of material disruption.

168. See J. NYKA, 'Press' Four-Letter Word In Illinois, 1 STUDENT PRESS L. CENTER RPT. 9 (Spring 1978) (survey of 121 Illinois high schools with populations of more than 1000 students regarding student press rights) [hereinafter cited as NYKA SURVEY]; R. TRACER, Survey Reveals Little Change In Censorship Following Ruling Banning Prior Restraint, 1 STUDENT PRESS L. CENTER RPT. 1 (Spring 1977) (survey of 1200 public schools in the Seventh Circuit to determine the effect of the Fujishima decision, see notes 125-29 and accompanying text supra, on the functioning of school newspapers) [hereinafter cited as TRACER SURVEY]. See generally Zirkel, A Test On Supreme Court Decisions Affecting Education, 59 PHI DELTA KAPAN 521 (1978) in which a survey conducted among educators to determine their awareness of Supreme Court decisions affecting virtually every aspect of public school operations was discussed. The question concerning Tinker and its progeny—The school district [must/may/must not/don't know] allow pupils to wear armbands, picket peacefully, distribute publications, or otherwise express their beliefs where such means of expression are not shown to materially disrupt or substantially interfere with school activities—was answered correctly by only 52% of the respondents.

169. See also text accompanying notes 182-85 infra.
170. See also text accompanying note 186 infra.
171. See TRACER SURVEY, note 168 supra.
172. Id. at 1.
173. See notes 166-67 and accompanying text supra.
174. See note 168 supra.
175. See notes 125-36 and accompanying text supra.
prior restraint of student publications has not wreaked havoc on the educational system, it is difficult to believe that the more moderate majority position would lead to such a result. And if prior restraints can no longer reasonably be justified as a means of preventing substantial disruption of either discipline or the educational process, imposition of them clearly would offend constitutional and Supreme Court mandates. 176

B. Administrative Response

The most obvious method by which to quell a troublesome student press is through the school's regulatory powers. The courts have defined the constitutionally permissible limits of such regulations and even in the Seventh Circuit school authorities may impose certain restrictions on student publications distributed on the school premises. 177 A recent article for educators and administrators outlined the legal control mechanisms that constitutionally could be employed with respect to student publications. 178 For example, regulations can validly restrain publication and distribution of materials which are outside the scope of the First Amendment. 179 The author also suggests that school boards adopt policies which clearly delineate the rights and duties of the student staff in the publication of school-sponsored newspapers. 180

A set of model guidelines for student publications was recently published by the Student Press Law Center. 181 Their proposal is intended to embrace all school-sponsored publications, including yearbooks and literary magazines, as well as non-school-sponsored publications. The premise underlying these guidelines is set forth in an introductory policy statement where the importance of protecting the autonomy of forums for student expression is stressed. Comprehensive definitions of prohibited areas and materials are included. These definitions are couched in terms which will be meaningful to the students, faculty, and administrators involved. 182 A list of specifically protected areas has also been included. 183

176. To allow prior restraints of speech or expression which does not actually threaten discipline or education would be to respond to the undifferentiated fear or apprehension of disturbance, a response which was found to be clearly unconstitutional in Tinker. Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 508 (1969). See notes 32-48 and accompanying text supra.

177. See notes 126-36 and accompanying text supra.


179. Materials not protected by the First Amendment include those which are libelous, obscene, which would invade the privacy of others, or would cause a substantial disruption. Id. at 35, 36, 62.

180. Id. at 35, 62. Of course, the policy guidelines developed by the school must not violate First Amendment principles.

181. See Student Press Law Center Model Guidelines for Student Publications, 2 STUDENT PRESS L. CENTER RPT. 33 (Winter 1978-79). These Guidelines have been reproduced in an Appendix. See note 211 infra. For information on the Student Press Law Center, see note 164 supra.

182. See Appendix § II (B).

183. See Appendix § III.
The Student Press Law Center's recommendations are founded on case law in this area, although, strictly speaking, they are consistent only with the law in those circuits which have afforded students full First Amendment freedoms. However, even in jurisdictions which have been unwilling to extend this level of protection to minors, school boards are not foreclosed from adopting policies and regulations which allow students a greater degree of freedom of expression than has been mandated by the courts. Although all school systems seriously should consider adopting these guidelines as formulated by the Center, there is leeway for modification to accommodate the needs of the school and the requirements of the particular circuit. Perhaps successful experimentation with even modified forms will lead to future support for policies allowing students greater freedom of expression.

Surveys conducted to study prior restraints in public high schools do not show the extent to which clear policy statements have been formulated. The results of these surveys do indicate, however, that administrative restraint and repression of student expression might not have been as pervasive as indicated by the amount of litigation in this area.

The Trager survey, conducted to determine the effect of the Seventh Circuit's ban on prior restraints of student publications, found that only fifteen percent of the principals and ten percent of the publications' advisors had even heard of the Fujishima decision. Sixty-two per cent of the respondents believed that school advisors still had the authority to impose prior restraints on student expression. Similar results were obtained in the Nyka survey, which concluded that administrators are either unaware of student rights or "have simply chosen to ignore them, hoping that the legal pendulum will swing the other way."

Given these findings, it is safe to assume that judicial protection of student press rights has not prompted educators to change their policies and regulations. In spite of the fact that no change in policy is apparent, eighty-two per cent of the schools responding in the Trager survey reported that school administrators do not require prior review of all student publications. However, this statistic is not as encouraging as it first appears. Both surveys found that "controversial" material still is reviewed in some manner by educators in about one-half of the responding schools. Accordingly, it is crucial to continue efforts to provide and safeguard student press rights, since the potential for abuse remains strong.

184. See text accompanying notes 125-36 supra.
185. See text accompanying notes 137-62 supra.
186. See note 168 supra.
187. Id.
188. TRACER SURVEY, supra note 168, at 1.
189. See note 168 supra.
190. NYKA SURVEY, supra note 168, at 9.
191. TRACER SURVEY, supra note 168, at 1.
192. Id.; NYKA SURVEY, supra note 168, at 9. The respondents to the Nyka survey indicated strong objections to student coverage of gay liberation, criticism of the principal or administra-
C. Legislative Response

In the ten years since the *Tinker* decision there has been some alteration and revision of policies and regulations regarding the student press. However, California is the only state which has adopted a state-wide policy in this area. With this legislative action, California has joined the Seventh Circuit in banning prior restraint of all student publications except those which are obscene, libelous, or create a clear and present danger in the school setting. These standards thus bring the students' First Amendment rights in line with those of adults.

This statute represents the first large-scale effort to categorically establish free press rights for the public school student. Legislation which pre-

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193. *But see* notes 182-85 and accompanying text *supra*.

194. Relevant portions of the statutory section provide as follows:

Students of the public schools shall have the right to exercise freedom of speech and of the press including, but not limited to, the use of bulletin boards, the distribution of printed materials or petitions, the wearing of buttons, badges and other insignia, and the right of expression in official publications, whether or not such publications or other means of expression are supported financially by the school or by use of school facilities, except that expression shall be prohibited which is obscene, libelous or slanderous. Also prohibited shall be material which so incites students as to create a clear and present danger of the commission of unlawful acts on school premises or the violation of lawful school regulations, or the substantial disruption of the orderly operation of the school.

Each board of education shall adopt rules and regulations in the form of a written publications code, which shall include reasonable provisions for the time, place and manner of conducting such activities.

There shall be no prior restraint of material prepared for official school publications except insofar as it violates this section. School officials shall have the burden of showing justification without undue delay prior to any limitation of student expression under this section.

Nothing in this section shall prohibit or prevent any governing board of a school district to adopt otherwise valid rules and regulations relating to oral communication by students upon the premises of each school.

CAL. EDUC. CODE § 48916 (West 1978).

195. *See* notes 126-36 and accompanying text *supra*.

196. CAL. EDUC. CODE § 48916 (West 1978).

197. This statutory section only addresses student press rights, specifically providing that "[n]othing in this section shall prohibit or prevent any governing board of a school district to adopt otherwise valid rules and regulations relating to oral communication by students upon the premises of each school." *Id.* By its very nature, oral communication contains greater potential for disruption of school operations (e.g., loud talking in hallways would interrupt scheduled classroom activities) and can, therefore, be subject to more stringent time, place and manner restrictions. It must be assumed, in light of the statute's strict protection of student press rights, that the reference to "otherwise valid rules" is meant to be interpreted as allowing these time, place, and manner restrictions, but prohibiting restrictions as to content or subject (unless, of course, the speech is obscene, slanderous, substantially disruptive or which incites the commission of illegal acts on school premises).

198. As a consequence of federal litigation in this area, legal guidelines have been established.
vents unconstitutional restraint of student expression certainly is to be applauded, and it is hoped that other states will take similar actions, but to be truly effective change must come from within the educational system itself.

D. Curricular Response

The responses designed to have a long-term positive effect on student exercise of free speech are those which are aimed at altering the school curriculum so that it recognizes, fosters, and guides students in the responsible exercise of their newly acquired freedoms. The rationale for this curricular response to the judicial recognition of student rights is that, by teaching students the substantive protections of their constitutional rights, as well as the moral consequences and responsibilities inherent in those rights, the feared abuses likely will not occur.

One education professor encouraged the profession to implement the spirit as well as the letter of the law in order to better achieve the goal of educating citizens to understand and honor constitutional freedoms. In suggesting appropriate steps for the school and community to take toward realization of this goal, he stressed that educators, students, parents, and community members should examine the principles inherent in the Bill of Rights and analyze school policies and practices in light of those principles. Only then can changes be made which will translate principles into practices.

Unfortunately, a more recent Article has indicated that such implementation is still in the developmental stages. Furnishing students with opportunities to apply their classroom knowledge by encouraging participation in policy decision-making, disciplinary cases regarding the rights of their peers and formulating rules to regulate their own behavior is advocated. The inclusion of law studies programs as a part of the school curriculum has been especially helpful in this regard, since many such programs include materials and activities on constitutional rights, which enables students to apply the relevant legal principles to their own school environment.

for thousands of schools across the country. See Section II supra. Although it is to be hoped that other schools will voluntarily bring their policies and regulations into conformity with changes in the law, the specific rulings can be enforced only with respect to the litigants.

199. Even in the absence of statewide legislation, local school boards should be encouraged to model their policies and rules after the California statute.

200. See Ratliff, Schools, Courts & Students’ Freedom of Expression, 35 EDUC. LEADERSHIP 634, 637 (1978) [hereinafter cited as Ratliff]; Schwartz, Beyond the Court Cases: Curricular Responses to the Student-Citizen, 32 EDUC. LEADERSHIP 128, 128-29 (1974) [hereinafter cited as Schwartz].

201. Schwartz, supra note 200, at 129.

202. Id. at 130-32.

203. Id. at 132.

204. Ratliff, supra note 200, at 638.

205. Id. at 637-38. See generally R. GERLACH & L. LAMPRECHT, TEACHING ABOUT THE LAW 23-59 (1975).
Although progress is being made and many educators are endeavoring to devise and implement programs to assure the knowledgeable and responsible exercise of First Amendment rights by students, it clearly will take more than decrees from the judiciary to insure the continued possession of these rights. The educators themselves need to be instructed as to the nature and extent of their students' rights. If these officials are to be entrusted with the civic development of our children, it is critical that they not only be cognizant of the role of the First Amendment in the schools but also that they take an active part in furthering its growth.\(^{206}\) Students have come a long way in establishing the right to publish their ideas and criticisms, but they have yet a long way to go before that right may fully and uniformly be exercised.

### IV. CONCLUSION

There have been genuine advances in student rights' law in the decade since the *Gault*-Ginsberg-Tinker trilogy, but there is a demonstrable lack of recognition of this law by the very people who are charged with its implementation. Student speech and press rights remain a privilege, albeit a court-enforced privilege.

With the potential for abuse remaining strong in this extensively litigated area, there clearly remains a need for extensive reform in the unlitigated areas affecting children's rights. In the wake of *Gault*, gains have been made in the area of juvenile court procedures. However, these gains stem in part from the more explicit requirements mandated by the Court in *Gault* as well as from a growing awareness of criminal justice abuses in general. But even in this area, reforms in theory may not be realized in practice.\(^{207}\) For example, with respect to physical integrity and safety, children are still protected only by the grace of the adults around them: search and seizure principles developed in adult Fourth Amendment cases have not been uniformly applied to students;\(^{208}\) the Supreme Court refused to apply the Eighth

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206. Ratliff cites three studies which indicate that educators have not yet responded to the need for this expansion of the school curriculum: J. DeCecco, A. Richard, et al., *Civic Education for the Seventies: An Alternative to Repression and Revolution* (1970) (alluding to the lack of student opportunity to learn about their rights as one reason for the students' view of schools as undemocratic institutions); K. Fox, Correlates of Adolescents' Knowledge of the Legal Rights of Minors (1973) (unpublished Ph.D. dissertation, Stanford University) (a study of students in northern California which found that they needed and wanted more information about their rights); survey by the Nat'l Assessment of Educational Progress, *reported in Educ. Daily* 1-2 (Feb. 2, 1978) (reporting that from 1972 to 1976 the knowledge of and support for constitutional rights among adolescents declined). Ratliff, supra note 200, at 637 n.7 and accompanying text.

207. This problem recently has been recognized by the Justice Department. The National Center for State Courts has been given funding for a two-year study on the effect of the *Gault* decision on 150 metropolitan courts. The study was prompted in part by criticism that courts have complied only superficially with the requirements of *Gault*. 1 Nat'l L.J. 13 (Nov. 6, 1978).

208. See, e.g., Georgia v. Young, 234 Ga. 488, 216 S.E.2d 586 (1975); In re Donaldson, 269
Amendment to prevent corporal punishment of school children;\textsuperscript{209} and frequent studies report a rapidly rising incidence of child abuse with only sporadic legislative, administrative, and judicial attempts to avert it.\textsuperscript{210}

Advocates of children's rights must continue the struggle to secure basic constitutional rights for minors. The pursuit of First Amendment rights is perhaps the most crucial step toward attainment of that goal. Only by educating students in the responsible exercise and protection of these most cherished rights will we ensure the continued existence of a genuine "free marketplace of ideas." And only by airing the problem of the shackled rights of our minor citizens in that marketplace can realistic attempts be made to cure this egregious void in our system of constitutionally protected freedoms. Today's student must be given proper preparation to become tomorrow's advocate.

\textit{Jill H. Krafte}

\textsuperscript{209} See note 67 supra.

APPENDIX

Student Press Law Center
Model Guidelines
For Student Publications*

I. STATEMENT OF POLICY

It is undeniable that students are protected in their exercise of freedom of expression by the First Amendment to the Constitution of the United States. Accordingly, it is the responsibility of school officials to insure the maximum freedom of expression to all students.

It is the policy of the Board of Education that newspaper, Yearbook, and literary magazine, official, school-sponsored publications of High School have been established as forums for student expression. As a forum, each publication should provide a full opportunity for students to inquire, question and exchange ideas. Content should reflect all areas of student interest, including topics about which there may be dissent or controversy.

It is the policy of the Board of Education that student journalists shall have the ultimate and absolute right to determine the content of official student publications.

II. OFFICIAL SCHOOL PUBLICATIONS

A. Responsibilities of Student Journalists

Students who work on official student publications will:
1. Rewrite material, as required by the faculty advisers, to improve sentence structure, grammar, spelling and punctuation;
2. Check and verify all facts and verify the accuracy of all quotations;
3. In the case of editorials or letters to the editor concerning controversial issues, provide space for rebuttal comments and opinions;
4. Determine the content of the student publication.

B. Prohibited Material

1. Students cannot publish or distribute material which is "obscene as to minors". Obscene as to minors is defined as:
   (a) the average person, applying contemporary community standards, would find that the publication, taken as a whole, appeals to a minor’s prurient interest in sex; and
   (b) the publication depicts or describes, in a patently offensive way, sexual conduct such as ultimate sexual acts (normal or perverted), masturbation, excretory functions, and lewd exhibition of the genitals; and
   (c) the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.
   (d) "Minor" means any person under the age of eighteen.

2. Students cannot publish or distribute material which is "libelous", defined as a false and unprivileged statement about a specific individual which injures the individual’s reputation in the community. If the allegedly libeled individual is a "public figure" or "public official" as defined below, then school officials must show that the false statement was published "with actual malice", i.e., that the student journalists knew that the statement was false, or that they published the statement with reckless disregard for the truth—without trying to verify the truthfulness of the statement.
   (a) A public official is a person who holds an elected or appointed public office.
   (b) A public figure is a person who either seeks the public’s attention or is well known because of his achievements.
   (c) School employees are to be considered public officials or public figures in articles concerning their school-related activities.

* 2 Student Press L. Center Rptr. 33-34 (Winter 1978-79).
(d) When an allegedly libelous statement concerns a private individual, school officials must show that the false statement was published willfully or negligently, i.e., the student journalist has failed to exercise the care that a reasonably prudent person would exercise.

(e) Under the “fair comment rule” a student is free to express an opinion on matters of public interest. Specifically, a student enjoys a privilege to criticize the performance of teachers, administrators, school officials and other school employees.

3. Students cannot publish or distribute material which will cause "a material and substantial disruption of school activities."

(a) Disruption is defined as student rioting; unlawful seizures of property; destruction of property; widespread shouting or boisterous conduct; or substantial student participation in a school boycott, sit-in, stand-in, walk-out or other related form of activity. Material that stimulates heated discussion or debate does not constitute the type of disruption prohibited.

(b) In order for a student publication to be considered disruptive, there must exist specific facts upon which it would be reasonable to forecast that a clear and present likelihood of an immediate, substantial material disruption to normal school activity would occur if the material were distributed. Mere undifferentiated fear or apprehension of disturbance is not enough; school administrators must be able to affirmatively show substantial facts which reasonably support a forecast of likely disruption.

(c) In determining whether a student publication is disruptive, consideration must be given to the context of the distribution as well as the content of the material. In this regard, consideration should be given to past experience in the school with similar material, past experience in the school in dealing with and supervising the students in the subject school, current events influencing student attitudes and behavior, and whether or not there have been any instances of actual or threatened disruption prior to or contemporaneously with the dissemination of the student publication in question.

(d) School officials must act to protect the safety of advocates of unpopular viewpoints.

(e) "School activity"—means educational activity of students sponsored by the school and includes, by way of example and not by way of limitation, classroom work, library activities, physical education classes, individual decision time, official assemblies and other similar gatherings, school athletic contests, band concerts, school plays, and scheduled in-school lunch periods.

C. Legal Advice

1. If, in the opinion of the student editor, student editorial staff or faculty adviser, material proposed for publication may be "obscene," "libelous," or "cause a substantial disruption of school activities," the legal opinion of a practicing attorney should be sought. It is recommended that the services of the attorney for the local newspaper be used.

2. Legal fees charged in connection with this consultation will be paid by the board of education.

3. The final decision of whether the material is to be published will be left to the student editor or student editorial staff.

III. PROTECTED SPEECH

School officials cannot:

1. Ban the publication or distribution of birth control information in student publications;
2. Censor or punish the occasional use of vulgar or so-called “four-letter” words in student publications;
3. Prohibit criticism of school policies or practices;
4. Cut off funds to official student publications because of disagreement over editorial policy;
5. Ban speech which merely advocates illegal conduct without proving that such speech is directed toward and will actually cause imminent lawless action;
6. Ban the publication or distribution of material written by nonstudents;
7. Prohibit the school newspaper from accepting advertising.
IV. NONSCHOOL-SPONSORED PUBLICATIONS

School officials may not ban the distribution of nonschool-sponsored publications on school grounds. However, students who violate any rule listed under II.B. may be disciplined after distribution.

1. School officials may regulate the time, place and manner of distribution.
   (a) Nonschool-sponsored publications will have the same rights of distribution as official school publications.
   (b) "Distribution"—means dissemination of a publication to students at a time and place of normal school activity, or immediately prior or subsequent thereto, by means of handing out free copies, selling or offering copies for sale, accepting donations for copies of the publication, or displaying the student publication in areas of the school which are generally frequented by students.

2. School officials cannot:
   (a) Prohibit the distribution of anonymous literature or require that literature bear the name of the sponsoring organization or author;
   (b) Ban the distribution of literature because it contains advertising;
   (c) Ban the sale of literature.

V. ADVISER JOB SECURITY

No teacher who advises a student publication will be fired, transferred or removed from the advisership for failure to exercise editorial control over the student publication or to otherwise suppress the rights of free expression of student journalists.

VI. PRIOR RESTRAINT

No student publication, whether nonschool-sponsored or official, will be reviewed by school administrators prior to distribution.

VII. CIRCULATION

These guidelines will be included in the handbook on student rights and responsibilities and circulated to all students in attendance.