AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 8: The New Deal/Great Society Era—Democratic Rights/Free Speech/Public Property, Subsidies, Employers, and Schools

**Norton v. Discipline Committee of East Tennessee State University, 419 F.2d 195** (6th Cir. 1969)

*In May 1968, just before final exams, a group of students at East Tennessee State University distributed on campus a flyer complaining about a variety of actions taken by the administration and calling on the students to “stand up and fight” and urged students to “move against them” and “put up or shut up” when it came time “to assault the bastions of administrative tyranny” and to take note of “other American students” who had “seized buildings and raised havoc until they got what they were entitled.” The students were suspended after a hearing on charge of distributing “material of a false, seditious and inflammatory nature” and calculated “to cause a disturbance and disruption of school activities.”*

*The students filed suit in federal district court arguing that their suspension violated their First Amendment rights. The district court denied their application for an injunction blocking their suspension. The district judge concluded that “at least one document is susceptible to the interpretation that the writer of the article is encouraging demonstrations similar to those which had occurred on other campuses throughout the country” and that had significantly disrupted school activities and interfered with the rights of other students to pursue their education. They appealed to the circuit court, which in a divided decision affirmed that ruling. The Supreme Court refused to hear the case, though three justices dissented from the denial of certiorari. Those dissenting justices thought the literature was constitutionally protected under the string of cases dating back to the First World War and that the students had not created a disruption that would fall outside the bounds of the recently decided case of* Tinker v. Des Moines Independent School District *(1969).*

JUDGE WEICK.

*. . .*

Ordinarily students go to college to acquire an education, but these students apparently want to educate the teachers.

It would indeed be difficult to maintain discipline on the campus of an institution of higher learning if conduct of this type were tolerated. We would doubt that parents would send their college-age children to such an institution if they knew that the philosophy as contained in the literature was taught or sanctioned there. We cannot imagine that a student could have confidence in the teachers in a university such as the literature portrays.

Appellants contend that distribution of the two handouts was privileged under the First Amendment to the Constitution as an expression of free speech unaccompanied by acts of violence. They rely primarily on *Tinker*. . . . *Tinker* involved a few high school children who did nothing except wear black arm bands for a few days to publicize their objections to hostilities in Vietnam. These children did not urge a riot, nor were they disrespectful to their teachers.

Justice Fortas, who wrote the opinion in *Tinker,* was careful to mention:

"As we have discussed, the record does not demonstrate any facts which might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities, and no disturbances or disorders on the school premises in fact occurred."

In the present case, Dean Davis and President Culp did forecast disturbances and they acted quickly to prevent threatened disorders by making the charges against the inciters and holding the hearings.

. . . .

It is not required that the college authorities delay action against the inciters until after the riot has started and buildings have been taken over and damaged. The college authorities had the right to nip such action in the bud and prevent it in its inception. This is authorized even in criminal cases.

As well stated by Chief Justice Vinson in *Dennis v. United States* (1951):

"Obviously, the words cannot mean that before the Government may act, it must wait until the *putsch* is about to be executed, the plans have been laid and the signal is awaited. If Government is aware that a group aiming at its overthrow is attempting to indoctrinate its members and to commit them to a course whereby they will strike when the leaders feel the circumstances permit, action by the Government is required."

. . . .

*Affirmed*.

JUDGE CELEBREZZE.

. . . .

Although pamphleteering involves the conduct of distributing leaflets, it is afforded the broad First Amendment freedoms of speech and of the press. . . . Such First Amendment rights, applied in light of the special characteristics of the campus environment, are available to students and teachers participating in conduct akin to "pure speech". Indeed, the United States Supreme Court has emphasized that "in the absence of a specific showing of constitutionally valid reasons to regulate their speech, students are entitled to freedom of expression of their views." *Tinker v. Des Moines Independent Community School District* (1969). . . .

Limitations on the scope of the First Amendment Free Speech Clause have been characterized in two ways: First, qualifications as to time, place and manner; and second, qualifications for the protection of the rights of others and for the prevention of actual or probable material interference with legitimate state interests.

. . . . The pamphlets were distributed when neither student activity nor classes were scheduled so that students would have a fuller opportunity to prepare for examinations. The places of distribution were various customary spots on the University campus at which students generally have circulated handbills and other information. The manner of distribution was equally unobjectionable. There are no indications of pamphlets being foisted upon unwilling students or of any disturbance whatsoever, even when some leaflets were slipped beneath dormitory doors. Thus, the record indicates that neither the time, nor the place nor the manner of the students' pamphleteering caused even the slightest hint of probable or actual disruption.

The second limitation on the First Amendment's broad grant of protective activity is that of protecting the legitimate interests of the state from actual or probable material interference. Clearly, if such interference reached the proportions of an actual or probable campus eruption or riot, the speech initiating such a state of affairs could be proscribed. . . . There is inadequate evidence in the record before us to sustain the majority's finding that there was any constitutionally significant degree of likelihood of eruption or riot based on the *Schenck* *v. United States* (1919) [clear and present danger] standard.

. . . .

The record reveals no grounds from which any neutral body could reasonably determine that there existed at any time on the East Tennessee campus an actual or probable danger of eruption so as to breach the standard of *Schenck* and its progeny.

. . . .

. . . . I believe that the language of the pamphlets is abrasive, abrupt, rude, possibly even false and inflammatory; however, *Schenck* requires an evidentiary showing of imminent disruption before such language can be considered a clear and present danger. . . .

. . . .

The majority points to only one passage that could be reasonably and logically construed ("is susceptible of" to quote the District Court) to mean that the writer was encouraging or advocating the same kind of conduct that had occurred at Columbia University in the Spring of 1968. However, writing which may or may not be construed as "encouraging" unlawful activity does not constitute a "clear and present danger", particularly when the entire context of the document concerns matters of topical student concern. . . .

Given the topical character of the subject matter and the context of the time, place, and manner in which the pamphlets were distributed, even the single statement susceptible of being read as "encouraging" unlawful activity should only be regarded as "advocacy", not "incitement". These pamphlets were not distributed in any angry crowd or in the wake of prior disturbances, but on a campus of presumably tempered and rational students. Imminent lawless action, such as occurred at Columbia, was not a clear and present danger on the facts and evidence of this case.

. . . .

Of course, there are allegations in the instant case of a deterioration of respect by students for teachers and of likely disapproval of the pamphlets by the parents of college age students. Similar allegations were made in *Tinker* and dismissed as speculative fears, because of a lack of a specific evidentiary showing of actual or imminent harmful effect of the requisite magnitude to proscribe otherwise protected speech. . . .

. . . .

[T]o say that false and inflammatory language — of itself — obviates the need to show probable or actual occurrence of material disruption in campus discipline or academic performance is to disregard the fundamental basis of the "clear and present danger" policy. . . .

. . . .

Absent a showing of material interference with school activities, it is constitutionally impermissible to give campus officials discretion so broad that there exists an almost irresistible invitation to censor those expressions personally offensive to them.