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Constitutional Law: Selective, Nonreligious Conscientious Objector Is Exempt from Combatant Military Service

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Case Comments

Constitutional Law: Selective, Nonreligious Conscientious Objector Is Exempt from Combatant Military Service

Defendant refused induction into the Army, claiming to be conscientiously opposed, on ethical and moral grounds, to killing in the Vietnam war. After being indicted by a grand jury, defendant moved to dismiss the indictment, contending that the Government has no constitutional authority to conscript persons to serve in an undeclared war. The district court denied the motion, holding that the questions presented concerning the nature of military activities were outside the court's jurisdiction.[1] Upon conviction of refusing induction,[2] defendant filed a motion in arrest of judgment[3] challenging the constitutionality of the statute exempting conscientious objectors.[4] The district court per Wyzanski, C. J., granted the motion, *holding* that the first and fifth amendments guarantee a selective, nonreligious conscientious objector the constitutional right to exemption from combatant military service in an undeclared war not involving a direct defense of the homeland. Alternatively, the court held that section 6(j) of the Military Selective Service Act of 1967[5] unconstitutionally discriminates against nonreligious conscientious objectors in violation of the first amendment. *United States v. Sisson*, 297 F. Supp. 902 (D. Mass. 1969).[6]

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1. United States v. Sisson, 294 F. Supp. 511 (D. Mass. 1968). In a separate proceeding, the defendant also moved to dismiss the indictment on the ground that he was being ordered to fight in a genocidal war contrary to international law. The court held that this was a political question requiring the elicitation of facts and disinterested judgment of which a domestic court is incapable. United States v. Sisson, 294 F. Supp. 515 (D. Mass. 1968).

In a third opinion, the court held that the defendant was not entitled to introduce expert opinion to show that United States actions in Vietnam are a breach of international obligations undertaken by the United States. United States v. Sisson, 294 F. Supp. 520 (D. Mass. 1968).

2. *See* Military Selective Service Act of 1967 § 12(a), 50 U.S.C. App. § 462 (Supp. IV, 1969).

3. FED. R. CRIM. P. 34. This rule provides that a judgment shall be arrested "if the indictment . . . does not charge an offense . . . ." If a judgment is arrested because it is based on an invalid statute, 18 U.S.C. § 3731 allows direct appeal from a district court to the Supreme Court of the United States.

4. Military Selective Service Act of 1967 § 6(j), 50 U.S.C. App. § 456(j) (Supp. IV, 1969).

5. *Id.*

6. *Jurisdictional decision postponed until hearing on the merits*, — U.S. —, 90 S. Ct. 92 (1969).

Conscientious objector exemptions of varying scope have been enacted whenever the United States has resorted to nationwide conscription. The initial statute,[7] exempting members of traditional peace sects such as Quakers and Mennonites from combat service in World War I, was upheld by the Supreme Court in the *Selective Draft Law Cases*.[8] The Court stated that the establishment and free exercise clauses of the first amendment[9] neither require nor prohibit the conscientious objector exemption,[10] which is merely a privilege.[11] This principle has been followed by lower courts to the present.[12]

With the resumption of conscription in 1940, Congress broadened the exemption to include anyone "who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form."[13] Thus, members of churches not generally known for total opposition to war became eligible for exemption, in addition to members of the "peace churches." The critical question arising under the 1940 statute was whether belief in a deity was necessary to invoke the exemption. Opposing answers emerged from the Second and Ninth Circuits. In

7. Act of May 18, 1917, ch. 15, § 4, 40 Stat. 78.

8. 245 U.S. 366 (1918).

9. "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof . . . ." U.S. CONST. amend. I.

10. 245 U.S. at 389-90.

11. *See also* United States v. Macintosh, 283 U.S. 605, 624 (1931), and Hamilton v. Board of Regents of the Univ. of Cal., 293 U.S. 245, 266-68 (1934) (Cardozo, J., concurring) (exemption on grounds of conscientious objection a privilege rather than a right). *Macintosh* held that an alien conscientious objector may not be naturalized since the required oath exacts a promise to bear arms. Girouard v. United States, 328 U.S. 61 (1946), overruled *Macintosh* without affecting the point at issue. *Hamilton* held that a student who voluntarily attends a state university may be required to take courses in military science, despite his religious beliefs.

12. *See, e.g.*, George v. United States, 196 F.2d 445, 450 (9th Cir. 1952), *cert. denied*, 344 U.S. 843 (1952); United States *ex rel.* Brooks v. Clifford, 296 F. Supp. 716, 724 (D.S.C. 1969). However, the cursory examination often given by courts to the constitutional claims together with recent developments concerning the "religion" clauses of the first amendment have led several commentators to doubt the present vitality of this position. *See* Comment, *The Conscientious Objector and the First Amendment: There but for the Grace of God . . . .*, 34 U. CHI. L. REV. 79 (1966); Brodie & Sutherland, *Conscience, the Constitution, and the Supreme Court: The Riddle of United States v. Seeger*, 1966 WIS. L. REV. 306.

13. Selective Training and Service Act of 1940, ch. 720, § 5(g), 54 Stat. 889.

United States v. Kauten[14] the Second Circuit adopted a broad view of religion which included both theistic and nontheistic beliefs, while the Ninth Circuit, in *Berman v. United States*,[15] required that an objector believe in a deity to qualify for exemption.

In 1948, Congress apparently adopted the *Berman* viewpoint by requiring a belief in a "Supreme Being" and excluding "essentially political, sociological or philosophical views or a merely personal moral code."[16] In 1965, however, the Supreme Court in *United States v. Seeger*[17] emphasized the use of the term "Supreme Being" instead of "God" and concluded that Congress intended to allow the broadest possible application of the exemption statute.[18] Consequently, persons with essentially nontheistic beliefs such as humanism or ethical culture were judicially included within the exemption.

In 1967, Congress deleted the "Supreme Being" criterion but otherwise left the exemption intact.[19] This alteration appears to have little, if any, effect on the scope of the exemption since it does not include any new limitation on the phrase "religious training and belief." The exemption now extends to theistic and at least some nontheistic religious objectors "to participation in war in any form" but still excludes those who object because of political, sociological, philosophical or personal moral views.

The court in *Sisson* offered alternative holdings, one nar-

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14. 133 F.2d 703 (2d Cir. 1943); *accord*, United States *ex rel.* Reel v. Badt, 141 F.2d 845 (2d Cir. 1944); *accord*, United States *ex rel.* Phillips v. Downer, 135 F.2d 521 (2d Cir. 1943).

15. 156 F.2d 377 (9th Cir. 1946), *cert. denied*, 329 U.S. 795 (1946). It is noteworthy that the Supreme Court refused to grant certiorari here even though there was a clear conflict between the two circuits.

16. Military Training and Service Act of 1948 § 6(j), 62 Stat. 613 (1948). For a more extensive discussion of the history of the exemption prior to 1965 *see generally* U.S. SELECTIVE SERVICE SYSTEM, CONSCIENTIOUS OBJECTION 1-65 (Special Monograph No. 11, 1950); Conklin, *The Conscientious Objector Provisions: A View in the Light of Torcaso v. Watkins*, 51 GEO. L.J. 252 (1963).

17. 380 U.S. 163 (1965).

18. *Id.* at 165.

19. Military Selective Service Act of 1967 § 6(j), 50 U.S.C. App. § 456(j) (Supp. IV, 1969). This section provides in part:

> Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term "religious training and belief" does not include essentially political, sociological or philosophical views, or a merely personal moral code.

row[20] and one broad, for arresting the judgment.[21] On the narrow ground, the court held that Congress cannot constitutionally discriminate against nonreligious conscientious objectors, due to the mandate of the first amendment that "Congress shall make no law respecting an establishment of religion . . . ."[22] By granting an exemption only to conscientious objectors who can demonstrate that their opposition is based on some form of religious belief, the Government violates its required neutrality with respect to religious practices.[23]

The court relied on the Supreme Court's decision in *Torcaso v. Watkins*[24] to sustain its holding, but it failed to discuss the problems that exist in deriving the result in the instant case from the *Torcaso* decision. *Torcaso* held that a public official who held nontheistic though religious beliefs could not be constitutionally required to declare a belief in God prior to assuming office. Thus *Sisson* extends beyond *Torcaso* by prohibiting discrimination against *nonreligious* persons, as opposed to nontheistic religious persons. There is, however, language in *Torcaso* supporting the *Sisson* result:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person "to profess a belief or disbelief in any religion." *Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers,* and neither can aid those religions based on a belief in the existence of God as against those re-

20. This holding is termed narrow since it is limited to a consideration of the constitutionality of a statute and does not deal with expansive constitutional rights nor selective objection as does the broad holding.

21. The district court observed that the Supreme Court could rely solely on the narrow holding, but the lack of absolute clarity and the interrelatedness of the issues required the lower court to examine both grounds. 297 F. Supp. at 906. Though the narrow holding followed the broad one in the court's opinion, it will be discussed here first because the issues are less complex and are involved in a solution of the broader question.

22. 297 F. Supp. at 911-12.

23. *See* Board of Educ. v. Allen, 392 U.S. 236 (1968); Abington v. Schemp, 374 U.S. 203 (1963); Everson v. Board of Educ., 330 U.S. 1 (1947). The neutrality theory was explained in *Schemp*:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion.

374 U.S. at 222.

24. 367 U.S. 488 (1961).

ligions founded on different beliefs.[25]

The dicta in *Torcaso* invalidating distinctions between religious and nonreligious persons can be supported not only by the establishment clause but also by the due process clause of the fifth amendment. The argument, which is only implied by *Sisson*, is that the equal protection aspect of the due process clause prohibits arbitrary discrimination among classes of citizens[26]—even as to an exemption which is a privilege and not a right.[27] Several factors indicate the existence of arbitrary discrimination in the statutory exemption for conscientious objectors. The wide diversity of religious belief has made an exact definition of religion nearly impossible, and there is no sufficient or conclusive aspect of religion separating it from philosophy, morals, ethics or matters of conscience.[28] Due to these conceptual problems, any legislative or judicial attempt to define religion will almost

25. *Id.* at 495 (emphasis added). The applicability of at least a part of the *Torcaso* principle to the statutory conscientious objector exemption was demonstrated by the second circuit opinion in United States v. Seeger, 326 F.2d 846 (2d Cir. 1964), *aff'd on other grounds*, 380 U.S. 163 (1965). The circuit court held that *Torcaso* required the conclusion that the "Supreme Being" limitation of the 1948 objector exemption, Military Training and Service Act of 1948 § 6(j), 62 Stat. 613 was unconstitutional as a denial of due process of law under the fifth amendment and as a violation of the first amendment. 326 F.2d at 851-54. Although the Supreme Court, on appeal, avoided this constitutional issue by using a rather strained statutory construction based on a questionable analysis of congressional intent in using the term "Supreme Being," (*see* text accompanying note 18 *supra*) the fact that the Court resorted to dubious grounds suggests that the Court would have held the statute to be unconstitutional if forced to consider the question. Thus, several commentators have concluded that, on the basis of *Torcaso*, the Court would invalidate a statutory exemption which made a distinction between theistic and nontheistic religious bases for conscientious objection. *See* Conklin, *supra* note 16, at 276; Macgill, *Selective Conscientious Objection: Divine Will and Legislative Grace*, 54 VA. L. REV. 1355, 1365-67 (1968); Comment, *Defining Religion: of God, the Constitution and The D.A.R.*, 32 U. CHI. L. REV. 533, 539, 541-43 (1965).

26. Shapiro v. Thompson, 394 U.S. 618, 641-42 (1969); Schneider v. Rusk, 377 U.S. 163, 168 (1964); Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

27. Speiser v. Randall, 357 U.S. 513 (1958). *See* note 11 *supra*.

28. The element of faith has been suggested as a differentiating factor which is only applicable to religion, but the existentialist philosophies of the nineteenth and twentieth centuries cast doubt upon the applicability of "faith" *solely* to religion. Moreover, conscientious objectors cannot rely on past empirical verification for their beliefs, and it is doubtful that reason alone can compel their beliefs in view of the many immeasurable factors and complex interrelationships involved. Thus faith or intuition as the only other type of cognition must be a foundation for their beliefs regardless of any avowed basis.

certainly exclude some beliefs which some people consider to be "religious." But an exclusion of certain "religious" groups from benefits bestowed by the Government on similar groups amounts to preferential treatment for some religions in violation of the free exercise and establishment clauses.[29] The *Seeger* Court attempted to avoid these constitutional problems by defining religion comprehensively,[30] but when limits are drawn at the fringes, any exclusion of particular beliefs must ultimately rest on arbitrary distinctions.

An additional indicator of arbitrariness is the intensity of the claim to exemption. As the *Sisson* court observed, the claim of the sincere nonreligious conscientious objector can certainly be as intense as that of his religious counterpart. Even if a difference in the magnitude of variously motivated conscientious scruples against personal combat activity did exist, no indicator could provide objective measurement of such a difference. Absent any discernible distinction, then, it appears illusory and arbitrary to distinguish between religious and nonreligious objection on grounds of intensity. The problems of definition and intensity indicate that the exclusion of nonreligious objectors from the exemption does indeed constitute an arbitrary discrimination in violation of due process requirements.

An argument urged in favor of restricting the exemption to religious objectors is that it is possible to determine the sincerity, meaningfulness and importance of religious beliefs to a conscientious objector claimant, whereas such a determination is not feasible for those claiming the more individualistic nonreligious beliefs.[31] However, *Seeger* precludes a requirement of strict belief in a traditional Supreme Being, and courts cannot question the merits of the religious belief itself.[32] Therefore, courts and draft boards cannot rely solely upon traditional objective criteria but must examine many unorthodox beliefs under the present law. Further, since a nonreligious objector's personalistic beliefs are necessarily interrelated with his total belief system, determination of the validity of his claim to ex-

29. *Cf.* Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

30. "We believe that under this construction, the test of belief 'in a relation to a Supreme Being' is whether a given belief that is sincere and meaningful occupies a place in the life of its possessor parallel to that filled by the orthodox belief in God of one who clearly qualifies for the exemption." 380 U.S. at 165-66.

31. *See* Stone, *The Conscientious Objector*, 21 COLUM. UNIV. Q. 253, 263 (1919).

32. United States v. Ballard, 322 U.S. 78, 86 (1944).

emption will subject him to an examination wherein he will be required to explain in some detail his personal position on philosophical and moral matters. But a religious objector might conceal his personal beliefs behind dogma or positions of an established church which are independent of his other beliefs, thus permitting greater success in attaining an exemption.

The *Sisson* court concluded that there is no basis for distinguishing between religious and nonreligious objectors except "religious prejudice."[33] Though the court provided a sketchy discussion of its position, its conclusion has a reasonable basis in the *Torcaso* establishment clause principle and the requirements of fifth amendment due process.

If the Supreme Court should adopt such a view in deciding the instant case on appeal, the question arises whether any exemption whatever will remain, since removal of the limitation may cause the entire exemption to fall. The "religious training and belief" clause is probably not severable from the exemption as a whole, for such a construction would require a finding that Congress intended an exemption unlimited by any reference to religion.[34] The history of the exemption offers little support for such a proposition. If, as a result, the entire exemption were to be struck, Congress would be faced with the choice of enacting either a valid exemption which eliminates conscientious objector status or no exemption at all. An alternative for the Court lies in finding a constitutional right to exemption.

On the broader ground, *Sisson* held that the free exercise clause of the first amendment and the due process clause of the fifth amendment guarantee a selective, nonreligious objector a constitutional right to exemption from combatant military service in an undeclared war not involving a direct defense of the homeland. Initially, the court noted that, notwithstanding several Supreme Court decisions,[35] "it has not been actually decided that a conscientious objector, not within any group exempted by Congress" can be compelled to perform combat duty.[36]

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33. 297 F. Supp. at 911.

34. *Cf.* H.R. 12743, 91st Cong., 1st Sess. (1969) introduced by Congressman Allard Lowenstein (D.-N.Y.) which removes the requirement of opposition stemming from "religious training and belief" and allows exemption for objection to a particular war.

35. Hamilton v. Regents of the Univ. of Cal., 293 U.S. 245 (1934); United States v. Macintosh, 283 U.S. 605 (1931). *See* text accompanying notes 8-12 *supra.*

36. 297 F. Supp. at 908.

The court educed the constitutional right to exemption by balancing the interests in the defense of the nation, within the context of a limited war, against the interests in not requiring individuals to act contrary to deep religious or conscientious objections to killing in a particular war.[37] The court concluded that the interests in the individual's liberty of conscience surpassed those in the need for his participation as a combatant in the military actions of Vietnam.[38] Fundamental to the court's balancing process is the proposition that sincere albeit nonreligious matters of conscience are entitled to the same rights under the free exercise clause as are religious beliefs, at least for purposes of conscientious objection.

The court derived this constitutional right to exemption for nonreligious objectors from a due process clause "expansion" of the free exercise clause of the first amendment. The basis of the position, although not cited by *Sisson*, is expressed in the Supreme Court decision of *Sherbert v. Verner*.[39] In *Sherbert* the Court held that the free exercise clause prevented a state from withholding unemployment compensation benefits from a person who, due to religious beliefs, refused to work on Saturday. The Court set out the criteria to be used in determining the relative weights of the interests involved in such cases: "It is basic that no showing merely of a rational relationship to some colorable state interest would suffice; in this highly sensitive constitutional area, '[O]nly the gravest abuses, endangering paramount interests, give occasion for permissible limitation.' "[40]

As a general matter the interests of the nation in the common defense certainly must be given great weight. However, the *Sisson* court correctly perceived that the question for selective objection purposes is not one of national defense in the abstract, but rather, national defense in terms of the particular circumstances of the admittedly limited war in Vietnam.[41] Sev-

37. *See* R. POUND, SOCIAL CONTROL THROUGH LAW 68-81 (1942) concerning balancing of the same class of interests.

38. 297 F. Supp. 910.

39. 374 U.S. 398 (1963). The *Sisson* court did, however, cite the related case of *In re* Jenison, 375 U.S. 14 (1963), *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963) which allowed a person to be excused from jury duty due to religious beliefs against such activity.

40. 374 U.S. at 406, *quoting* Thomas v. Collins, 323 U.S. 516, 530 (1945). *Cf.* People v. Woody, 61 Cal. 2d 716, 394 P.2d 813, 40 Cal. Rptr. 69 (1964) (state's interest in prohibiting use of a hallucinogenic plant does not outweigh an Indian's interest in using the plant for religious purposes).

41. 297 F. Supp. at 908-09. The significant problem of judicial

eral factors influenced the court as to the degree of the threat to United States' security posed by Vietnam. The court interpreted the absence of a formal declaration of war to mean at least: "that the present situation is one in which the State Department and the other branches of the executive treat our action in Vietnam as though it were different from an unlimited war against an enemy."[42] The improbability of a battlefront in the United States resulting from Vietnam and the lack of serious sacrifices required from civilians also indicated that Vietnam poses something less than an imminent threat to the survival of the United States. It must be recognized that even in a limited war, such interests far exceed the national interest in requiring a flag salute,[43] in providing juries,[44] or in regulating unemployment benefits.[45] But on the other hand, the fundamental nature of an objection to killing human beings[46] leads to the conclusion that compulsory combatant military service by those with religious scruples against war constitutes a greater interference with religious freedom than does compulsory flag saluting, jury service or working on Saturday. Additionally, it is generally believed that a requirement of an affirmative act in violation of a person's religious beliefs constitutes a more severe infringement of religious liberty than a requirement of abstinence from a religious act deemed by the state to be immoral or against the public welfare or safety.[47] Such considerations led Chief Justice Stone to conclude that "nothing short of the self-preservation of the state should warrant" denial of protection to conscientious objectors to warfare.[48] Another commentator recommended that a form of the "clear and present danger" test or a "grave and immediate harm" test be used to determine when the national interests are in sufficient jeopardy

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competence to consider this arguably political question is discussed at text accompanying notes 62 & 63 *infra*.

42. 294 F. Supp. at 515.

43. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624 (1943).

44. *See In re* Jenison, 375 U.S. 14 (1963), *on remand*, 267 Minn. 136, 125 N.W.2d 588 (1963).

45. *See* Sherbert v. Verner, 374 U.S. 398 (1963).

46. *See* Brodie & Sutherland, *supra* note 12, at 322.

47. Prince v. Massachusetts, 321 U.S. 158 (1944) (employment of child labor to distribute religious tracts); Reynolds v. United States, 98 U.S. 145 (1878) (practice of polygamy); *See* Powell, *Conscience and the Constitution*, in DEMOCRACY AND NATIONAL UNITY 29 (R. Hutchinson ed. 1941); Stone, *supra* note 31, at 268-69.

48. Stone, *supra* note 31, at 268-69.

to warrant interference with the right of free exercise of religion.[49] These considerations strongly suggest the conclusion that an objector to all wars is entitled to an exemption, but is the same true for a selective objector?

While the selective objector's convictions are generally not as vehement as those of a total pacifist since the latter will entertain no exceptions, the difference in the intensity of their beliefs in relation to a particular war may be minimal. The *Sisson* court stated that selectivity does not change the intensity of the claim for exemption; in fact, a selective objector might display "a more discriminating study of the problem, a more sensitive conscience, and a deeper spiritual understanding."[50]

Furthermore, the propriety of granting exemption to the selective objector is conceptually related to the granting of an exemption to the nonreligious objector, which issue is now considered.

In *Everson v. Board of Education* the Court stated:

> Consequently, [a State] cannot [consistent with the free exercise clause] exclude individual Catholics, Lutherans, Mohammedans, Baptists, Jews, Methodists, *Non-believers*, Presbyterians, or the members of any other faith, *because of their faith, or lack of it*, from receiving the benefits of public welfare legislation.[51]

In *McGowan v. Maryland*,[52] Justice Frankfurter, concurring, stated that the establishment clause prohibited legislative consideration of "man's belief or disbelief in the verity of some transcendental idea and man's expression in action of that belief or disbelief."[53] For purposes of conscientious objection, "non-belief" or "disbelief" is not nihilism, but a belief in fundamental ethical or moral principles without any concept of deity or other theistic elements. Thus, these authorities support a conclusion that the types of "non-belief" that have an operating characteristic resembling "belief"—the sincere, deep and fundamental ones[54]—are constitutionally protected.

Furthermore, the constitutional problems discussed earlier[55] concerning problems of definition of "religion" make the distinc-

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49. White, *Processing Conscientious Objector Claims: A Constitutional Inquiry*, 56 CALIF. L. REV. 652, 661 (1968).
50. 297 F. Supp. at 908.
51. 330 U.S. 1, 16 (1947) (first emphasis added).
52. 366 U.S. 420 (1961).
53. *Id.* at 465-66.
54. *See* Mansfield, *Conscientious Objection - 1964 Term*, 1965 RELIGION AND THE PUBLIC ORDER 1, 27.
55. *See* text accompanying notes 26-30 *supra*.

tion between a "religious" objector and a nonreligious moral objector difficult to draw, if indeed it should be drawn at all. The putative distinction is vital in considering the selective objector as well as the total objector.

The "just war" doctrine, advocated by Thomas Aquinas, requires one to make determinations of a religious nature in regard to temporal events which may also be political facts.[56] If a member of a religious sect which adopts the just war doctrine determines that a particular war is unjust, his conclusions arise from "religious training and belief." When someone who is not a member of a religious sect adopts the just war doctrine, his motivation would seem to be essentially similar to that of the religious objector, even though the latter's decision does not arise from "religious training and belief." Thus, the denial of an exemption to these selective nonreligious objectors would arguably violate the due process clause of the fifth amendment since it constitutes an arbitrary discrimination against such objectors, and it also violates the selective objectors' free exercise of religion.[57] In opposition to this position, it is contended that the exclusion of selective objectors is neither arbitrary nor a violation of free exercise since society has a paramount interest in requiring all persons to obey the commands of government without

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56. Macgill, *supra* note 25, at 1374-75 lists the following criteria for determining whether a modern war is just:

1. All peaceful means of resolving the conflict must have been exhausted before recourse is had to war.
2. The war must be formally declared by legitimate authority.
3. The war must be in defense of a "morally preferable cause against threats of destruction or the rise of injustice."
4. There must be reasonable assurance of success.
5. There must be, in the war as a whole and with respect to any act within the war, a balance in which the good outweighs the evil.
6. The means of warfare must be legitimate: there must be no indiscriminate killing of noncombatants.

See also Potter, *Conscientious Objection to Particular Wars*, 1968 RELIGION AND THE PUBLIC ORDER 44.

57. 297 F. Supp. at 905. *See* Everson v. Board of Educ., 330 U.S. 1, 16 (1947), *quoted at* note 51 *supra*. *See* Hochstadt, *The Right to Exemption from Military Service of a Conscientious Objector to a Particular War*, 3 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 1, 13 (1967) where the author states:

> Another type of religious selective objector would be the individual who arrives at his opposition to a war by a "complex process of reasoning combining fundamental theological beliefs, theologically derived ethical norms, convictions concerning ultimate loyalties, and specific impirical output.". . . . Such a process would be quite similar to that used by Christians for more than 1500 years to assess whether a conflict is a "just war."

each reserving an individual veto.[58] However, the exemption claimed is not from the obligation to observe governmental decisions and to respect public order, but rather from the obligation of combatant military service, since the objector agrees to accept *alternative* noncombatant service of military or civilian nature. Consequently, there are substantial arguments requiring exemption for selective objection both on the basis of a balancing of interests and in regard to arbitrary distinctions prohibited by the fifth and first amendments. It appears that the most effective way to assure that government neither advances nor inhibits religion is to grant an exemption to religious and nonreligious objectors alike by making the test for exemption to be solely one of sincere, fundamental and intense conscientious belief regardless of its source.

It has been suggested that exemptions granted on the basis of individual conscience will result in fraudulent claims. In *Sherbert v. Verner*,[59] the Court observed that even if fraudulent claims were prevalent, which was not shown, such a fact would not "be sufficient to warrant infringement of religious liberties."[60] The same considerations discussed above[61] apply here also to minimize the effect of this objection.

Accepting the above arguments in support of a limited constitutional right to exemption for all *conscientious* objectors, an establishment clause problem remains. If the term "religion" includes all sincerely held conscientious belief systems, at least in relation to objection to war, then this view appears to result in a *prima facie* violation of the establishment of religion prohibition, since it results in governmental protection of religion, however defined. But to give religion such an inclusive definition is to remove, in effect, any "religious" (in the narrower and more customary use of the term) considerations. Hence, the conflict within the first amendment vanishes since all claimants depend on the free exercise clause as the basis of their right to exemption and the establishment clause to ensure no arbitrary or unreasonable exclusions; *i.e.*, to ensure inclusion. Thus, the

58. *See* West Virginia State Bd. of Educ. v. Barnette, 319 U.S. 624, 643 (1943) (Black, J. and Douglas, J., concurring); Hamilton v. Regents of the University of California, 293 U.S. 245, 268 (1934) (Cardozo, J., concurring); United States v. Macintosh, 283 U.S. 605, 624 (1931); Rabin, *When is a Religious Belief Religious: United States v. Seeger and the Scope of Free Exercise*, 51 CORNELL L.Q. 231, 232 (1965).

59. 374 U.S. 398 (1963).

60. *Id.* at 407.

61. *See* text accompanying notes 31 & 32 *supra*.

test is no longer one of "religion" but of conscience.

A most serious problem with the *Sisson* decision, affecting the court's jurisdiction, concerns the competence of the judiciary to determine the magnitude and seriousness of a foreign military campaign which is required to complete the balancing of interests. Generally, such determinations would appear to fall under the political question doctrine since they require what the *Sisson* court itself called elicitation of facts of which a domestic court is incapable.[62] Though many indications of the gravity of the situation *are* political questions, the lack of a formal declaration of war is one indicator clearly amenable to judicial notice.[63] Other factors such as civilian sacrifices may be capable of factual proof, but doubts exist as to their conclusiveness. However, at least in relation to Vietnam, the general tenor of official and nonofficial discussion indicates that the magnitude of the military conflict is such that exemption of truly conscientious objectors would not be a severe threat to national security.

Although both holdings are compelling, the narrow one more so, they are not absolutely conclusive. Difficulties are implicit in the expanded concept of freedom of "religion" when applied to matters other than conscientious objection; activities which were not previously considered religious might violate the establishment clause. However, it may be possible to limit the expanded concept of religion to the unique case of conscientious objection. While the court treated many problems superficially and did not adequately discuss the effect of various cases and constitutional provisions, the ultimate conclusions in *Sisson* designate the most compelling path for the law's development.

62. 294 F. Supp. at 517-18.

63. This puts the discussion in 294 F. Supp. 511 in doubt since conclusions from a lack of a declaration of war were not deemed capable of judicial examination in that opinion.

Constitutional Law: Regulation Prohibiting War Protest in High School is Unconstitutional

Petitioners were suspended from public junior and senior high schools for wearing black armbands to school in protest of the Vietnam war. The suspension was based upon a regulation prohibiting the wearing of armbands which had been adopted by the school authorities in response to the students' plans to protest. Petitioners sought both an injunction to restrain defendant school officials from disciplining them and nominal damages.[1] The federal district court dismissed the complaint on the ground that the school officials' action, in view of their fear of disturbance, was a reasonable exercise of discretion.[2] The Court of Appeals for the Eighth Circuit, dividing evenly, affirmed without opinion.[3] The United States Supreme Court reversed, *holding* that the wearing of armbands in school is protected under the first amendment[4] in the absence of a showing that the wearing of such armbands materially and substantially interferes with the requirements of appropriate school discipline. *Tinker v. Des Moines Independent Community School District*, 393 U.S. 503 (1969).

The first amendment guarantee of freedom of speech is applicable to the states through the fourteenth amendment[5] and has been extended to local school boards as agencies of state government.[6] While the United States Supreme Court has in-

1. The action was brought as a civil action for deprivation of rights under 42 U.S.C. § 1983 (1964).

2. Tinker v. Des Moines School Dist., 258 F. Supp. 971 (S.D. Iowa 1966).

3. Tinker v. Des Moines School Dist., 383 F.2d 988 (8th Cir. 1967).

4. U.S. CONST. amend. I provides: "Congress shall make no law . . . abridging the freedom of speech . . . ."

5. Hughes v. California, 339 U.S. 460 (1950); Whitney v. California, 274 U.S. 357 (1927); Gitlow v. New York, 268 U.S. 652 (1920). The Supreme Court has not indicated that the standard for freedom of speech applicable to the states through the fourteenth amendment is any different from that applicable to the federal government under the first. *See* Board of Educ. v. Barnette, 319 U.S. 624 (1943). In striking down a federal statute as violative of freedom of speech, the Court in Lamont v. Postmaster General, 381 U.S. 301 (1965), based its decision wholly on cases involving state attempts to restrict freedom of speech.

6. Slochower v. Board of Educ., 350 U.S. 551 (1956); Brown v. Board of Educ., 347 U.S. 483 (1954); Board of Educ. v. Barnette, 319 U.S. 624 (1943). Through "state action" theories, the fourteenth amendment may even reach private schools. *See* Guillory v. Administrators of Tulane Univ., 203 F. Supp. 855 (E.D. La. 1962). *But see* Greene v. Howard Univ., 271 F. Supp. 609 (D.D.C. 1967).

validated school provisions which have interfered with students' rights to freedom of religion,[7] it has not previously had occasion to pass on a case involving freedom of speech by secondary school students.[8] Courts which have considered the issue have not been persuaded by allegations that a rule or disciplinary action by high school authorities unreasonably infringes upon a student's right to freedom of speech,[9] and therefore such courts have been reluctant to overturn discretionary actions by school authorities.[10] To this end, courts presented with freedom of speech claims by high school students have usually either rejected the assertion that the expression comes within first amendment protection[11] or have concluded that the state's interest in maintaining the orderly operation of its schools outweighs the student's interest in free speech.[12]

In balancing these interests, courts have generally required only that the regulations promulgated by the school board be "reasonable"[13] and some courts have not even required this.[14]

7. Engle v. Vitale, 370 U.S. 421 (1962); Board of Educ. v. Barnette, 319 U.S. 624 (1943). *Compare* McCollum v. Board of Educ., 333 U.S. 203 (1948) (prohibiting use of public schools for religious instruction), *with* Everson v. Board of Educ., 330 U.S. 1 (1947) (upholding use of public school buses to transport parochial school students).

8. Some language in Board of Educ. v. Barnette, 319 U.S. 624 (1943) indicates that it was decided on freedom of speech as well as freedom of religion grounds. However, it involved a statute compelling the recitation of a pledge and therefore does not constitute authority for the situation where expression by a student is restricted. *See also* Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923). The Court has applied freedom of speech protection to high school teachers. Pickering v. Board of Educ., 391 U.S. 563 (1968), *following* New York Times v. Sullivan, 376 U.S. 254 (1964).

9. Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Ferrell v. Dallas School Dist., 261 F. Supp. 545 (N.D. Tex. 1966); Atkins v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968). The courts have been more prone to consider constitutional issues raised by college students. *Compare* Dickey v. Alabama State Bd., 273 F. Supp. 612 (N.D. Ala. 1967), *and* Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968).

10. Board of Directors v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Leonard v. School Comm. of Attleboro, 349 Mass. 704, 212 N.E. 2d 468 (1965); State *ex rel.* Dresser v. School Dist. No. 1, 135 Wisc. 619, 116 N.W. 322 (1908).

11. Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Leonard v. School Committee of Attleboro, 349 Mass. 704, 212 N.E.2d 468 (1965). *But see* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

12. Atkins v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968); Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968). *But see* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

13. *See, e.g.*, Kissick v. Garland Ind. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959); Wright v. Board of Educ., 295 Mo. 466, 246 S.W. 43 (1922).

Moreover, the "reasonableness" standard has often been illusory, since courts have almost uniformly granted a strong presumption of validity to any school board rule[15] and have at times characterized as "reasonable" even patently abusive actions by school boards.[16] While some actions of school authorities have been found unreasonable,[17] the question of reasonableness has clearly not always been given thorough consideration.[18] In *Ferrell v. Dallas Independent School District*,[19] for example, the federal district court recognized long hair as a form of "free expression," the suppression of which would extend beyond the classroom into the home. This convinced the court that it should evaluate the impact of the prohibition of long hair in view of the educational needs of the individual rather than by emphasizing the need of the school to maintain discipline. While the court noted testimony which indicated that long hair no longer evoked disruption in school, it still dismissed the student's claim because, in the court's view, the school board had acted "reasonably under the circumstances."[20]

Two recent Fifth Circuit decisions, however, have departed from this prevailing response to the claims of high school stu-

14. *See, e.g.*, Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538 (1923) ("We are not required to find a valid reason for its promulgation . . . ."); Bishop v. Huston Ind. School Dist., 29 S.W.2d 312 (Tex. Civ. App. 1930) ("We are not concerned with the reasonableness of the rule adopted by the Board . . . .").

15. *See* Starkey v. Board, 14 Utah 2d 227, 381 P.2d 718 (1963); State v. Stevenson, 27 Ohio Op. 2d 223, 189 N.E.2d 181 (1962). In Bishop v. Huston Ind. School Dist., 29 S.W.2d 312 (Tex. Civ. App. 1930), the court said it would assume that any unnecessarily harsh, oppressive or unreasonable rules would be declared invalid and inoperative by the school board itself.

16. Pugsley v. Sellmeyer, 158 Ark. 247, 250 S.W. 538, 539 (1923): "Courts have other and more important functions to perform than that of hearing the complaints of disaffected pupils of the public schools against rules and regulations . . . ." *See also* Wooster v. Sutherland, 27 Cal. App. 2d 51, 148 P. 599 (1915), where the court held "reasonable" the suspension of a student for criticizing the school board for allegedly maintaining an unsafe school building.

17. Board of Educ. v. Bently, 383 S.W.2d 676 (Ky. 1964); Trustees of Schools v. People, 87 Ill. 303 (1877). The rules overturned as unreasonable often concern the exclusion of married students from school. *See* collection of cases discussed in Annot., 11 A.L.R.3d 996.

18. *See* Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967); Kissick v. Garland Ind. School Dist., 330 S.W.2d 708 (Tex. Civ. App. 1959).

19. 261 F. Supp. 545 (N.D. Tex. 1966).

20. *Id.* at 552. Similar reasoning was employed by the courts in Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968) and Atkins v. Board of Educ., 68 Cal. Rptr. 557, 262 Cal. App. 2d 161 (1968).

dents. In both cases, students in all-black high schools were suspended for violating rules which prohibited the wearing of "freedom buttons."[21] The facts of the two cases were essentially identical except that in *Blackwell v. Issaquena County Board of Education*[22] the students wearing the buttons attempted to force them upon other students, thereby causing a general breakdown in classroom discipline, while in *Burnside v. Byars*,[23] the buttons evoked only "mild curiosity."[24] On the basis of this distinction, the Fifth Circuit held suspensions based on the regulations valid in the former case but invalid in the latter. The court adopted the test of whether the conduct materially and substantially interferes with the requirements of appropriate discipline in the operation of the school.[25] If such interference is found to have been present, the state interest in maintaining school discipline, according to the Fifth Circuit, is sufficiently compelling to justify overriding the students' rights to express themselves. The two cases, taken together, illustrate an attempt to accommodate the need for an orderly educational environment without completely obliterating students' rights to freedom of speech.

The United States Supreme Court in *Tinker* found that the silent and passive wearing of black armbands in protest of the Vietnam war was so "closely akin to pure speech"[26] as to be entitled to comprehensive first amendment protection. The Court therefore held that secondary school students are entitled to free expression of their views in this manner in the absence of a specific showing of constitutionally valid reasons against such expression.

In promulgating the prohibition against armbands, Des Moines school authorities were primarily concerned with the controversy which had come to surround the Vietnam war.[27]

21. It had been suggested that the civil rights issues in these cases may detract from their authority as student discipline precedents. Note, *Public Secondary Education*, 42 S. CALIF. L. REV. 126 (1969). Subsequent action by the Supreme Court in the instant case, however, has invalidated this theory. Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

22. 363 F.2d 749 (5th Cir. 1966).

23. 363 F.2d 744 (5th Cir. 1966).

24. *Id.* at 748.

25. 363 F.2d 749 (5th Cir. 1966). The same standard was applied to college discipline in Dickey v. Alabama State Bd., 273 F. Supp. 613 (M.D. Ala. 1967).

26. 393 U.S. at 505.

27. The Supreme Court cited the memorandum of the school officials which contained no references to disturbance and the district

Upon learning of the students' plan to wear black armbands, school officials met and adopted the policy that any student wearing an armband would be suspended unless the armband was removed. Testimony of the school officials indicated that the regulation was directed against the principle of demonstrations in schools. Focusing on the fact that this one act of protest had been singled out for prohibition, the *Tinker* Court held that the desire to avoid the unpleasantness resulting from the exposition of a controversial opinion is not a sufficient reason to infringe upon the first amendment rights of students.

Thus, while recognizing that the state has a valid interest in maintaining the orderly operation of its schools, the Court refused to diminish the scope of students' rights to free expression where the rule is directed primarily toward the controversial nature of the subject and the general principle of demonstrations in schools rather than toward the disruption of school life. The standard adopted by the Court is that the rule, to be constitutionally valid, must be directed at conduct which "materially and substantially interferes with the requirements of appropriate school discipline in the operation of the schools."[28] The Supreme Court in *Tinker* failed to find the requisite disruptive conduct.[29]

By adopting the "material and substantial interference" standard, the *Tinker* Court sought to raise freedom of expression in high schools to a constitutionally protected plane. The Court commendably did not adopt the "reasonableness" test in balancing the state's interest against the individual student's rights, since "reasonableness" has more often been used as a conclusion than as a test.[30] But rather than marking a substantial departure from the past practice of courts, the *Tinker* standard, by its terms, serves only to limit the facts which are to be properly considered in determining whether the action of the school authorities is constitutionally acceptable.

While the Court appeared to be primarily concerned with

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court's recognition of the controversial nature of the subject. The decision of the district court, however, was based on the anticipation of classroom disturbance. 258 F. Supp. at 973.

28. 393 U.S. at 509, *quoting* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

29. *But see* 393 U.S. at 517, 518 (Black, J., dissenting).

30. *See, e.g.*, Tinker v. Des Moines School Dist., 258 F. Supp. 971 (S.D. Iowa 1966); Scoville v. Board of Educ., 286 F. Supp. 988 (N.D. Ill. 1968); Atkins v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968). *But see* Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

protection of political expression, no attempt was made to limit this new application of the first amendment. It is axiomatic that freedom of speech does not guarantee the absolute right to say anything at any time, even in public places.[31] Particularly in schools, unfettered freedom of speech would often be entirely inappropriate.

Moreover, while the *Tinker* Court attempted to establish a standard for the degree of disruption student conduct must entail before it may legitimately be subject to restrictions by school authorities, the dearth of judicial opinion concerning political protest in high schools leaves unanswered what conduct will actually be subjected to the standard. In *Tinker*, passive conduct by protesting students resulted in no disruption, while in *Blackwell*, the protesting students themselves precipitated a general breakdown in classroom discipline. The difficult area lies between these two situations, such as where passive conduct of a student who is advocating an unpopular cause results in substantially disruptive reactions from other students.[32] It is not clear whether the Court would find the passive, albeit unpopular, protest undeserving of protection[33] or whether any expression would be immune so long as the disruption does not come from the protesting students.

While neither of these extremes would be desirable, the Court makes no suggestion as to where it would draw the line.[34] Where the protesting student is engaged in silent, passive expression of his opinion, it would seem that the focus of discipline should be directed at the disrupting student rather than the protesting student. Obviously a different result would be appropriate where the protesting student intends to incite the other students to a disruptive reaction. But where a silent,

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31. *See, e.g.*, Adderly v. Florida, 385 U.S. 39 (1966); Cox v. Louisiana, 379 U.S. 536 (1965).

32. The question of long hair on male students would be close to this problem. The *Tinker* Court specifically noted that the case did not involve long hair. 393 U.S. at 508. The threshhold question is whether long hair is a form of expression at all. *Compare* Atkins v. Board of Educ., 262 Cal. App. 2d 161, 68 Cal. Rptr. 557 (1968), *with* Davis v. Firment, 269 F. Supp. 524 (E.D. La. 1967).

33. *See, e.g.*, 1 B. SCHWARTZ, RIGHTS OF THE PERSON 248 (1968); Note, 49 COLUM. L. REV. 1118 (1948); *cf.* Terminiello v. Chicago, 337 U.S. 1 (1948); Edwards v. South Carolina, 372 U.S. 229 (1963). *Compare* Feiner v. New York, 340 U.S. 315 (1951).

34. *Compare* "disruptive conduct by those participating in it," 393 U.S. at 505, *with* conduct which disrupts "for any reason," 393 U.S. at 513.

passive protest is involved, it is difficult to envision a situation where it could truly be said that incitement is present.

How the Supreme Court would handle a case where the student verbally protests is also unclear since the Court placed great emphasis on the silent and passive nature of the symbolic protest. While pure speech is generally accorded greater protection than "speech plus conduct," it is clear that the wearing of an armband in a classroom entails less potential for disruption than does a verbal expression. If the Court's assertion that the meaning of armbands was "closely akin to 'pure speech' " and thus was "entitled to comprehensive protection under the First Amendment"[35] means that the Court places symbolic protest on a constitutional plane with pure speech, the balancing of interests could very well result in greater protection afforded a symbolic protest than one entailing verbal expression.[36]

The rule which prohibited the wearing of armbands in *Tinker* was entirely prospective since the protest had not yet taken place. In upholding the rule, the district court had accepted as reasonable the school board's fear of disruption.[37] The Supreme Court, however, rejected this finding, concluding that the school authorities had no facts which "might reasonably lead [them] to forecast substantial disruption."[38] The Court thus not only refused to accept the district court's finding of fact but also its legal premise. Citing *Terminiello v. Chicago*,[39] the Supreme Court refused to accept the fear or apprehension of disturbance as valid grounds for overcoming the right to freedom of expression.[40]

While it is doubtful that the Court intended the circumstances found in *Terminiello* to serve as a literal example of the classroom, it did not indicate what degree of expectation must

35. 393 U.S. at 505, 506.

36. While this may seem constitutionally anomalous, there is no reason (even in the literal language of the first amendment) that only pure speech should be considered sacred, particularly when the symbolic expression being considered does not entail "conduct" in the active, physical sense of the word such as picketing or sit-in. *Cf.* Giboney v. Empire Storage & Ice Co., 336 U.S. 490 (1949).

37. 258 F. Supp. at 973.

38. 393 U.S. at 514.

39. 337 U.S. 1 (1948). In *Terminiello*, the Supreme Court reversed a disorderly conduct conviction on first amendment grounds where the defendant's speech precipitated a near riot. It seems significant that the disturbance occurred in a privately rented hall. *Compare* Feiner v. New York, 340 U.S. 315 (1951).

40. 393 U.S. at 508.

be present before a prospective rule would be acceptable.[41] The Court's language suggests that "reasonable anticipation" of material disruption would be necessary,[42] but its flat disapproval of "fear of disruption" leaves the exact requirement unclear. The Court compounded the ambiguity by not indicating what it would consider as *evidencing* a reasonable anticipation of disruption. It only noted that its "independent examination of the record" did not disclose "reason to anticipate" substantial disruption of the school's operation.[43]

A rule which anticipates the proscribed conduct would seem to be highly desirable. But unless the Court demands a high standard for the anticipation of the disturbance, much of the protection afforded student expression by *Tinker* will be rendered ineffective. Rather than reverting to a notion of "reasonable" anticipation, a standard which requires a showing of an immediate threat of disruption would better serve the purposes of the material and substantial interference test, at least where the expression involves political matters.[44] By requiring a greater showing of immediacy, school authorities would be deterred from establishing broad prohibitions on classroom expression and would be forced to focus more closely on the actual potential for disruption.[45]

The *Tinker* decision is no surprise in view of the Supreme Court's recent interpretations of the first amendment. Most

41. The Supreme Court no longer analyzes freedom of speech cases strictly in terms of "clear and present danger." *See, e.g., The Supreme Court, 1966 Term*, 81 HARV. L. REV. 110, 153 (1965); Alfange, *Free Speech and Symbolic Conduct*, 1968 SUP. C. REV. 1, 9, 19-21. *Compare* Dennis v. United States, 341 U.S. 494 (1951), *with* Keyishian v. Board of Regents, 385 U.S. 589 (1967) *and* Cox v. Louisiana, 379 U.S. 536 (1965).

42. The Court's conclusion that the school authorities had no facts which might reasonably have led them to forecast substantial disruption seems to imply that a reasonable anticipation of such conduct would have constituted valid grounds for the rule.

43. 393 U.S. at 509.

44. The Court has considered expression of political opinions worthy of very broad protection. Rosenblatt v. Baer, 383 U.S. 75 (1966); Garrison v. Louisiana, 379 U.S. 64 (1965); New York Times v. Sullivan, 376 U.S. 254 (1964). It has been suggested that the "materially and substantially interferes" test is contrary to the broad immunity granted criticism of government in *New York Times*. Recent decisions, 3 GONZAGA L. REV. 227, 235 (1968). However, it is important to note that *New York Times* was concerned with the content of the speech while the "materially and substantially interferes" test is intended to categorize prohibitions only on the basis of time and place of the expression.

45. With the proposed standard of "immediacy," no less than with the "reasonable anticipation" test, the Court should indicate what facts could be considered as evidence.

notably, criticism of the Government and government officials has been given comprehensive protection,[46] and in the academic area first amendment protection has been extended to both college[47] and high school teachers.[48] Moreover, the rights of juveniles, while not yet recognized as coextensive with adults', can no longer be denied in the absence of a countervailing advantage to juveniles as a group.[49]

The increasing political and social awareness of high school students will probably lead to future collisions between school discipline and the students' expression of their ideas. Possibly even more so than in other areas, respect for the high school students' right of expression should not suffer diminution except in the most exigent circumstances.[50]

46. *See, e.g.*, New York Times v. Sullivan, 376 U.S. 254 (1964).
47. Keyishian v. Board of Regents, 385 U.S. 589 (1967).
48. Pickering v. Board of Educ., 391 U.S. 563 (1968).
49. *Cf. In re* Gault, 387 U.S. 1 (1967); Kent v. United States, 383 U.S. 541 (1966); *In re* Urbasek, 38 Ill. 2d 535, 232 N.E.2d 716 (1967).
50. *See, e.g.*, Board of Educ. v. Barnette, 319 U.S. 624, 637 (1943):

> That [the school boards] are 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 principals of our government as mere platitudes.