CONSTITUTIONAL LAW—VIETNAM WAR MORATORIUM—BOARD OF EDUCATION DISALLOWED TO AUTHORIZE ABSENCES FOR PARTICIPATION IN MORATORIUM ACTIVITIES—*Nistad v. Board of Education,* 304 N.Y.S.2d 971 (Sup. Ct. Richmond Cty. 1969).

On October 8, 1969, the Board of Education of the City of New York issued a statement concerning the proposed Vietnam War Moratorium to be held on October 15, 1969. The Board said that it and "the acting Superintendent of Schools recognize the universal desire of the American people to end the war in Vietnam. We also recognize that there are differences among the people and their leaders as to how this can best be achieved."[1] The Board declared that "[a]ll schools will be open October 15, but the school system recognizes the rights of those teachers and pupils who wish, as a matter of conscience, to participate in planned programs outside the schools."[2] To implement this recognition, the Board declared that,

> [t]he absence of pupils will be recorded, but they will not be penalized for their absence. Teachers may charge the day against their personal business allowance, provided they notify their supervisors in advance.[3]

Petitioners, a junior high school student and his mother, sought an order directing the Board "to hold classes as usual on October 15, 1969 and such other relief as the Court deems appropriate."[4] The court upheld petitioners' demands and ordered that respondent "issue a statement or directive rescinding its statement or directive of October 8, 1969 and also stating that the public schools will conduct their usual and normal school day on October 15, 1969."[5]

In affirming petitioners' contentions and making this order, the Richmond County Supreme Court,[6] a court of first instance, based its decision on three points. The first was that the Board's order was in violation of petitioners' rights under the first and fourteenth amendments to the Federal Constitution, specifically, the guarantee of free expression.[7] The second point was that the Board lacked the power to determine what was or was not a national issue of sufficient importance

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1 Nistad v. Board of Educ., 304 N.Y.S.2d 971, 975 (Sup. Ct. Richmond Cty. 1969).
2 N.Y. Times, Oct. 9, 1969, at 5, col. 5.
3 *Id.*
4 304 N.Y.S.2d at 972.
5 *Id.* at 976.
6 Opinion authored by Justice Vito J. Titone.
7 304 N.Y.S.2d at 973-74.

to allow students' and teachers' absences.[8] The final point was that those students who did attend school on "Moratorium Day" might lack sufficient supervision because of the absence of teachers.[9]

Underlying all three of these issues was the question of the rights of students and teachers to express their opinions through speech or actions, "and to petition the Government for a redress of grievances."[10] The court here based its decision on those rights, saying that within the Board's directive allowing absences of students and teachers,

> [t]he element of compulsion is clear. Students and teachers who do not attend school that day will be deemed to be against the Government's Viet Nam War policy, and those who attend will be assumed to favor such policy. It forces people to take a position when, as a matter of constitutional law, they are not required to do so.[11]

The court based this proposition on the authority of *Board of Education v. Barnette*.[12] That case dealt with the state board's right to force pupils to recite the pledge of allegiance to the flag. The *Barnette* Court held that the board could not do so, because compelling that act would violate the students' first amendment right to free speech. In the instant case the court cited the words of Mr. Justice Murphy's concurring opinion in *Barnette* as being pertinent;

> [t]he right of freedom of thought and of religion as guaranteed by the Constitution against State action includes both the right to speak freely and the right to refrain from speaking at all. . . .[13]

Both before and after *Barnette*, the courts have consistently held that the first amendment right to free speech applies to public schools. This right to free expression has included the right to wear black armbands to school in order to exhibit the students' disapproval of the Vietnam War,[14] as well as the wearing of freedom buttons by students during school hours.[15] Earlier cases held that freedom of speech under the first amendment included the teaching of a foreign language.[16] Before *Barnette*, state courts followed the Supreme Court's decision in

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8 *Id.* at 975.

9 *Id.* at 974.

10 U.S. CONST., amend. I.

11 304 N.Y.S.2d at 973.

12 319 U.S. 624 (1943).

13 *Id.* at 645 (concurring opinion).

14 Tinker v. Des Moines School Dist., 393 U.S. 503 (1969).

15 Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966) (the buttons contained the words "One Man One Vote" and "SNCC").

16 Meyer v. Nebraska, 262 U.S. 390 (1923); Bartels v. Iowa, 262 U.S. 404 (1923).

Minersville School District v. Gobitis[17] which held that forcing students to salute the flag was not unconstitutional.[18] Since *Barnette,* those same courts have refused to enforce such compulsory activity when students objected on religious grounds.[19]

Teachers' rights, as to what they believe and what they teach, are also protected under the first amendment. The Supreme Court has consistently held that loyalty oaths or requirements that teachers reveal the organizations to which they belong are unconstitutional, either because of vagueness or because they violate the right to free speech and association.[20] State courts have not been as consistent in protecting teachers against dismissal for their political beliefs.[21]

In the instant case, the court advanced this requirement of free speech one step further than the previous decisions of the United States Supreme Court. By explicitly allowing students and teachers to exercise their rights of free speech and assembly without penalty, the Board has, according to the court, overstepped its bounds. The court

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17 310 U.S. 586 (1940) (*overruled by Barnette*).

18 People *ex rel.* Fish v. Sandstrom, 279 N.Y. 523, 18 N.E.2d 840 (1939) (flag raising ceremony); *accord, In re* Latrecchia, 128 N.J.L. 472, 26 A.2d 881 (Sup. Ct. 1942) (Jehovah's Witness may be forced to salute flag); Hering v. State Bd. of Educ., 117 N.J.L. 455, 189 A. 629 (Sup. Ct. 1937), *aff'd,* 118 N.J.L. 566, 194 A. 177 (Ct. Err. & App. 1937) *appeal dismissed for want of a substantial federal question,* 303 U.S. 624 (1937) (flag salute).

19 Lewis v. Allen, 5 Misc. 2d 68, 159 N.Y.S.2d 807 (Sup. Ct. Spec. T. 1957), *aff'd,* 11 App. Div. 2d 447, 207 N.Y.S.2d 862 (1960), *aff'd,* 14 N.Y.2d 867, 200 N.E.2d 767, 252 N.Y.S.2d 80, *cert. denied,* 379 U.S. 923 (1964) (voluntary flag salute with no penalty for refusal is constitutional); *accord,* Holden v. Board of Educ., 46 N.J. 281, 216 A.2d 387 (1966) (Black Muslims may not be forced to salue the flag); *cf.* Baer v. Kolmorgen, 14 Misc. 2d 1015, 181 N.Y.S.2d 230 (Sup. Ct. Westchester Cty. 1958) (refused to separate church and state with regard to a nativity scene on school property); N.J. STAT. ANN. 18A:36-3 (1968) (requiring flag salute except for those with conscientious scruples who shall stand at attention).

20 Keyishian v. Board of Regents, 385 U.S. 589 (1967); Shelton v. Tucker, 364 U.S. 479 (1960) (both cases holding that mere membership in the Communist Party is not sufficient basis for dismissal); Baggett v. Bullitt, 377 U.S. 360 (1964) (loyalty oath unconstitutional because too vague, uncertain, and broad). *But see* Adler v. Board of Educ. 342 U.S. 485 (1952) (mere membership in Communist Party held to be sufficient grounds for dismissal; *Keyishian, supra,* held not controlled by *Adler*).

21 Thompson v. Wallin, 301 N.Y. 476, 95 N.E.2d 806 (1950), *aff'd sub nom.,* Adler v. Board of Educ., 342 U.S. 485 (1952); McDowell v. Board of Educ., 104 Misc. 564, 172 N.Y.S. 590 (Sup. Ct. Spec. T. 1918) (Quaker's dismissal because of views on World War I upheld); *accord,* Laba v. Board of Educ., 23 N.J. 364, 129 A.2d 273 (1957) (mere membership held sufficient grounds for dismissal); Thorp v. Board of Trustees, 6 N.J. 498, 79 A.2d 462 (1951), *vacated on other grounds,* 342 U.S. 803 (1951) (loyalty oath held constitutional); *cf.* Lowenstein v. Board of Educ. 35 N.J. 94, 171 A.2d 265 (1961) (teacher's dismissal reversed on other grounds but opinion contains full discussion of loyalty oaths). *See also* N.J. STAT. ANN. 18A:6-10 (1968) (dismissal for "inefficiency, incapacity, unbecoming conduct, or other just cause . . . ."); N.Y. EDUC. LAWS, §§ 3021-22 (McKinney 1953) (grounds for dismissal discussed in *Thompson, supra*).

said that the Board's directive giving students and teachers the right to free speech is, in effect, a compulsion to speak. At that point the case veered from previous decisions and posed the unique question whether the explicit allowance of free speech can become the compulsion to speak.

Directly related to the court's first reason for its decision was its second point, that the Board has no power to decide what national issues merit a day of allowed absences. The court based this contention on the authority of *Engel v. Vitale*,[22] wherein the Supreme Court held that a state may not compose a prayer to be said voluntarily at the opening of the school day, because that would be in violation of the first amendment's prohibition against "establishment of religion." By allowing the Board to determine the merit of national issues, the *Nistad* court apparently felt that the same dangers present in the school prayer would be present in the national issue, that "[t]his determination would depend upon the political outlook of the board members at a particular time."[23] *Engel* is consistent with the decisions of the Supreme Court which hold that the separation between church and state must be complete.[24] Although the *Nistad* court cited no authority that the separation between national issues and the schools must be as complete as that between church and state, it has indicated that that must indeed be the case. Just as religion must be kept separate from the schools, so must controversial national issues. The court declared that "[g]overnment may not thus involve itself in such controversial matters or moral issues."[25] Quoting from a New York State Education Department opinion, the court observed that "nothing that will tend to foster intolerance, bigotry, animosity or dissension should be allowed to inject itself into the public school system of this great state."[26]

At this point, the court's argument leads directly into the third basis of the decision, that the involvement of the Board in such a controversial issue will cause harm to the school system. The court, in fact, found three types of harm that would come to the school system if the

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22 370 U.S. 421 (1962).

23 304 N.Y.S.2d at 975.

24 *See* Chamberlin v. Public Instr. Bd., 377 U.S. 402 (1964) (school prayer); Abington School Dist. v. Schempp, 374 U.S. 203 (1963) (school prayer). *Compare* Zorach v. Clauson, 343 U.S. 306 (1952) (released time from school for voluntary sectarian education held constitutional) *with* McCollum v. Board of Educ., 333 U.S. 203 (1948) (voluntary sectarian education in the school building held unconstitutional). *See also* Everson v. Board of Educ. 330 U.S. 1 (1947) (reimbursing parochial school children for bus costs held constitutional).

25 304 N.Y.S.2d at 975.

26 Appeal of A.C.L.U., 36 State Dept. Rep. 87, 97 (N.Y. Educ. Dept. 1926) (use of school auditorium for political meeting), *quoted at* 304 N.Y.S.2d at 975.

Board's order were allowed to stand. First, the chance of lack of supervision "and the real possibility of demonstrators, picket lines, and the like, in school areas."[27] Secondly, the court observed that to allow absence on this one day would give students the impression "that they have total freedom, by official edict, to move about and participate in whatever they, in 'good conscience,' feel right (*sic*) at any time, and absent themselves from school in so doing."[28] The final harm would be to the students themselves because "a prospective employer could check specifically to determine whether or not a person was absent on this highly publicized day, October 15, 1969, and might draw an inference about that person's politics."[29]

In the last analysis, the court's decision was based solely upon the rights of students and teachers to free expression under the first amendment. The precise question presented was, if the use of those rights is specifically and explicitly allowed by the Board, should that use then be curtailed by the same constitutional provision which had created those rights? Does the Board's directive specifically allowing students to exercise their rights cause such compulsion so that those rights must then be curtailed? The court answered these questions in the affirmative. Examining its reasons for doing so discloses that those reasons are not, in fact, based on law, and that the right to free expression should be allowed, explicitly or implicitly.

The court's first reason, that the allowance of free speech may become the compulsion to speak, points up the precariousness of the first amendment right. How should that right be applied to society so that the individual will feel free to speak or not to speak? The balance point may be, as the court indicated, that allowance becomes compulsion only when, as in the instant case, it is an explicit allowance. But, that is indeed a nebulous distinction. The decisions in *Tinker v. Des Moines School District*,[30] *Burnside v. Byars*,[31] and *Barnette* forbade those school boards from disallowing free expression. Do not the court-forced allowances of free expression in those cases compel speech in the same way as in the instant case? Allowing some students to wear armbands, as in *Tinker*, permits the implication that those who do not wear the armband do not support the demonstrator's cause. Those who do not wear the freedom buttons, as in *Burnside*, impliedly do not stand for whatever the buttons stand for, regardless of their true beliefs.

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27 304 N.Y.S.2d at 974.

28 *Id.* at 976.

29 *Id.*

30 393 U.S. 503 (1969).

31 363 F.2d 744 (5th Cir. 1966).

It is clear that the balance point is in the wrong place; compulsion exists whether the allowance of free expression is explicit or implicit. Many people listening to a soapbox orator feel bound by human nature to declare their agreement or disagreement verbally. The orator's words have compelled the listener's retort; the former's use of his right to free expression has compelled the listener to speak. Thus, this first basis of the court's decision is not sufficient reason to deny students and teachers their constitutional right to free expression. That right cannot be balanced on the mere fact that the Board had issued a specific directive. To balance it there would be to invite an examination into every instance where free speech is allowed in order to determine if compulsion exists. Some compulsion exists in all cases where free speech is allowed; to deny it in one place merely because of an explicit allowance would place too great a strain on that right. The right to free expression is too important to American democracy to be constrained by artificial and unworkable boundaries.

The second basis of the court's decision also falls short of the point where free expression can be curtailed in the schools. The court cites no authority on which to base its contention that national issues and the schools must be as separate as church and state. The establishment of religion is not so similar to the establishment of national issues. Obviously, a school system must teach current events in its classes; to that extent, the teachers must be allowed to teach and talk about national issues. The Supreme Court of the United States has protected the teacher's right to discuss controversial issues without being removed for treason or sedition.[32] The true arguments for separating the schools from controversial national issues are revealed in the court's third basis for its decision.

In this third area, that the introduction of controversial issues into the school would cause harm and disruption, the court is on more solid ground. Forbidding first amendment rights to free expression has been allowed where there is a showing of harm or disruption.[33] But, the Supreme Court has consistently held that there must be a showing that there will be disruption or harm before the right to freedom of speech can be curtailed;

> [f]reedom of speech, though not absolute . . . is nevertheless protected against censorship or punishment, unless shown likely to

[32] Keyishian v. Board of Regents, 385 U.S. 589 (1967).

[33] Ferrell v. Dallas Ind. School Dist., 392 F.2d 697 (5th Cir. 1968) (student with Beatle haircut); Blackwell v. Issaquena Cty. Bd. of Educ., 363 F.2d 749 (5th Cir. 1966) (protest buttons); Zanders v. Louisiana State Bd. of Educ., 281 F. Supp. 747 (W.D. La. 1968) (blocking entrance to school building).

> produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest.[34]

This requirement of a clear and present danger applies to schools as well as to students[35] and teachers.[36] Both *Tinker* and *Burnside* hold that a showing of disruption is necessary in order to allow a curtailment of a student's right to free expression, even though other cases have held that the "state's authority over children's activities is broader than over like actions of adults."[37]

But, in the instant case, there is no showing of a clear and present danger of disruption and harm in allowing the students to demonstrate out of school. There has been no showing by the court that there will be a disruption of classes as was necessary in *Tinker* and *Burnside*. The only harm shown is that "[a]n implication might arise, contrary to state law, that attendance in school is secondary to their right to participate in causes morally worthwhile in their minds."[38] This implication falls short of the degree necessary to allow curtailment of the students' and teachers' rights to free expression.

> In each case they [courts] must ask whether the gravity of the 'evil,' discounted by its improbability, justifies such invasion of free speech as is necessary to avoid the danger.[39]

The facts in the instant case do not meet that test.

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34 Terminiello v. Chicago, 337 U.S. 1, 4 (1948) (breach of peace statute); *accord*, Dennis v. United States, 341 U.S. 494 (1951) (federal conspiracy statute); Communications Ass'n v. Douds, 339 U.S. 382 (1950) (loyalty oath for union officers); Cantwell v. Connecticut, 310 U.S. 296 (1940) (breach of peace statute); *cf.* Brandenburg v. Ohio, 395 U.S. 444 (1969), *overruling* Whitney v. California, 274 U.S. 357 (1927) (statute unconstitutional if it forbids mere assembly to advocate a particular action).

35 Tinker v. Des Moines School Dist., 393 U.S. 503 (1969); Burnside v. Byars, 363 F.2d 744 (5th Cir. 1966).

36 Elfbrandt v. Russell, 384 U.S. 11 (1966) (loyalty oath).

37 Prince v. Massachusetts, 321 U.S. 158, 168 (1944) (minor prohibited from selling magazines on the street); *accord*, Ginsberg v. New York, 390 U.S. 629 (1968) (sale of obscene magazines to minors prohibited).

38 304 N.Y.S.2d at 976; *see* N.Y. EDUC. LAWS, §§ 3205, 3210 (McKinney 1953) (compulsory attendance statutes).

39 United States v. Dennis, 183 F.2d 201, 212 (2d Cir. 1950), *aff'd*, 341 U.S. 494 (1951).